Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01519/2009 and others

THE IMMIGRATION ACTS

Heard at Field House
On 9-13 and 17-18 September 2013
9 January and 14 October 2014
and 12 February 2015

Determination Promulgated
On 16 March 2015

Before

UPPER TRIBUNAL JUDGE JORDAN
UPPER TRIBUNAL JUDGE O'CONNOR

Between

MEHMOOD AHMED and others

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms. K. Cronin, Mr R. Toal, Mr D. Jones, Counsel, instructed by Wilson Solicitors LLP

For the Respondent: Mr D. Blundell, Mr A. Byass, Counsel, instructed by the Treasury Solicitor

DETERMINATION AND REASONS

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**The families.**

[The date of birth of each child is shown in parenthesis and date of the removal decision in relation to the appellants is shown in square brackets]

**Family 1 - Qadir Ahmed's family**

Parents (i) Qadir Ahmed [10 October 2008]
(ii) Nasreen Bi [10 October 2008]
Children (1) Toukeer Ahmed (1 August 1988) now aged 25 [10 October 2008]
(2) Tousif Ahmed* (10 February 1990) now aged 24 [5 May 2009]
(3) Sulva Bi (20 April 1994) now aged 20 [5 May 2009]
(4) Salma Bi (10 December 1998) now aged 15 [10 October 2008]

**Family 2 - Ghulam Rabani's family**

Parents (i) Ghulam Rabani [10 October 2008]
(ii) Noreen Shakila Bi [10 October 2008]
Children (1) Mohammed Atif* (18 March 1986) now aged 28 [5 May 2009]
(2)Mobushra Begum* (2 October 1988) now aged 25 [5 May 2009]
(3)Farah Begum* (10 March 1990) now aged 24 [5 May 2009]
(4) Nusrat Bi (2 January 1987) now aged 27 [10 October 2008]
(5) Mohammed Rustam Rabani (1 November 1991) now aged 22 [24 April 2009]
(6) Zahra Bi (3 August 1993) now aged 20 [10 October 2008]

**Family 3 - Rungzaib Mohamed's family**

Parents (i) Rungzaib Mohammed [10 October 2008]
(ii) Jamila Kauser [29 April 2009]
Children (1) Kamran (3 October 1985) now aged 28 [29 April 2009]
(2) Jehan* (3 January 1988) now aged 26 [5 May 2009]

(3) Ishrut* (12 January 1990) now aged 24 [5 May 2009]
(4) Idris (10 February 1993) now aged 21 [5 May 2009]
(5) Alam (6 January 1992) now aged 22 [29 April 2009]
(6) Hina Bi (20 May 1997) now aged 17 [29 April 2009]

**Family 4 - Mehmood Ahmed's family**

Parents (i) Mehmood Ahmed [29 April 2009]
(ii) Fazal Jan [29 April 2009]
Children (1) Wasim (12 April 1993) now aged 21 [29 April 2009]
(2) Arfan (12 April 1993) now aged 21 [29 April 2009]
(3) Atteqa (4 May 1996) now aged 18 [29 April 2009]
(4) Adeel (25 June 1997) now aged 16 [29 April 2009]
(5) H (24 April 2004) now aged 10, a British citizen and therefore not an appellant in these proceedings

[* connotes an applicant in *Ahmad and others* (removal of children over 18) [2012] UKUT 00267(IAC)]

**Introduction**

1. This appeal concerns four families totalling 29 individuals, comprising four sets of parents and 21 children, both adult children and minors.

2. All are Pakistani citizens and inter-related either by blood or marriage or both. Each family obtained visit entry clearances in 2000 or 2001 as Pakistani nationals applying through the High Commissioner in Islamabad. Having arrived in the United Kingdom, each family claimed asylum on the basis that they were Indian nationals giving names, dates of birth and histories which differed from what had been presented to obtain the entry clearances. In particular, each family alleged that the parent was single and his or her spouse had been murdered by the Indian army.

3. Not all of the 29 family members are before us following the judgment of the Upper Tribunal (Collins J and Upper Tribunal Judge Coker) in *Ahmad and others* (removal of children over 18) [2012] UKUT 00267(IAC).

4. Neither the names of the individuals concerned, nor their dates of birth have remained consistent. Accordingly, the names attributed to the appellants and their respective dates of birth cannot be definitively stated but, for these purposes, the Tribunal will adopt both the names and the dates of birth that each appellant currently claims as his or her own. In the course of these proceedings, a schedule was produced, appropriately coloured, setting out the membership of the four families with which we are concerned and the respective claims that each member makes to one or more of the methods relied upon in resisting removal.

5. The issue before the Upper Tribunal in *Ahmad and others* (removal of children over 18) related to the lawfulness of removal decisions in relation to those appellants who had (a) leave to remain in the UK *and* (b) were over the age of 18 on the date of decision. As a result of the determination in *Ahmad and others* (removal of children over 18), the removal decisions made against the 6 appellants who fell into this classification were rendered unlawful. These six adult children now have leave to remain and we are told that one of them has now become a British citizen. The appellants before us, reduced by these six, comprise the parents and 14 of the 15 remaining children.

6. *Ahmad and others* (removal of children over 18) was heard on 10 May 2012 in relation to decisions made earlier. The appellants contend that another three children, having now reached 18, should benefit from the decision in *Ahmad and others* for the reasons we will explain.

7. These three children and eight others (making 11 in all) are now said to derive the benefit of paragraph 276ADE (iv) or (v) of the Statement of Changes in the Immigration Rules either from being, at the relevant time, under 18 and present

in the United Kingdom for seven years or over 18 and under 25 and having spent more than half their lives in the United Kingdom.

8. Only 5 of the children are now minors. One of the minor children, whom we shall refer to as 'H', was born in the United Kingdom and was granted British citizenship under the provisions of s.1 of the British Nationality Act 1981 at a time when his parents had settled status. H was born on 24 April 2004. He is now aged nine. It is said that he cannot be removed and that the other family members, including both parents, benefit from a derivative right to remain following *Zambrano* principles, (*Case C-34/09 Ruiz Zambrano v Office National de l'Emploi [2012] QB 265*).

9. Each of the 22 individuals before us has a right to have his claim considered separately but there are, however, broad categories in relation to which similar considerations apply with certain issues. For these purposes, it will be convenient to refer to the four sets of parents as 'the parents', the six children who benefitted from the decision in *Ahmad and others* as 'the adult Ahmad children'. In relation to the children who are now over 18 years of age, we propose to refer to them as being 'now adult'. The remainder are collectively referred to as the minor children.

10. These four families form part of a wider group of individuals who, in their different ways, were involved in the matters which form the subject-matter of this determination.

11. The appeal has involved the preparation of some nine volumes of evidence and background material as well as seven volumes of case law drawn from the United Kingdom and European sources, together totalling in excess of 150 cases. Inevitably, this determination can only summarise part of this material. So, too, the skeleton arguments. The appellants' arguments and replies cover some 65 pages and the respondent's some 93 pages. We are indebted to all counsel for the care with which they have approached the issues raised in this appeal.

**The issues**

12. The issues (many of which overlap) may be summarised as follows by way of headlines only:

    i. The roles played by the various adults; the circumstances in which the families came to the United Kingdom; the roles of Mohammed Faruq and his immediate family members; the role/responsibility of the parents; their criminal wrong-doing.

    ii. The above feeds into a consideration of trafficking and the extent to which the parents (or some of them) and the children can properly be classified as victims of trafficking and the effect this has upon their claims and the claims of their family members.

iii. The effect of the Tribunal's decision in *Ahmad*, removing the adult Ahmad children from the current appeal and raising issues as to the position of the children now adult and the prospective position of the minor children. This involves a consideration of the powers of removal under s.10 of the Immigration and Asylum Act 1999.

iv. The families arrived in the United Kingdom between 2001 and 2002 and have remained here ever since. The Secretary of State has not yet succeeded in removing them. The lapse of time, characterised by the appellants' as *delay*, requires to be analysed both in order to ascertain the responsibility for it and in order to assess the consequences of it.

v. Not all those involved in this case have been made the subject of removal decisions. The adult Ahmad children are not now the subject of removal action. This has resulted in different outcomes for different people characterised by the appellants' as inconsistent decision-making.

vi. As a result of the presence of the children in the United Kingdom, some have potential claims under the Immigration Rules and, in particular, under paragraph 276 ADE (1) which provides:

> "The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> …
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years…and it would not be reasonable to expect the applicant to leave the UK; or
>
> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK…"

vii. H, as a Union citizen, enjoys the benefits of the decision of the Court of Justice in *Zambrano*. The extent of his rights and the rights of his parents and siblings derived through them require assessment. In particular, the Secretary of State asserts H's rights are derogable.

viii. Alam, one of the children, now adult, is currently suffering from mental health problems. The Secretary of State agrees Alam cannot currently be removed. Other family members also suffer, in varying degrees, from mental health difficulties.

ix. All those appellants over the age of 18 remain at home. There is an issue as to whether they enjoy family life of a type protected by the ECHR.

x. All of these factors, and more, including discrete private and family life considerations, feed into the assessment of the Article 8 claims of all of the appellants.

**The criminal conspiracy**

13. The commencement of the conspiracy did not involve these appellants. It concerned the grant of a visa to Rasheeda Begum in April 2000 for the specific purpose of allowing her to enter into the United Kingdom to take up employment as a domestic servant. She was, however, the wife of Abdul Rafiq, the brother of Mohammed Faruq and Abdul Qayyum and the claim was fraudulent. In pursuing it, Mohammed Faruq and Abdul Qayyum elicited the help of the Rt. Hon. Andrew Smith MP. It included the initiation of judicial review proceedings which the Home Office conceded. Rasheeda Begum made a false claim for asylum in another name. It was, however, accepted by Ms Cronin in the course of the hearing that she was married to a British citizen.

14. The prosecution asserted that the planning began in late 1999 and included the concept that once in the United Kingdom the newcomers would change their names and lodge false asylum claims which would then permit them to make claims for state benefits. It was always the prosecution's case, as well as the respondent's case before us, that Mohammed Faruq was the directing mind behind the planning of the enterprise. Pages within a notebook found in the office of a company that facilitated the enterprise indicated how the scheme would operate. Mohammed Faruq's wife, Khurshid, and their daughter travelled to Pakistan in February 2000 as part of the conspiracy.

15. The case of Chaudry Mahboob Hussain and Shakila Begum (whom we know as part of Family 3 - Ghulam Rabani and Noreen Shakila Bi) was typical. They are married with six children. For the purposes of making false asylum claims, they both pretended to have lost their spouses in tragic circumstances. They split their six children between them in support of their asylum applications. Within days of arrival in the United Kingdom on 25 July 2000 on the strength of visit visas sponsored by Mohammed Faruq and granted to them and their six children, Mr Hussein claimed asylum for himself and three of the children in the name of Rabani. He claimed that he came from Srinagar in India and had been arrested, detained and tortured by the Indian authorities and that his wife had been murdered. He was provided with emergency accommodation that was in fact owned by Mohammed Faruq. His claim was refused. His wife, acting independently, made a similar claim with the remaining three children claiming that she had been beaten and raped by the Indian authorities and her husband murdered. On the strength of her claim, she was granted indefinite leave to remain.

16. Family 2, Rungzaib Mohamed and his wife, Jamila Kauser, made separate and almost identical claims, claiming that each came from Srinagar in Indian Kashmir, that each had been persecuted by the Indian authorities and their spouse had been murdered leaving them widowed. Each claimed with three of their six children as their dependents. Eventually, Rungzaib's appeal was allowed and he was granted indefinite leave to remain on 3 January 2001.

Jamila's appeal was dismissed in a determination promulgated on 11 March 2003.

17. The pattern was repeated in relation to the remaining parents with the result that, in each case, only one of the spouses was granted indefinite leave to remain.

18. A similar pattern emerges in relation to the evidence provided by Zafar Iqbal and Shazia Kausar. This couple are not appellants before us. They obtained visit visas sponsored by Mohammed Faruq's wife, Kurshid, and entered the United Kingdom on 17 August 2000. They then claimed asylum using different names. Zafar claimed he was from the Indian occupied area of Kashmir and had been arrested, raped and beaten by the Indian authorities. His wife had been murdered. His wife in a separate claim, claimed that she was from Srinagar and had been beaten and raped and her husband murdered by the Indian army. Zafar was granted exceptional leave to remain. His wife's claim was refused. There is one difference, however, in this claim. It appears that, six days before their arrival, Mohammed Faruq made arrangements for two unidentified persons to make a claim for asylum on 11 August 2000 so as to ensure that Zafar Iqbal and Shazia Kausar would be housed in accommodation provided by Mohammed Faruq in an attempt to avoid changes introduced on 14 August 2000 whereby NASS took over responsibility for housing asylum seekers on a nationwide basis, [vol 5, tab A, p 30].

19. The parents stood trial on two counts.

20. The first related to a conspiracy to contravene s.25 of the Immigration Act 1971 to the effect that they conspired together with others to being knowingly concerned in the making or carrying out of arrangements for securing or facilitating the obtaining of leave to remain in the United Kingdom by means which they knew or had reasonable cause for believing to include deception. Count 2 was a conspiracy to defraud contrary to common law. The conspiracy related to defrauding central and local government agencies or authorities charged with the provision of financial support and benefits to persons legitimately seeking asylum by dishonestly representing in their false asylum claims in assumed names that they were entitled to financial support and benefits.

21. The male parents pleaded guilty to both counts. The female parents pleaded guilty to count one, described by the judge as '*dishonesty in relation to the claims for asylum*', [vol 5, tab A, p 586].

22. When the proceedings came before Judge McIntyre on 9 March 2006, he made it plain that there remained an issue between the parents and the prosecution as to where the defendants came from and whether or not they had been persecuted in India. He resolved to make no findings on these issues [vol 5, tab A, p 585]. However, [vol 5, tab A, p 586] he expressly approached sentencing in

relation to the defendant's dishonesty in connection with their making claims for asylum and applying for leave to remain in the country and, in the case of the male parents, their dishonesty in relation to obtaining benefits in the course of their asylum claims. He continued [pp 585-6]:

> "… I have to bear in mind the parts you played in respect of those offences. There was no doubt, as I have said previously, that Mr Mohamed Faruq was the organiser of these conspiracies, and the initiator of them, and that his business (MP S) was the main beneficiary in terms of benefits received, and although sums of £500,000 have been referred to, as the benefits that were paid to you, the losers should look to Mr Mohamed Faruq for compensation rather than you.
>
> So far as the male defendants here are concerned, you did agree to do what he asked you to do. And so far as the female defendants here are concerned, I take into account the fact that you did what your husbands ask you to do… and I am sentencing you for being dishonest in relation to your asylum claims by lying about the death of your spouses, by lying about how you came to this country. Whether or not you were born in India or Pakistan, whether or not at some time in the past you were subjected to persecution is better left to the immigration authorities to decide than this court, and it seems to me has more to do with whether or not you should be allowed to remain here or be sent back to Pakistan.
>
> This court is concerned with your dishonesty. In my view, only sentences of imprisonment are appropriate. The sort of dishonesty, your acts of dishonesty which you committed, strike at the root of the proper administration of the system for processing asylum claims. The immigration authorities rely upon the honesty of the accounts given by applicants for asylum, and have only a limited ability to check them out. It is somewhat more difficult for me to understand why, if you had good reasons to seek asylum here rather than come for a visit, you were dishonest about it. Your dishonesty is prejudicial to honest applicants, and there is no doubt that as a result of your dishonesty public money has been spent on you which would otherwise have been spent on honest applicants.
>
> I take into account your pleas of guilty, and although they were made for different reasons this week they have nevertheless led to a considerable saving of money which would have been spent if you had fought the case to the end. I take into account the fact that none of you have previous convictions."

23. In considering the parts that were played by the various individuals, Judge McIntyre equated their conduct with that of Mr Qayyam. The male parents were each sentenced to 6 months imprisonment on count 1 and nine months imprisonment on count 2. Judge McIntyre continued

> "So far as deportation is concerned, having considered the cases which have been put before me, I have come to the conclusion that it will be better left to the immigration authorities to decide whether or not you should be allowed to remain here. So far as I am concerned, bearing in mind the offences which you have admitted, and your previous good character, I do not think the potential detriment to the UK is such if you remain that I ought to make a recommendation that you be deported today."

24. It is apparent from the foregoing that, for his purposes, the trial judge was not concerned with whether the appellants came from India and were at risk of

persecution on return. Accordingly, he could not have reached a conclusion whether they should be deported to India. He properly left those issues to the immigration authorities. We construe his remarks as being neutral in relation to the issue of removal considering it best left to the immigration authorities. Furthermore, whilst he acknowledged the part played by Mohamed Faruq, he also sentenced the parents for their part in the conspiracy and the dishonesty for which they themselves were responsible. Clearly these sentences imposed on the women were '*exceptional*' [p 588] arising from the fact that their imprisonment would have led to the children being placed in care as well as the express acknowledgment of health problems which would have rendered imprisonment inappropriate.

25. Similar considerations arose when he sentenced some of the other appellants on 25 April 2006 [vol 5, tab A, p 592] in which he spoke of the mothers being very much the primary carers of young children one or more of whom had significant health problems which would be exacerbated if the children were separated from their care. He continued:

> "… I have reconsidered the authorities that were put before me then and it seems to me now, as it did then, that the offences which all four of you have admitted are directly related to your presence in this country. They are not, in my view, so serious as to merit a recommendation being made, and I take into account your previous good characters and the fact that you have been of good character since coming to this country some five… or six years ago. In all the circumstances I think it more appropriate to leave it to the immigration authorities to decide whether or not you should be deported.
>
> …I find it very difficult to understand why any of you are still here given that the one adult member in each of your familyies was refused permission to stay here in your cases, all of you, as long ago as 2002, but that is a matter which I have raised already and which I hope will be further investigated [p 595]."

**Immigration decisions under appeal**

**The determination of the First-tier Tribunal**

26. At the hearing before the First-tier Tribunal panel (Senior Immigration Judge Renton and Immigration Judge Forrester) the 28 appellants conceded that:

    i. they were entitled to Pakistani citizenship;

    ii. they would not be at risk on return to Pakistan, nor were they entitled to recognition as refugees or to humanitarian protection;

    iii. the Secretary of State had been entitled to cancel the grant of refugee status where it had been granted, or any derivative status based upon it.

    iv. some of the appellants were liable to removal under s. 10 (1) of the Immigration and Asylum Act 1999.

27. It was not, however, conceded that those children who had reached the age of 18 at the date of the immigration decision or at the date of the hearing before the First-tier Tribunal could be removed under the provisions of s.10.

28. It was common ground that the parents were capable of being removed under the powers reserved in s.10 of the 1999 Act. The First-tier Tribunal construed s.10(1)(c) as applying to a child of a person capable of being so removed, irrespective of his age so long as he or she remained part of the family.

29. Having so decided, the panel went on to consider whether it was proportionate to remove the entire family. The respondent maintained, as identified in paragraphs 28 and 29 of the determination, that the public interest in removing those found guilty of serious breaches of immigration law outweighed the rights of all the family members.

30. The appellants, however, argued that their culpability was limited. They maintained their claim that they were from Srinagar or the neighbouring area of Jammu Kashmir on the Indian side of the border. They further maintained their claim to have been persecuted before fleeing to Pakistan; where they were thereafter able to acquire Pakistani documentation identifying them as citizens of Pakistan. In doing so, none of the parents gave evidence. Instead, they relied upon the expert evidence of Professor Menski and Drs. Ballard and Price to establish the truthfulness of their account.

31. The principal point advanced by the parents in seeking to diminish the degree of their culpability was the claim that they acted under the malign influence of Mr Faruq and members of his family. They claimed that they were all subject to manipulation, control and exploitation by him as evidenced by the prosecution case against them at their trials in Oxford. Relying on the comments of Judge McIntyre, they classified Mr Faruq as the mastermind and he and his family members as the initiators, organisers, directors and principal beneficiaries of the fraud. He had presented himself as a community worker, a friend, a representative of the local community, and an interpreter while directing the fraudulent claims of the appellants for asylum and for an entitlement to receive state benefits. In advancing this claim, the appellants relied upon the expert evidence dealing with the influence of the biradhiri. The biradhiri is the network of familial relationships through which influence can be exerted on other family members. Furthermore, the appellants argued in paragraphs 36 of the determination [vol 6, tab A, p 11] that a distinction should be made between the male parents on one hand and their wives and children on the other as establishing that the latter were required to comply with the decisions of their husbands or their fathers. This was forcibly contested by the Secretary of State.

32. Whilst accepting that Mr Faruq and his family benefited greatly from the fraud, the First-tier Tribunal also found the appellants themselves to have benefited both by way of benefits from health care, education and other publics services

but also by reason of their obtaining, through deception, the right to remain as refugees or as dependants of refugees. It was said that the appellants:

> "…achieved refugee status by a sophisticated web of lies maintained for many years. That web even extended to the child appellants who were able to dupe experienced experts assisting them with their problems. The fact of the matter is that none of the appellants were ever entitled to enter the United Kingdom as family visitors, or to remain as refugees with their dependants, and their lengthy presence in the United Kingdom since 2000 or 2001 has been at considerable expense to the State and has never had any lawful basis."

33. In order to reduce the weight to be attached to the parents' wrongdoing, the panel was invited to make positive findings of fact in relation to the credibility of significant parts of the appellants' accounts. This was not, of course, on the basis that the appellants themselves had given oral evidence. The panel made no such positive credibility findings but neither did it find the claims were fabricated. Instead, in paragraph 39 of its determination [vol 6, tab A, p 12] it made no findings:

> "On reflection, we find these arguments to be of little consequence, and we therefore make no specific findings of fact in respect of those parts of the account in dispute in this way. It may be the case that the appellants have shown to the lower standard of proof applicable in asylum appeals, and despite the fact that earlier appeals on those and other facts were dismissed, that the families originated from Jammu Kashmir where they were persecuted by the Indian authorities and as a consequence crossed the border into Pakistani Kashmir. Although the expert evidence produced on behalf of the appellants in this respect was of varying quality, it may be the case that there is sufficient such evidence to find that this part of the account is plausible. It has been commented with accuracy that such is the extent of the various deceptions perpetrated by the appellants that it is impossible to have confidence in the credibility of anything they have said, but even taking their account at its highest, we find that it assists them little. There is so much of the appellants' stories which are accepted as lies for us to find that it is necessary to attach considerable weight to the legitimate public end sought by their removal."

34. The panel accepted the central role played by Mohamed Faruq describing him as a "malevolent figure" who was at "the fulcrum of all these events". However, it was not persuaded that his actions absolved the parents of all responsibility.

> "We do not see the appellants entirely as victims and thereby deserving of sympathy. Regardless of the pressures, they did not entirely lose the capacity for independent thought, and we find it significant that the appellants persisted in their deceptions even after the influence of Mohammed Faruq had been removed by his own prosecution. In any event, we repeat that in considering the weight to be attached to the legitimate public end of fair and proper immigration control, the overriding fact is that the appellants never had any lawful right to enter the UK as family visitors, nor to remain as refugees with their dependants. For that reason, we further find that it is not a mitigating factor that the wife and children appellants acted under the understandable influence of their husbands and fathers. It is not a case that the sins of the fathers should not be visited upon their

> wives and children. It is more the case that those wives and children should not benefit from the sins of the fathers." [p13, paragraph 40]"

35. Having considered whether the appellants, or some of them, were the victims of trafficking, the panel rejected their claim [vol 6, tab A, p 14, paragraph 44]:

> "Our findings in respect of these arguments are that although the appellants are not the victims of trafficking in the conventional meaning of the term, many features of their entry to and continued presence in the UK with at the least the assistance of Mr Faruq, and his subsequent exploitation and control of them after entry, accord with many of the features of trafficking as recited on behalf of the appellants. However, we have decided to attach little weight to this aspect of the matter. There is no evidence that any of the appellants have been subjected to any physical coercion or force, although no doubt they have been subject to other pressures. It must be the case that they are not now the victims of trafficking according to any definition of that term… there is no evidence that if the appellants returned to Pakistan they would be at any real risk of being trafficked again."

36. Having also rejected the appellants' claim that significant weight should be attributed to delay on the part of the Secretary of State in accordance with the principles of EB (Kosovo) v SSHD [2008] UKHL 41, the panel went on to assess the balance arising in the assessment of proportionality. The basis of its approach was that all of the appellants would return to Pakistan in their respective family units and would continue to benefit from the support they provided. The panel noted the evidence of Dr Ballard to the effect that those returning would be at risk of bonded labour; the daughters would be at risk of exploitation; that the females would be at risk of discrimination as a result of their gender and would face the loss of enjoyment of an independent life.

37. Finally, in concluding that removal of the families was not disproportionate, the panel considered the mental health issues raised in the appeals of Alam and Wasim but decided that, although the provision of health care in Pakistan '*may not be ideal and may not compare well with that available in the United Kingdom*', it was sufficient to avoid a violation of their human rights or their families'.

**The appeal to the Upper Tribunal**

38. Permission to appeal was granted on 23 April 2010 on all grounds submitted:

    (i) It is arguable that the Tribunal erred in law by failing to allow the appeals of those aged over 18 at the date of decision on the grounds that the decisions were not in accordance with the Immigration Rules and/or failing to allow the appeals on the grounds that the decisions were not in accordance with the law owing to the Secretary of State's failure to give effect to his policy as to how he would exercise his powers under s. 10(1)(c) and/or failing to allow the appeals because they were not the spouses or partners or children under the age of 18 of a person in respect of whom removal directions under s. 10 had been made and there was therefore no power in law to make those immigration decisions.

(ii) It is arguable that the Tribunal erred in law in relation to those appellants nearing the age of 18 at the date of decision. The decision was not in accordance with the law because it was made without regard to policy contained in Chapter 50 of the Enforcement Instructions and Guidance with regard to the exercise of the power under s. 10(1)(c).

(iii) It is arguable that the Tribunal erred in law in reaching its conclusion that the nature and consequences of the deception practised were of such gravity as to operate against the presumption not to remove families where the children have been in the UK for 7+ years, wrongly treated all appellants as parties to the deception, irrationally excluded the benefit of DP5/96 and Article 8, erred in its assessment of the individual culpability of each appellant, failed to make proper assessment of the trafficking submission.

39. The case was listed for hearing to consider as a preliminary issue:-

> "Whether there is power in law to remove children who are over the age of 18 under the provisions of s. 10(1)(c) of the Immigration and Asylum Act 1999 as family members of an adult being removed under s. 10(1)(b)."

**The preliminary issue - *Ahmad and others* (removal of children over 18) [2012] UKUT 00267 (IAC)**

40. In *Ahmad and others* (removal of children over 18) [2012] UKUT 00267 (IAC) (Collins J and Upper Tribunal Judge Coker), the decision was summarised in these terms:

> There is no power under the provisions of section 10(1)(c) of the Immigration and Asylum Act 1999 to remove children who are over the age of 18 years as the family members of an adult being removed under section 10(1)(b) of that Act.

41. It was agreed between the parties that the individuals whose appeals were allowed by the *Ahmad* decision are as follows: Tousif Ahmad AA/08844/2008, Jehan Mohammed AA/08847/2008, Ishrut Begum AA/08849/2008, Mohammed Atif AA/08853/2008, Mobushra Begum AA/08852/2008 and Furah Begum AA/08856/2008.

42. The Tribunal in *Ahmad* considered s. 10 of the Immigration and Asylum Act 1999 which deals with administrative removal. Under the heading "Removal of certain persons unlawfully in the United Kingdom", s. 10 provides:

> "(1) A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if:
>
> > (a)…
> >
> > (b) he uses deception in seeking (whether successfully or not) leave to remain;
> >
> > (c) directions have been given for the removal, under this section, of a person to whose family he belongs

> …
>
> (5A) Directions for the removal of a person under subsection (1)(c) cease to have effect if he ceases to belong to the family of the person whose removal under subsection (1)(a) or (b) is the cause of the directions under subsection (1)(c) ….."
>
> …
>
> (8) Where a person is notified that a decision has been made to remove him in accordance with this section, the notification invalidates any leave to enter or remain in the United Kingdom previously given to him."

43. The process by which administrative removal is effected continues to be governed by Schedule 2 to the 1971 Act to which paragraph 10A had been added by the Nationality, Immigration and Asylum Act 2002 and which provides:

> "Where directions are given in respect of a person under any of paragraphs 8 to 10 above, directions to the same effect may be given under this paragraph in respect of a member of the person's family."

44. In neither legislative source were members of the family expressly limited to children under the age of 18. This might be contrasted with the provisions effecting deportation. Section 5 of the 1971 Act dealing with deportation provides in s. 5(4):

> "For the purposes of deportation the following shall be those who are regarded as belonging to another person's family –
>
> (a) where that other person is a man, his wife or civil partner and his or her children under the age of eighteen; and
>
> (b) where that other person is a woman, her husband or civil partner and her or his children under the age of eighteen."

45. However, new Immigration Rules were passed to deal with the provisions of s.10. These included:

> "395A. A person is now liable to administrative removal in certain circumstances in which he would, prior to 2 October 2000, have been liable to deportation.
>
> 395B. Those circumstances are set out in s.10 of the 1999 Act. They are:
>
> (i) …
>
> (iv) where the person is the spouse, civil partner or child under 18 of someone in respect of whom directions for removal have been given under section 10."

46. The expression 'family' inevitably contained limitations as to the persons who might qualify. Indeed, s. 10(5A) recognised that those who were family members could cease to be such. For example, children under 18 might marry and so move away from the family. Further, the clear understanding of the draftsman of paragraph 395B of the Rules, approved by Parliament, was that 'family' within s. 10(1)(c) should be limited to those specified in s. 5(4) of the 1971 Act, that is children under 18. Once in a Rule, the policy had to be

followed. Thus, paragraph 395B would require the Tribunal to allow the appeals of those over the age of 18 in any event, but this also pointed the way to the true construction of s.10(1)(c).

47. Hence, the Tribunal construed the provisions of s. 10(1)(c) of the 1999 Act as limited in their application to the removal of children under the age of 18 years when the family members of an adult were being removed under s. 10(1)(b). It followed that removal could not lawfully be effected pursuant to s.10(1)(c) – the route adopted by the Secretary of State - in the cases of the adult Ahmad children.

**The error of law**

48. By directions dated 12 December 2012, Upper Tribunal Judge Coker explained in paragraph 1 that the First-tier Tribunal's determination on Article 8 had been set aside on 28 October 2011. Neither the Tribunal nor the parties have located this decision and it was suggested it took the form of a concession at a hearing on that date. We are satisfied that the First-tier Tribunal's determination is flawed if only because of the different approach taken by the decision of the Tribunal in *Ahmad and others* which, although relating to only six of the family members, upset the balance in the assessment of proportionality. As the adult Ahmad children who formed the subject matter of the preliminary issue will not, we understand, now be removed, the First-tier Tribunal's approach that the four entire families will be removed together no longer holds good. Accordingly, the appeal has to be re-made insofar as the appellants before us are concerned.

49. On 10 May 2013, this panel sought to identify the nature and scope of the hearing before us and we directed:

> The scope of the hearing is to include consideration of the effects of the Secretary of State's refusal decision of 1 May 2013 declining to issue a residence card to members of the Mehmood Ahmed family confirming their derivative (Zambrano) right of residence and a further fresh decision so long as the same is served on the relevant appellants and the appellants' representatives by 31 May 2013. (For the avoidance of doubt, the Upper Tribunal will not be sitting as judges of the First-tier Tribunal to determine any appeal brought against either or both of the decisions but its consideration of them will cover all the issues arising from them as necessary issues falling within the scope of the present appeals.)

50. A further decision was indeed made by the Secretary of State on 31 May 2013 in relation to the *Zambrano* issue.

51. In the course of the hearing we invited the parties to agree the exact scope of the hearing in the Upper Tribunal and it was agreed as follows:

> The parties conceding that the First-tier Tribunal made an error on a point of law and the Upper Tribunal agreeing in like terms, the Upper Tribunal will set aside the decision of the First-tier Tribunal and re-make the decision in light of the submissions made by the parties in their skeleton arguments and oral

submissions, subject to the determination of Collins J and Upper Tribunal Judge Coker and give such weight and significance as the Upper Tribunal considers appropriate to the findings of the First-tier Tribunal.

**The nature of the offending – the role played by Mohammed Faruq**

52. In paras 4.1 to 4.12 of the appellants' skeleton argument, the parents seek to minimise their own responsibility in the conspiracy whilst attributing fault to Mohammed Faruq and his family for the events that resulted in their coming to the UK. Indeed, when asserting that the appellants are the objects of trafficking, they expressly assert that they, collectively, are victims rather than perpetrators. Whilst it goes without saying that, in the circumstances of this case, none of the children, adult or minor, bears any responsibility for what occurred, the Tribunal is required to make findings of fact on the responsibility that the parents must bear for what occurred. This is not limited to the circumstances of their entry into the United Kingdom but also extends to their continued presence here.

53. This requires us to consider the factors upon which the parents rely in support of their claim to bear only limited responsibility.

54. They rely on paragraph 39 of the determination (which we have summarised above). The First-tier Tribunal made no findings in relation to whether the families originated from Jammu Kashmir where they were persecuted by the Indian authorities and as a consequence crossed the border into Pakistan Kashmir. They point out that the First-tier Tribunal accepted [44] that the appellants' entry and continued presence in the United Kingdom and Mohammed Faruq's exploitation and control of them had 'many of the features of trafficking' and that the cultural norms of their *biradhiri* made them susceptible to Mohammed Faruq's control. Whilst expressly acknowledging their responsibility for the deception, they then move to attribute much greater responsibility upon Mohammed Faruq. In summary, they claim:

    i. Mohammed Faruq and his immediate family (wives and daughter) bore full responsibility for the initiation and execution of the deceptions and have been the principal beneficiaries.

    ii. Judge McIntyre was clear as to the differential responsibilities and culpability of the individual defendants and found Mohammed Faruq's criminal conduct went beyond that alleged in the indictment; that Mr Mohammed Faruq was the organiser of these conspiracies, and the initiator of them, and that his business (MPS) was the main beneficiary, in terms of benefits received. The losers should look to Mohammed Faruq for compensation rather than to the appellants. The male parents did what Mohammed Faruq asked them to do; the female parents did what their husbands asked them to do. The appellants were present in the UK as victims of trafficking, brought into the UK and harboured by Mohammed Faruq for the purpose of exploitation.

iii. The 'large scale conspiracy' conducted by Mohammed Faruq was relevant because it provided the background and context necessary to assess the extent of the parents' culpability and the weight properly to be attached to their involvement in the conspiracy and it provides background evidence for the later proportionality exercise.

iv. Mohammed Faruq (variously described as the "head of the family and the head of the family business", the "directing mind", "instrumental in the organisation and execution of the [claims]…with whom the Council liaised directly", "the initiator" and "organiser", "principal beneficiary") together with his wives, Khurshid and Sheila Faruq, his daughter Haleema Saida Kamal and his brother Abdul Qayyum implemented the scheme to bring the appellants and others to the United Kingdom.

v. Mohammed Faruq was involved in multiple immigration and financial frauds over many years as a practised, serious fraudster before the entry of the appellants. At the time of his arrest he had acquired 62 houses in Oxford and made his income letting these properties as emergency and asylum-seeker accommodation through Oxford County Council and NASS. He was claimed to be a large scale trafficker of adults and children for benefit fraud.

vi. Prior to the entry of the appellants, Mohammed Faruq and his wife Sheila and brothers were directly involved in the deceptive entry of his wife Khurshid, his brothers and their wives; altering Khurshid's age when sponsoring her to come to the UK as his fiancée, and arranging for Sheila Hancock (his common law wife and mother of his children), to enter into a fraudulent marriage with his brother Abdul Hamid to gain him entry clearance. During her marriage to Abdul Hamid, she underwent a religious marriage to Faruq at which Abdul Hamid was a witness.

vii. Mohammed Faruq arranged the entry of his brother Abdul Rafiq's wife, Rasheeda Begum, as a domestic worker. At the time of her entry Rasheeda Begum had two children to Abdul Rafiq and a family home in Pakistan. His brother Abdul Hamid fraudulently sponsored Robina Kauser into the UK as his wife when she was the wife of another of Faruq's brothers, Abdul Qayyum. Documents showed Mohammed Faruq's direct involvement, as well as arranging for Rasheeda Begum to apply for asylum in the UK as Buksheeda Bi as a means by which Mohammed Faruq was enabled to claim housing benefits.

viii. Mohammed Faruq was also directly involved with the fraudulent entry and fraudulent asylum claims in relation to others and committed multiple tax and business frauds using his company MPS as a vehicle for these purposes, for which he benefitted directly.

ix. The appellants' deceptions, it is said, were calculated to serve his ends. Planned by Mohammed Faruq, Abdul Qayyum, Khurshid Faruq and her adult daughter Haleema visited Pakistan to make arrangements for the entry clearance applications for the appellants and others. The appellants' entry and asylum applications were dictated by Mohammed Faruq (via his associates) relying on false standardised evidence. Mohammed Faruq liaised directly in arranging housing accommodation, signing the invoices and letters in support of the housing benefit applications as well as post-NASS asylum appeals. The housing benefit was paid directly to him. Mohammed Faruq chose the solicitors, interpreted at meetings and interviews or arranged for his daughter Haleema so to act and instructed medical experts, monitoring and correcting their reports. Mohammed Faruq retained the appellants' travel and identity documents, their asylum appeal papers and statements. The children's teachers recorded that Mohammed Faruq and his family provided the identity and family information for the appellants and they noted his control of the children and parents, their activities and his refusal to sanction their participation in school group activities.

**Events in Srinagar and Jammu Kashmir, India**

55. At the commencement of her submissions to us, Ms Cronin conceded, according to the expert evidence of Prof Menski, that even if the appellants were from Jammu Kashmir, they would be given Pakistani citizenship and it was therefore accepted that if returned, they would return to Pakistan. The appellants did not give evidence before the First-tier Tribunal and were not going to give evidence in the Upper Tribunal because, she accepted, on certain core issues they could not be found to be credible. She maintained that credibility was a significant factor and that the decision not to call the appellants was a "*professional decision*" because a live contest on a credibility issue that had been conceded would serve no purpose. Mr Blundell commenced his submissions on the basis that the parents were not advancing a case on the basis that they were credible. The appellants did not give evidence but relied upon the expert evidence of others to advance their claim. Accordingly, it was his understanding that, for the first time, the appellants were conceding that they had not told the truth about that part of their claim in which they alleged they had been tortured and persecuted in India.

56. Later in the hearing, on the morning of 18 September 2013, Ms Cronin sought to clarify the extent of the concession that she had made. It had not been her intention to concede that the appellants were not telling the truth about their claims to have been persecuted in the past or the risk of persecution in India.

57. We have already pointed out that Judge McIntyre expressly declined to make findings on this issue and the First-tier Tribunal adopted a similar course. Notwithstanding this, the Secretary of State has, throughout these proceedings,

maintained that this part of the case was untruthful. Whilst, in view of what he had earlier considered to be a concession, Mr Blundell did not initially address us on the issue of credibility, he later did so by submitting the written submissions on credibility that had been advanced before the First-tier Tribunal.

58. We were referred to the respondent's closing submissions and were provided with an extract of paragraphs 30 to 121 of the written submissions as they were advanced to the First-tier Tribunal. These closing submissions are a detailed critique of the evidence that was advanced by the experts on the appellants' behalf in the First-tier Tribunal and the accounts given by the parents.

59. They begin with the premise that three of the families are closely related and the fourth related but less so. All are related by blood or marriage to Mohammed Faruq. Three of the parents are siblings, all the children are first cousins. The parents speak of their experiences in Jammu Kashmir. All were living in or around Srinagar, according to their accounts. It is, in our judgment, inconceivable that one family would not have been highly familiar with the circumstances of the other two or three families. Their accounts, however, are silent on this.

60. What is more striking still are the similarities that exist between the accounts provided when it is said that these are truthful accounts of different incidents which happened to different people on different occasions. For example, the Secretary of State points out that the accounts of Nasreen Bi and Fazal Jan demonstrate the following similarities:

    i. Indian soldiers coming to their home;
    ii. the soldiers breaking down the door;
    iii. their husbands trying to stop the soldiers;
    iv. each husband was shot dead by the Indian soldiers;
    v. the wives were grabbed and their hands tied behind their back;
    vi. each of the wives was blindfolded and put in a truck;
    vii. the soldiers took them to a camp;
    viii. each of the wives was burned with cigarettes and given electric shocks;
    ix. each was beaten with a belt;
    x. each was raped;
    xi. each was released near their village;
    xii. neither could walk properly;
    xiii. on arrival home each found the house had been burned down;

xiv. in the case of these two sisters, each describe having lost a baby as a result of the injuries they received, although neither sister refers to the incident as it affected the other.

61. These are not the only similarities. For example, one tells of forefingers being cut off the hand of his father; another of forefingers being cut off the hands of her husband.

62. We are, of course, mindful of the fact that a striking consistency between two events does not necessarily mean that the two accounts cannot be true. However, it is the scale of the similarities that is, in our judgment, so significant.

63. The evidence of what occurred in India has to be assessed by the parents' portrayal of these events in what appears to have been a rural setting. However, it is apparent that the places named by the appellants are in the city of Srinagar. The events do not apparently relate to village life but are placed in an urban setting.

64. Further, as the closing submissions make clear, the Secretary of State was at pains to point out the degree of integration that Mohammed Faruq has with Pakistan, the parents' own admitted evidence about the time spent in Pakistan, the relations and connections they have with Pakistan and various other factors suggestive, although not necessarily determinatively, of their coming from Pakistan.

65. Together, they make up a compelling case that the parents are not telling the truth and that the appellants' overall account is fabricated.

66. Whilst the First-tier Tribunal had the benefit of the expert evidence of Drs Price, Ballard and Huckstep, none of the experts was called before us, nor were we referred to their expert evidence in the bundles, although we know those reports were contained within them.

67. Furthermore, the appellants' representatives can have been in no doubt that credibility was in issue since Mr Blundell repeatedly made this clear.

68. Notwithstanding the respondent setting out her submissions on credibility in detail, no evidence was produced by any of the appellants in response to them.

69. The appellants' case is that given the parents' admitted inability to provide credible evidence to us on what they consider to be the 'core' issues, there was little point in making the attempt. We regard this as a counsel of despair. In our judgment, it has always been open to the parents to face up to the fact (which they admit) that they have not told the truth but nevertheless advance a case by explaining why they did so and seeking to put the record straight by telling the truth. There are, of course, hurdles that have to be overcome in this path, but that does not prevent the attempt.

70. We must assess the credibility of these accounts against the background of the appellants' case as a whole. We are satisfied so that we are sure that these accounts are not credible. Furthermore, we are satisfied that by continuing to maintain them, even in the face of the detailed criticism that has been made but has not been adequately answered, the parents are continuing to lie about their claim. Whilst the parents seek to claim that their responsibilities for events ended with the conspiracy which effected their initial entry into the United Kingdom, we do not regard this as an adequate description of the role that has been played by them. Notwithstanding the fact that the appellants entered the United Kingdom in 2001 and 2002, they have still not seen fit to provide us with a truthful account. We accept that the decision not to call the appellants was made on their behalf by their legal representatives but this cannot absolve the parents from responsibility for the underlying instructions they as parents were providing to their counsel. Those instructions are not the truth. Doubtless that provides their representatives with a difficulty but the responsibility for this is that of the parents alone, not that of their representatives.

71. We will deal with the effect this finding has in due course. What, however, is clear to us is that the parents cannot realistically attribute blame to Mohammed Faruq for the continuing deception since he no longer has any influence on their lives. Accordingly, the continuing use of deception provides an insight into their independent engagement with deception in furthering their claim.

**Trafficking – the development of the claim**

72. When the appeal came before us there was a fully developed claim that the appellants were the victims of trafficking. For example, in a statement made by Gulan Rabani [vol 2, tab L, p 1] dated 1 May 2013, he said this:

> "[Mohammed Faruq] is a very cruel man. That's all I can say. I cannot say more than that. He always lied and he told us to lie as well. He has made me work in this country. I have never told anyone this before because I was afraid. He had lots of properties and he made me work in them for free.
>
> As I said in my previous statement, it was not until after we were arrested that I realised how much control [Mohammed Faruq] had over our arrangements to come to the UK and what we did when we got here."

73. This is strikingly different from the way in which the claims had previously been put. Qadir Ahmed made a statement [vol 6, tab X, p 42] in which he said in paragraphs 18 to 20:

> "We left India in 2001 and went to Pakistan… the Pakistani police arrested me… After I was released I asked Ajab [my employer] to help me as I was scared that the police would arrest me again. I told Ajab that I had four maternal uncles in the UK namely Mohammed Faruq, Abdul Qayyum, Abdul Hamid and Abdul Rafiq… I had a good relationship with my uncle Abdul Qayyum. I had maintained communication with him since the first time that I went to Pakistan. My uncle used to phone me regularly while I was working… to ask about me

> and my family's welfare. After a discussion with Ajab I phoned my uncle in the UK and asked him to help me."

He continued in paragraphs 25 to 30:

> "That evening my uncle Qayyum advised me that I should claim asylum but it would be best to make separate asylum claims because if one spouse was granted then the other one could benefit from that. He said that this increased the chances of success…Qayyum told me to destroy our Pakistani passports and ID cards which I did… I had been encouraged by Qayyum to tell my children to lie. I had to coach them to tell everybody outside of the immediate family that their mother or their father had died and if they did not do this then they would be deported. I accept that I coached my children into saying that either their mother or father was dead whilst we lived together as a family."

74. In a statement made by Qadir Ahmed dated 7 March 2013 [vol 1, tab A, p 1] at paragraphs 8 to 9, he said:

> "I now know what we did when he claimed asylum in the UK was wrong. We did not understand the system. My wife and I were new to the country, illiterate and uneducated. We did what we were told to do by [Mohammed Faruq] and his associates. We could not refuse to do as they said as we did not know anything about the system, and had no way of finding out… it is horrible to see how it has affected our children. We thought that we would be giving them a better life when we came to the UK. Instead we have put them in a terrible position."

75. Qadir Ahmed's wife, Nasreen Bi made a statement [vol 1, tab D, p 57] dated 31 October 2009 in which she said in paragraph 16:

> "I know that we have lied. We did not know any better and we followed the advice of people that we thought were doing this because it was best for us. Everything we have done we have done in order to give the children a better chance and, in particular, to provide them with a place of safety."

76. Ghulam Rabani's earlier statements are couched in very different terms from his latest one. In a statement of 31 October 2009 [vol 2, tab C, p 68] he said in paragraphs 12, 13 and 15:

> "Sponsorship papers were sent to Pakistan to Gul Mohammed - I presume by Mohammed Faruq. When I spoke to Mohammed Faruq, he asked me to contact Gul Mohammed…Gul Mohammed gave me advice about what documents to get including statements from the Muslim Commercial Bank… Mohammed Faruq knew it was our intention to claim asylum in the UK."

77. In supplementary statement dated 4 December 2009 [vol 2, tab C, p 77] he said at 79]:

> "But it is the truth that both myself, my wife and all of our six children, were born in Jammu Kashmir and that we have no connection to the village of Mair in Pakistan. It is only very recently that we have come to learn, through our lawyers, of the extent to which we were used in order to benefit Mohammed Faruq and his business."

78. His wife, Noreen Shakila said in her statement of 3 July 2007 [vol 2, tab D, p 45] at paragraph 24:

> "My uncle, Mohammed Faruq, knew that it was our intention to claim asylum. He was nevertheless willing to help us in order to get to England to make that application. He did not advise us directly about making separate claims and giving some false information but he had a connection to the main person who did advise us whose name is Ali Wahid."

79. Rungzaib [vol 3, tab C, p 67] in paragraphs 20 - 24 and 32 of a statement dated 31 October 2009 described events as follows:

> "We travelled to England using false Pakistani passports obtained on our behalf by the friend with whom I was working. His name was Abdul Majid. Abdul Majid also obtained a false Pakistani ID card for my wife. I already had one due to my numerous travels to Pakistan before… I spoke to Abdul Qayyum when he was in England and asked for his help. I also met him afterwards in Pakistan. He told me that when he went back to England he would send sponsorship forms. He posted the documents to me. I do not know what papers were in the envelope…. I did not pay Mr Majid any money to help me… before coming to the UK I had met Abdul Qayyum on three or four occasions… in Pakistan. My family and I arrived in the United Kingdom on 5 August 2000. We were picked up by Mr Qayyum's wife, Shahida, and his friend Habib. Habib advised me that Qayyum had instructed him to help us claim asylum separately. I was reluctant but agreed… everything that I have done, for which I accept responsibility, has been done in order to make sure that my children are safe and can grow up in a way that any parent would expect for their children."

80. Jamila, his wife [vol 3, tab D, p 79] said at paragraph 8:

> "My husband phoned my uncle, Abdul Qayyum, when we were living in Pakistan in order to help us because we could not continue to live in Pakistan… my husband told me that we were claiming asylum and that we would make separate applications. He told me that I was to say that my husband had died and that I only had three children. He also told me that I had to tell them that I had arrived in the UK illegally. In fact it was Habib who sat with us many times until we learned an account of how we had travelled to England. Although I was confused, I followed my husband's instructions because I had no choice… In my culture, we follow our husbands' orders, right or wrong."

81. Mehmood Ahmed had this to say in a statement he signed on 3 July 2007 [vol 4, tab D, p 28] at paragraphs 20 to 24:

> "I had left Kashmir on several occasions and travelled to Pakistan. Whilst there I had been able to obtain employment through a man called Munshi Mohammed. I have worked for Munshi Mohammed on several occasions. It was Munshi Mohammed who helped me to get false passports for myself, my wife, and two boys in order to be able to travel from Pakistan with visitor's visas to England in order to come to claim asylum. However, to do that we also needed the assistance of family members in the UK to sponsor us….Fazal's sister, Khurshid, had already moved to England and had married Mohammed Faruq … I telephoned Safdar [my wife's brother] in the UK and begged him to help me as I

was now desperate to find a safe haven for myself and my family. As I have stated above, Munshi Mohammed helped me to obtain false passports using fake identity documents. He also helped me to obtain bank statements and property papers that would be needed in support of my Visa application… I approached Safdar in order to help us. I thought that Safdar was the person who sponsored us. The sponsorship documents were sent not to myself but to Munshi Mohammed. It was only after my arrest in July 2004 that I found out that the actual sponsor had been Khurshid and that all her documents had been made available in support of their visa application…. After our arrival in the United Kingdom, Safdar advised me to myself and my wife should make separate claims. He also told me that I should give a false account of our journey to the UK and not disclose anything about the visa applications. I went along with this… Mohammed Faruq became aware that I claimed asylum and he was angry because he had not been consulted. He was not someone, however, that I would ordinarily consult with. Although he is the brother-in-law of my wife, my wife is close to her sister, Khurshid and not to Mohammed Faruq himself. …Nevertheless, he gave help whenever we needed it for example in interpreting or providing financial support for medical reports. It was, however, Safdar who was the one most directly involved."

82. This might be contrasted with what Mehmood Ahmed said in his statement of 1 May 2013 [vol 4, tab A, p 5] at paragraphs 14 and 18 [pp 8 and 9] by which time the trafficking allegation was being strenuously pursued:

> "All my wife's family was here in the UK. They offered for us to come to the UK. When I got this offer, I mentioned it to Munshi Mohammed and he said he could organise documents for us…Because the way the family system was I took other peoples' words at face value. When I say family system, I am talking about a cultural thing. If Safdar said go this way I would go that way, if Mohammed Faruq said go this way, I would go that way. The reason Mohammed Faruq was higher up than I was that he had been in the UK for 30 years and he was wealthy. Mohammed Faruq also organised for Safdar to come here as well. They have been here longer and have more influence. I felt respect for them."

**Trafficking – the legal basis**

83. The Council of Europe Convention on Action against Trafficking in Human Beings ('European Convention against Trafficking') was ratified by the United Kingdom government on 17 December 2008. It proceeded from the UN Palermo Protocol (to which the United Kingdom was a signatory) which itself sought to take measures to deal with transnational organised crime and to prevent, suppress and punish trafficking in persons. The European Convention against Trafficking applies irrespective of immigration status.

84. Article 1 of the European Convention against Trafficking explains its purposes:

    1. The purposes of this Convention are:

    (1) to prevent and combat trafficking in human beings, while guaranteeing gender equality;

(2) to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution;

(3) to promote international cooperation on action against trafficking in human beings."

85. Article 2 provides that the Convention applies to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime.

86. According to Article 4:

> For the purposes of this Convention:
>
> (1) "Trafficking in human beings" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.
>
> (2) The consent of a victim of "trafficking in human beings" to the intended exploitation set forth in subparagraph (a) of this Article shall be irrelevant where any means set forth in subparagraph (a) have been used
>
> (3) The recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation shall be considered trafficking in human beings even if this does not involve any of the means set forth in subparagraph (a) of this Article;
>
> (4) Child shall mean any person under eighteen years of age;
>
> (5) "Victim" shall mean any natural person who is subject to trafficking in human beings as defined in this Article.

87. Section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 creates various offences of 'trafficking people for exploitation'. For this purpose, a person is exploited if:

> (4)(c) he is subject to force, threats or deception intended to induce him–
>
> > (i) to provide services of any kind,
> >
> > (ii) to provide another person with benefits of any kind, or
> >
> > (iii) to enable another person to acquire benefits of any kind, …
>
> (4)(d) a person uses or attempts to use him for any purpose within sub-paragraph (i), (ii) or (iii) of paragraph (c), having chosen him for that purpose on grounds that-
>
> > (i) he is mentally or physically ill or disabled, he is young or he has a family relationship with a person, and
> >
> > (ii) a person without the illness, disability, youth or family relationship would be likely to refuse to be used for that purpose.

88. The United Nations High Commissioner for Human Rights presented a set of Trafficking Principles and Guidelines to the United Nations Economic and Social Council which were stated to have the following effect:

> The Trafficking Principles and Guidelines are not contained in a treaty or similar instrument that is capable of giving rise to immediate legal obligation. As such, this instrument does not enjoy the force of law and cannot, on its own, be identified as or become a source of obligation for States. However, this does not mean that the Trafficking Principles and Guidelines are without legal significance. As the Commentary will demonstrate, certain aspects of the Trafficking Principles and Guidelines: (i) are based upon established customary rules of public international law to which all States are bound, including those relating to State responsibility and fundamental human rights; and/or (ii) reiterate, or make specific to the context of trafficking, norms contained in existing international agreements. To the extent that parts of the Trafficking Principles and Guidelines embody an existing rule of international law, then those parts are themselves a source of legal obligation for States. It is also important to note that the Trafficking Principles and Guidelines establish a framework for State practice that may itself provide the basis for emergent customary international law.

89. The UN *Trafficking Principles and Guidelines* offer general principles which include:

> Principle 1 seeks to ensure that trafficked persons are accorded all human rights, including those to which they are entitled as victims of crime as well as victims of human rights violations. This Principle is applicable to all State agents and to all other actors engaged in activities relating to the prevention and punishment of trafficking and the protection of victims.
>
> Principle 2 confirms that all States, irrespective of their place in the trafficking cycle, have an international legal responsibility to act with due diligence in preventing trafficking; investigating and prosecuting suspected traffickers; and providing assistance and protection to those who have been trafficked. The principle of State responsibility as it operates in the human rights context confirms that the State is held to a certain standard of care, even in situations where it is not the primary agent of harm.
>
> Principle 8 states 'The particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation requires that they be dealt with separately from adult trafficked persons in terms of laws, policies, programmes and interventions.'

90. UKBA's own guidance (as it then was) for identification of trafficking victims (APG, Victims of Trafficking) states:

> "It is important to be aware of a number of myths relating to human trafficking:
> …
>
> Myth: The person knew what was going to happen to him or her, so he/she cannot be considered a victim.
>
> Reality: Prior knowledge may indicate complicity and does not in itself indicate trafficking. But equally individuals may not have been aware of the level of

control over their freedom, movement or monetary arrangements so trafficking should not be ruled out simply because some prior knowledge of events can be established. …

Myth: It cannot be human trafficking when organiser and victim are related or married/cohabiting/ lovers.

Reality: Close relationships are often used to exploit and control others. …

Myth: A person is not a victim of trafficking when he or she says that he or she has a better life than previously. Reality: It is likely that victims may perceive their life as better, particularly when the money promised to them is delivered. It doesn't mean that they are not a victim of trafficking.

Behaviour of potential victims of trafficking

It should be recognised in the assessment process that victims may not be willing to fully disclose the details of their experience on first contact due to fear of retribution from their traffickers or mistrust of those trying to help. It should also be recognised that there may be an inability and/or an unwillingness of exploited persons to perceive themselves as 'victims'. For many individuals they may perceive their situation as temporary and partly attributed to their lack of knowledge in understanding the country or labour market. It should be noted that some exploited persons may be viewed as 'colluding' with their 'employer' in their illegality, for instance accepting the 'cover' of the person exploiting them from the immigration authorities. Such 'relationships' can add to confusion when attempting to identify individuals as victims of trafficking.

Agencies may also find that people are willing to tolerate their situation because they may perceive it as a 'stepping stone' to a better future and may also compare it more favourably to experiences at home. In this situation front-line responders and decision makers should consider objective indicators such as the seizure of identity documents or use of threats by the employer/exploiter. Such indicators will facilitate in the identification of a trafficking situation. …

Individuals who are in a trafficking situation may be extremely reticent with information, and may tell their stories with obvious errors. It is not uncommon for traffickers to provide 'stories' for victims to tell if approached by the authorities and the errors or 'lack of reality' may be because their initial stories are composed by others and learnt."

91. The Child Exploitation and Online Protection Centre (CEOP) report on Child Trafficking for Benefit Fraud (October 2010) concerning such child trafficking victims states at paragraph 8.2.1:

"When talking about impact on the child, it might be useful to discuss the child's development of identity and the negative impact that a false or adopted identity can have on a child. Children who are exploited for benefits may be given false identities or be told by their exploiters to 'role play' for various identities. This can lead to a sense of confusion about their identity which may inhibit the child's normal identity development and have adverse effects on the child's emotional and behavioural progress. This can result in low self-esteem and poor self-image. It may also cause the child to feel complicit in any crime that is being committed (benefit fraud/immigration) and prevent the child being able to express themselves or to seek help. ..The child may also develop with a sense of

> invisibility as they may feel that they have to continually suppress their true identity. The child's sense of individuation and social belonging may be poorly developed."

92. In *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, the ECtHR, speaking generally between paragraphs 271 and 308, identified in [284] the positive nature of the obligation:

> The Court observes that the Palermo Protocol and the Anti-Trafficking Convention refer to the need for a comprehensive approach to combat trafficking which includes measures to prevent trafficking and to protect victims, in addition to measures to punish traffickers …. It is clear from the provisions of these two instruments that the Contracting States, including almost all of the member States of the Council of Europe, have formed the view that only a combination of measures addressing all three aspects can be effective in the fight against trafficking ….. Accordingly, the duty to penalise and prosecute trafficking is only one aspect of member States' general undertaking to combat trafficking. The extent of the positive obligations arising under Article 4 must be considered within this broader context.

93. Chapter III (Articles 10-17) includes "Measures to protect and promote the rights of victims, guaranteeing gender equality". Article 10 provides:

> 1. Each party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation and children victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention.
>
> 2. Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.

**Our evaluation of this issue**

94. The appellants' case is that they – collectively - were trafficked by Mohammed Faruq for exploitation within a wider benefit fraud and that Mohammed Faruq's conduct is wholly consistent with the role of a trafficker. As the coercion applied by a trafficker may be subtle and need not be violent, victims frequently consent to travel, hence benefitting from trafficking is not inimical to being a victim. The parents' deceptive conduct is consistent with their being victims of trafficking. Even those with irregular immigration status and who

have committed criminal offences are entitled to benefit, it is submitted, from the European Convention against Trafficking.

95. In support of this, the appellants assert that the parents were unaware that Mohammed Faruq owned the accommodation in which they were living or that he was exploiting them to obtain bed and breakfast or housing benefit payments.

96. They point out Mohammed Faruq's worldliness, his great comparative wealth and position and as well as the position that places him as the principal of the *biradhiri* to which all the appellants belonged; similarly the wives and children assert their duty to obey and show deference to their husbands and fathers. In this construction of what occurred, Mohammed Faruq abused his power and exploited the appellants' vulnerability in a sophisticated benefit fraud. Accordingly, the argument proceeds, the First-tier Tribunal failed to give weight to this in the proportionality exercise. The appellants, as victims of trafficking, did not justify classification by the First-tier Tribunal as undeserving, illegal entrants who had unlawfully gained their presence in the United Kingdom and benefits to boot or that this justified their removal on proportionality grounds.

97. In advancing the claim, they rely heavily on the First-tier Tribunal's finding that '*many features of their entry to and continued presence in the United Kingdom…accord with many of the features of trafficking*'.

98. In adopting this approach, the appellants as victims have also suffered greatly, they have been prosecuted and imprisoned, the children significantly distressed, the families forced to live in a state of legal limbo, '*socialised into British norms and expectations*' but '*denied the opportunity to participate or progress in such system.*'

99. As part of a discrete claim, the appellants contend that the Convention enshrines a system of identification which is central to the proper application of the scheme, not only for their protection but in order to secure the punishment of the trafficker. Seen in this light, it is contrary to law to remove the appellants before such identification and investigation has been undertaken or without regard to the Article 16 protections for the safety and dignity of returning trafficking victims.

100. Furthermore, the parents' credibility and culpability should itself be assessed in the context of their being victims of trafficking.

101. Whilst it is not contested that Mohammed Faruq was central to the success of this scheme, his demonisation has to be established as a fact and there are significant difficulties in the parents' way in achieving this when the parents have not themselves given evidence or submitted themselves for cross-examination. As we have noted earlier, there are two diametrically-opposed explanations for what took place: one, as victims whose vulnerability resulted

in their being abused and exploited; the other, as willing participants in a scheme to gain unlawful entry into the United Kingdom, to secure free housing, state benefits, free education and healthcare with the realistic prospect of being granted settled status. The appellants' submissions that the evidence is consistent with the former is not determinative, since there is compelling evidence pointing the other way. Indeed, many of the points made by the appellants are equivocal. There is no underlying inconsistency in the appellants seeing this as an opportunity for them which they willingly embraced and Mohammed Faruq benefitting from the scheme as well and even more greatly. Their present antipathy towards Mohammed Faruq is not probative of their being victims: it is hardly surprising given the fact that the scheme has fallen apart in a way which neither foresaw.

102. The parents seek to establish their role as victims. If that meant coming to the Tribunal and giving evidence along the lines we have previously identified, confessing the prior deception and attempting to turn a new leaf, this was a clear means of achieving that goal.

103. As importantly, the evidence about the development of the trafficking claim, as we have seen, was not apparent from the original statements. Whilst they refer to the undisputed role played by Mohammed Faruq, they do not suggest (save in the most oblique way) that they were being exploited. Indeed, it is difficult to see how that could have been suggested. In Pakistan, opportunities for the parents and, more especially, the children were limited: they were illiterate, living in relative deprivation. It was not suggested that the children possessed a realistic prospect of further education, far less tertiary education, in Pakistan; there was no prospect of free education, free housing, state benefits or NHS healthcare. It is true that the decision was something of a gamble; there was a prospect of failure, perhaps detection and imprisonment, but the risks had to be off-set by the potential gains. If the appellants now claim that they are the victims of exploitation, we do not think it is improper for us to comment that they have never sought to flee from the exploitation they claim to have suffered in the United Kingdom. There is, at the very least, a suggestion that the exploitation that they seek to establish they suffered under the rod of Mohammed Faruq is strikingly similar to the benefit they currently assert they would lose if removed (and the loss of which amounts, they say, to a violation of their human rights).

104. The Secretary of State submitted before the First-tier Tribunal that there was no relevant exploitation: whilst the presence of the appellants in the United Kingdom in housing owned by Mohammed Faruq enabled him to claim large sums of money to which he was not entitled, nothing was required of the appellants other than their presence here. It was submitted they had not been made to work, or exploited in any other way (save the reference which we will deal with below). Further, the Secretary of State said there was no evidence of Mohammed Faruq using fraud, force, or coercion upon the appellants. Their presence involved deception but it was not deception upon the appellants. They

knew they were not entitled to enter the United Kingdom in the capacity they claimed or to claim asylum here; the contrary is inconsistent with the parents' guilty plea to the conspiracy. The fact that Mohammed Faruq profited greatly is immaterial.

105. The Secretary of State repeats those submissions before us. The high-water mark of the difference between the claim originally advanced and the present claim that the appellants are the victims of trafficking is seen when comparing the latter claim and that advanced by Mehmood Ahmed in his statement of 3 July 2007 in which he stated, '*Mohammed Faruq became aware that I claimed asylum and he was angry because he had not been consulted*'. This is not consistent with a claim to have been trafficked by Mohammed Faruq.

106. The Secretary of State, with some justification, relies upon the date when the trafficking argument first emerged:

> "The appellants have been represented by specialist and expert solicitors at all stages. They have been represented by equally specialist and expert counsel at all stages of the appeal process. Yet the trafficking argument first emerged in their skeleton argument submitted on the Thursday before the [First-tier Tribunal] hearing was due to commence the following week.
>
> That was an extremely late stage for such an important argument to be raised. Notably, there had never been any suggestion in any of the statements submitted by the appellants that they had been trafficked. Whilst self-identification is not essential to found a trafficking claim, it is notable that not only were the appellants apparently not aware of their own predicament, but neither were their lawyers."

107. In refuting this part of the claim, the Secretary of State also relies upon the fact that the appellants have not established the First-tier Tribunal made an error on a point of law and the appellants have never been given leave to argue the point. The new evidence on which they rely includes the Ghulam Rabani statement as well as one from Mehmood Ahmed's of 1 May 2013, both post-dating the determination. The First-tier Tribunal disposed of the trafficking point in paragraph 44 of its determination [vol 6, tab A, p 14] :

> "Our findings in respect of these arguments are that although the Appellants are not the victims of trafficking in the conventional meaning of that term, many features of their entry to and continued presence in the UK with at the least the assistance of Mr Faruq, and his subsequent exploitation and control of them after entry, accord with many of the features of trafficking as recited on behalf of the Appellants. However, we have decided to attach little weight to this aspect of the matter. There is no evidence that any of the Appellants have been subjected to any physical coercion or force, although no doubt they have been subject to other pressures. It must be the case that they are not now the victims of trafficking according to any definition of that term. For some years, they have had the services of a highly competent firm of solicitors, and they have not been at risk from Mr Faruq since the prosecutions. There is no authority for saying that the victims of any kind of trafficking for that reason alone should be excluded from immigration control including removal. There is no evidence that if the

> Appellants return to Pakistan they would be at any real risk of being trafficked again. Further, there is no medical evidence before us of any psychological damage suffered by any of the Appellants including the children as a result only of trafficking, including their exploitation whilst in the UK. This is particularly relevant to those Appellants who were obliged to maintain the deception of, for example, the death of a parent or the denial of siblings for a prolonged period of time. The benefits of being in the UK for all the Appellants have already been referred to, and on balance it seems to be the case that if trafficked, the Appellants had been more the beneficiaries of trafficking than victims. We do not therefore consider that any trafficking experienced by the Appellants is a compassionated feature which weighs heavily in their balance."

108. We are satisfied that the appellants have failed to establish they were the victims of trafficking. We find this was a late-developed opportunistic attempt to re-model the claim which cannot have been the result of the appellants becoming more self-aware of the circumstances in which they came to the United Kingdom. In so finding, we have considered the weight to be attached to the evidence of trafficking now provided by Ghulam Rabani. This evidence includes threatening letters received by him demanding the repayment of money owed under threat that he would be killed. We reject his evidence that he felt obliged to destroy this evidence as he did not want the letters in the house and that he was told to destroy them after reading them. He must have known their significance. Even at the earlier hearing, he did not mention that he had been forced to work for Mohammed Faruq or that he had been told that he had to pay back the money to him. The Secretary of State correctly in our judgment submits:

> "It is simply inconceivable that, having instructed his lawyers to advance that [trafficking] argument, he would withhold the most central information from them."

109. We have also considered whether there is a credible claim that the wives were trafficked by their husbands or the children trafficked by their fathers or parents. This has to be assessed by the consistent theme of the parents' evidence that their actions were directed towards improving their children's circumstances – an endeavour in which they have been largely successful. Further, both wives and children continue to live in the same households. Neither of these factors indicates the relationship of parent-trafficker and victim. In the context of these proceedings, no attempt has been made as far as we are aware, to seek separate representation to advance these claims. The fathers for example have not admitted they are guilty of trafficking and the children have not levelled the allegation against them. Experienced counsel such as are acting in this appeal would not, consistent with their professional duties, continue to act for all the appellants were there to have been a conflict of interest. This consideration is not, however, a complete answer because, realistically, we would not expect funding to be made available to each family member so as to proliferate, in an already complex field, claims and cross-claims between family members. Nor is it realistic to expect a child (or, in

practice, that child's solicitor) to advance a trafficking claim against his parent unless there was good reason to do so. Where the family members are unrepresented, the prospect will not cross anyone's mind.

110. In this protean jurisdiction, the Tribunal may have to exercise a degree of caution and be aware of the family dynamics both as between adults and as between adults and children. That, we believe, is something that occurs in all such cases where families are involved, whether as appellants or as dependants. This is a case where there are particular reasons why the dynamic relationships between parents and children and with each other have been particularly prominent; take, for example, the relationship between those whom we later describe as the *haves* and the *have-nots*, between Jamilla and her family, between the children forced to lie and the parents (whom they love) who required them to do so. Nevertheless, there are inevitable limitations upon the Tribunal's consideration of a potential trafficking claim when the claim is not advanced before them by any of the parties and where the evidence is likely to be equivocal. Whilst the Tribunal must always be alert to the unspoken but potential pitfalls, essentially its consideration must be evidence-based.

111. In any event, there is an air of unreality about viewing as traffickers those who are economic migrants seeking to better themselves in a foreign country and are bringing their children into the country with them as part of that process. We remind ourselves that Article 4 of the Convention, as we have set out in paragraph 86 is directed towards the movement of human beings '*for the purpose of exploitation*'. True it is that the minor children will have had little choice, that what their parents did was wrong, that the children might find themselves wrenched from a country in which they would prefer to live but these factors alone do not amount to trafficking. Nor can the negative features of the parents' design be assessed without having reference to the benefits with which the children have been provided, in terms of lifestyle, education, maintenance, accommodation and healthcare or the prospect of the children achieving settled status if the parents' conduct is to be classified as exploitative. If the minor children have been trafficked into the United Kingdom, so too were the six beneficiaries of the decision in *Ahmad and others*, some of whom have obtained or may obtain British citizenship. It would be a curious result if the adult Ahmad children who successfully establish a right to remain are *not* victims of trafficking (and their parents accordingly absolved from the charge of trafficking) whilst those children who have not been successful are classified as the victims of trafficking and their parents *guilty* of it.

112. Nor are we satisfied that the mothers are able to advance a claim that they have been trafficked by their husbands for the reasons we have given. More importantly, however, whilst there may be cultural reasons why women are subjected to the influence of their husbands in significant areas of their lives, we would not infer from this alone that a wife's decision to travel to the United Kingdom with her husband is an example of her being trafficked. The dynamics of family relationships are far too complex to draw such an inference.

Even in a cultural and social background in which the relationships between husband and wife are significantly different from that of a decision-maker, a finding of improper influence is not to be left to inference alone. Where the relationship has broken down, there may be, evidentially, a wider scope for such a finding of fact but this does not arise here in the evidential neutrality of family relationships which are continuing and appear, on their face, close and supportive.

113. For the reasons we have given, we reject the claim that the appellants are the victims of trafficking but in doing so we reject the Secretary of State's claim that it is not open to the Upper Tribunal to hear and determine this point because the appellants have not been granted permission to appeal on this issue. It is not a case of the Tribunal expressly refusing permission to appeal on a particular ground. Having found an error of law in the First-tier Tribunal's decision, the Tribunal has jurisdiction to re-make the decision where it needs to do so, *Kizhakudan v SSHD* [2012] EWCA Civ 566 and *NP (Sri Lanka) v SSHD* [2012] EWCA Civ 906. In *Ferrer (limited appeal grounds; Alvi)* [2012] UKUT 304(IAC) the Tribunal said:

> Whatever the grounds on which permission to appeal to the Upper Tribunal has been granted, once the Upper Tribunal has set aside the decision of the First-tier Tribunal, any re-making of the decision under s.12(2)(b)(ii) of the *Tribunals, Courts and Enforcement Act* 2007 is not necessarily limited by reference to errors of law identified in those grounds, or in any grounds that have subsequently been permitted to be argued, and which have resulted in the decision of the First-tier Tribunal being set aside. Further, the ambit of the re-making task will not necessarily depend on whether an issue has been raised before the First-tier Tribunal.

114. The scope of the Upper Tribunal hearing will, of course, depend upon the issues raised before it. Where there has been no effective challenge to a conclusion reached by the First-tier Tribunal, there is no requirement to re-visit it. In all cases, the reasoning of the First-tier Tribunal on the issue will provide the starting-point subject, inevitably, to the Upper Tribunal's findings on where the error on a point of law and the scope of the hearing before the Upper Tribunal, defined either at the hearing when the error of law was identified or in the course of subsequent directions or at the time of re-making the decision. In the present case, the scope of the appeal was determined in the way we have set out in paragraphs 51 – 53 above. There was no limitation imposed upon raising this issue or fully determining it.

115. For the reasons we have given we agree with the First-tier Tribunal's conclusion on the issue but our conclusion is the result of our own deliberations.

**Conclusion on trafficking**

116. We do not accept that these individuals would not have been able to articulate the pressure that was being exerted upon them by the malign influence of Mohammed Faruq. They may not have been able to have used the expression

that they were being 'trafficked' but their description of events could not realistically have omitted describing the situation. They could not have been oblivious to the part played by others in what they were doing. They were not then motivated by wishing to protect Mohammed Faruq.

117. The actions of the parents are capable of being understood as two quite different versions of events. Notwithstanding the benefits that Mohammed Faruq derived, they too derived significant benefits. They came from circumstances of poverty, poor prospects for themselves, poor prospects for their children and poor health care provision. In the United Kingdom they had accommodation, good education for their children and state benefits. More important still, if their plans had not unravelled, they would have had the prospect of a successful, though fraudulent, asylum claim, settled status, the real prospect of achieving British nationality for themselves or their children. Whilst we do not suggest that persons living close to destitution with an expectation of a better life in another country should be considered as disqualified from being categorised as victims of trafficking, there were significant advantages which render it entirely plausible that they were willing participants in the scheme which was, undoubtedly, put into effect through the activities of Mohammed Faruq but through which they stood to gain. The alternative, plausible, version of events was that these families were trafficked and abused under the malign influence of Mohammed Faruq.

118. Where there are two possible or plausible explanations for their actions, it was for the appellants to establish by credible evidence that it was one version of events, rather than the other, which operated. We do not see how the appellants can conceivably establish the version that they now wish to put forward without giving evidence. It cannot be inferred from the fact that, undoubtedly, Mohammed Faruq derived benefits from the scheme (something which the Secretary of State has always accepted) and that they were, relatively, unsophisticated. It did not require great sophistication for them to see the benefits of illegal entry for themselves and their children.

**Section 10(1)(c) of the Immigration and Asylum Act 1999**

119. As we have seen, all of the adult Ahmad children succeeded in establishing that, at the time the removal decisions were made in relation to them under s.10, they were no longer minors and could not, therefore, be removed under s.10(1)(c) as belonging to the family of the parents whose removal has been directed under s.10(1)(b).

120. This was not a decision on proportionality but on the proper application of the Secretary of State's powers of removal. The statute upon which she relied to effect removal, absent a definition which expressly permitted children (whether or not over the age of 18) to be removed, did not permit a lawful decision to be made in relation to them. Accordingly, it was inevitable that administrative

steps to effect removal on the basis of an unlawful decision could not themselves be lawful.

121. The appellants seek to extend this principle by identifying three children – Sulva Bi (Qadir Ahmed's family), Arfan Ahmed (Mehmood Ahmed's family) and Idris Mohammed (Rungzaib Mohammed's family) - who were aged under 18 at the time that the s.10(1)(c) removal decisions were taken, but who are now aged over 18.

122. The decisions made in their cases were lawful at the time they were made. On any view, they were to be regarded as belonging to the family of the parents whose removal had been directed under s.10(1)(b). Whatever definition of *'family'* might apply to their elder siblings, the decision in relation to them was lawfully made. Indeed, we would not understand the appellants to be contending otherwise. Thus, in contrast to their elder brothers and sisters, no argument can be advanced that removal is prevented by reason of the illegality of the underlying decision at the time that it was made.

123. The means by which the appellants seek to achieve their end is to argue that the decisions to remove them, once lawful, are no longer lawful and accordingly the appeals against the decisions to remove them should be allowed. The principle of a decision once lawful becoming unlawful is, at best, an elusive concept. Its converse has the benefit of being readily comprehensible: if we apply the law as it stands when we make a decision, the decision is correct in the sense that it is lawful. *That* decision remains a lawful decision if circumstances change or if the law is altered. *That* decision was lawful, is *now* lawful and will always be lawful. It is immaterial that a different decision would *now* be made applying the current circumstances and the law as it now exists. We are bound to ask the question how many decisions made over the years based on circumstances as they existed and the legal system as it is then applied would be the same if the decisions were made now? If these decisions are not now merely wrong but have to be treated as unlawful, the purpose of decision-making would be rendered futile. If the purpose of a decision made by a decision-maker is to provide certainty, this purpose would be entirely lost. No-one would be able to regulate his affairs on the basis of decisions that had been lawfully made because what was lawful then might not remain so. It is for this reason that the Secretary of State describes this is *'a recipe for administrative chaos.'* In our judgment the effect would not simply be administrative chaos but would percolate down to nullify, potentially, almost every decision made anywhere.

124. Nor does it seem to us to be a principle that might apply in a more limited sense and only in relation to decisions made in respect of children. The rights of children acquired by operation of law by reason of their being children do not become retrospectively unlawful at the moment they reach their majority, although the law may no longer permit them to continue to enjoy some of those rights as adults.

125. It is the inevitable corollary of the appellants' argument that, as night follows day, the removal of the minor children will become unlawful provided, always, those children survive to their majority. This is not retrospective invalidity but prospective invalidity. If a person can identify a foreseeable invalidity, is he permitted to rely upon it now? The minor appellants may be removed in accordance with lawful decisions but the remaining children (save H who is a UK and EEA national) are now aged between 14 and 17. The Secretary of State points out with some force that if the case reaches the Court of Appeal, it is possible these appellants or some of them will then have reached the age of majority. Even H, now aged 9, will be there in 9 years time. This raises the question: during what period does a prospective illegality prevent removal?

126. The basis for the claim is the passage in the decision of the Upper Tribunal in Ahmad and others when the Tribunal was considering the wider ambit of s. 5(4) of the 1971 Act, and the limitations on who should be regarded as family members in deportation. The Tribunal said at paragraph 39:

> "We do not need to decide whether the failure to apply the definition in s.5(4) to paragraph 10A of Schedule 2 to the 1971 Act has the effect of widening the ambit of family members in that paragraph. We are strongly inclined to the view that in context and having regard to the legislative history, the limitations should apply and we are faced with a drafting error."

127. The appellants rely upon this as supporting their case that the now adult children should be subject to the same limitation on removal as their elder siblings. However, the decision in Ahmad was predicated on the sharp distinction drawn by the appellants' representatives between those who were adult children at the time the decision was made and those who were not. Were there to have been no such distinction, it is at least possible that those children, now adult, would have sought an acknowledgment of their position at the date of the hearing, 10 May 2012, when Sulva, Idris and Arfan would then have been aged 18.

128. Whilst the appellants rely on all of the arguments that were advanced on behalf of the appellants in Ahmad that led the Upper Tribunal to that view, the submission fails to distinguish between the underlying unlawfulness of the decisions as they relate to the adult Ahmad children on the one hand with the fact that the decisions in relation to the children now adult were lawful. Nor does the principle properly distinguish between the distinct stages in the process of removal between the removal decision, that is the appealable immigration decision, and the administrative steps taken to enforce it, if and when those steps are taken.

129. In GH (Iraq) v. SSHD [2005] EWCA Civ 1182, (Court of Appeal) Scott Baker LJ stated:

> "24. Normally the removal directions are quite separate and distinct from the immigration decision. Ordinarily they follow the prior decision to remove in

principle. It is a two stage process. As Laws LJ pointed out in *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 842, 852, para 29,

> "Where, as here, the court is required to review the legality of an administrative decision already made it is generally no part of its duty to go further and review also, as a distinct exercise, the legality of the decision-maker's carrying the decision into effect at some future date. Any other view would submit the court's public law jurisdiction to undesirable and possibly insupportable distinctions. In any given case, within and without the immigration field, there may be many reasons why a public decision maker might not carry into execution a decision which he has earlier announced; or he might give effect to it subject to modification or qualification."

130. No removal directions have been set. The legality of delaying the issue of removal directions beyond the date of the immigration decision has been authoritatively stated in *Patel & Ors v SSHD* [2013] UKSC 72 (20 November 2013). The appellants' argument is a disguised or covert challenge to the legality of prospective removal directions which have not yet been made by way of an overt challenge to the lawfulness of the s.10 removal decision which was itself lawful at all material times. This flies in the face of what Scott Baker LJ said in paragraph 47 of *GH (Iraq)*.

> What I do not think the present legislation permits is an appeal against entirely freestanding removal directions as would be the case when they are made separately on a later occasion. In such circumstances the remedy for unlawful directions would be a judicial review. […]

131. The Secretary of State in categorising this approach as one of retrospective invalidity highlights what are said to be three perceptible flaws in the appellants' argument.

132. First, it is said by the respondent, the appellants must demonstrate an error of law in the First-tier Tribunal's determination which is impossible as the three now adult appellants were under the age of 18 at the time of the hearing. The respondent therefore asserts what she describes as *'the absurdity'* of a decision made by the First-tier Tribunal which was lawful but which becomes unlawful in an error of law jurisdiction by the time the appeal reaches the Upper Tribunal.

133. Secondly, the Secretary of State relies upon the disapproval of a principle of retrospective invalidity as expressed by the Court of Appeal in *Patel v. SSHD* [2012] EWCA Civ 741 in which an issue arose as to whether a variation decision was invalidated by the later failure to take a removal decision. Lord Neuberger MR said at paragraphs 50 and 51:

> "50. Thirdly, if the Secretary of State fails to decide whether to make a removal direction either at the same time as, or within a short time of, refusing an extension application, in a case where she ought to have done so (for public law or human rights reasons), I find it hard to accept that this could invalidate an otherwise unexceptionable decision to refuse the extension application. As a matter of logic, even if a statutory scheme has what Sedley LJ called in *Mirza's*

> case "a generalised practice" that two decisions should be taken at the same time, I am not quite sure why one of those decisions should be unlawful just because it is taken on its own, given that it cannot be contingent or even dependent on the other.
>
> 51. …There are obvious problems with concluding that the rejection of an extension application becomes invalid unless a decision to make a removal direction is made "promptly thereafter" or within "a short period" thereafter" (to quote from Sapkota's case and Mirza's case respectively). Not only is it both intellectually unattractive and administratively inconvenient for an executive decision to be potentially retrospectively invalidated, but there is inevitable room for doubt and argument about what constitutes "promptly" or "a short period" in a particular case."

134. The respondent further relies on the decision of the Supreme Court in *MS (Palestinian Territories) v. SSHD* [2010] UKSC 25 submitting the appellants were seeking to *'dissolve the distinction'* between an appeal against a removal decision and judicial review of later removal directions giving effect to the earlier decision. Lord Dyson, giving the judgment of the Court, said:

> "27. Fifthly, it is (rightly) common ground that there is no right of appeal against removal directions under the 2002 Act.

135. *Odelola v. SSHD* [2009] UKHL 25 affords the appellants no assistance. Odelola establishes that applications under the Rules fall to be considered according to the Rules in force at the time the application is determined, not at the time of application. The children, now adult, were considered by reference to the legislative framework that applied to them at the date of decision and, in doing so, the Secretary of State did as she was then required to do.

136. Whilst Article 8 requires the proportionality of the decision to remove the appellants to be considered, this has to be assessed by reference to a lawful decision and not an unlawful one. It is easy to see how an unlawful decision is carried into the proportionality balance as affecting the public interest in removal. That consideration finds no purchase where the decision is a lawful one.

137. The Secretary of State argues that the appellants are not permitted to raise this argument as it was not the subject of the grant of permission. We do not consider there is such a clog on the Upper Tribunal's jurisdiction, based as it is in this appeal on the agreed finding that the First-tier Tribunal's decision disclosed an error on a point of law and that it required re-making. The scope of the re-making has already been determined by us in paragraphs 51 to 53 above. However, we dismiss this ground for the reasons we have given.

138. This argument does not benefit the remaining adult children without indefinite leave to remain since they can be removed as illegal entrants in accordance with paragraph 9 of Schedule 2 to the 1971 Act and thus we could not allow their appeals on the basis commended to us as a consequence of the operation of s.86(4) of the 2002 Act.

## Delay

139. The parties have each adopted a highly polarised view of delay and the effect it should have on the outcome, the appellants attributing the fact that they have not been removed to the fact that the Secretary of State has been at fault in her conduct of the process, reducing the public interest element in removal to little or nothing.

140. Conversely, the Secretary of State (and the First-tier Tribunal) approached the delay in broad terms (and only implicitly) on the basis that the appellants have maintained a case based on a continued pattern of deception and that, as the appellants never had a right to be in the United Kingdom, no legitimate complaint can be made as to time accrued in the United Kingdom since the appellants should not have been here in the first place.

141. We consider that the position is more finely nuanced. All that we say on delay is predicated by the fact that the passage of time, irrespective of its cause, is highly relevant. Any consideration of delay must begin with the words of Lord Bingham in *EB (Kosovo) v SSHD* [2008] UKHL 41, [2009] 1 AC 1159:

> **Delay**
>
> 13. In *Strbac v SSHD* [2005] EWCA Civ 848, [2005] Imm AR 504, para 25, counsel for the applicant was understood to contend, in effect, that if the decision on an application for leave to enter or remain was made after the expiry of an unreasonable period of time, and if the application would probably have met with success, or a greater chance of success, if it had been decided within a reasonable time, and if the applicant had in the meantime established a family life in this country, he should be treated when the decision is ultimately made as if the decision had been made at that earlier time. For reasons given by Laws LJ, the Court of Appeal rejected this submission, for which it held *Shala v SSHD* [2003] EWCA Civ 233, [2003] INLR 349 to be no authority. While I consider that *Shala* was correctly decided on its facts, I am satisfied that the Court of Appeal was right to reject this submission. As Mr Sales QC for the respondent pointed out, there is no specified period within which, or at which, an immigration decision must be made; the facts, and with them government policy, may change over a period, as they did here; and the duty of the decision-maker is to have regard to the facts, and any policy in force, when the decision is made. Mr Drabble QC, for the appellant, did not make this submission, and he was right not to do so.
>
> 14. It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under Article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.
>
> 15. Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at

any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship. Thus in *R (Ajoh) v SSHD* [2007] EWCA Civ 655, para 11, it was noted that "It was reasonable to expect that both [the applicant] and her husband would be aware of her precarious immigration status". This reflects the Strasbourg court's listing of factors relevant to the proportionality of removing an immigrant convicted of crime: "whether the spouse knew about the offence at the time when he or she entered into a family relationship" see *Boultif v Switzerland* (2001) 33 EHRR 50, para 48; *Mokrani v France* (2003) 40 EHRR 123, para 30. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.

16. Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. In the present case the appellant's cousin, who entered the country and applied for asylum at the same time and whose position is not said to be materially different, was granted exceptional leave to remain, during the two-year period which it took the respondent to correct its erroneous decision to refuse the appellant's application on grounds of non-compliance. In the case of *JL (Sierra Leone)*, heard by the Court of Appeal at the same time as the present case, there was a somewhat similar pattern of facts. JL escaped from Sierra Leone with her half brother in 1999, and claimed asylum. In 2000 her claim was refused on grounds of non-compliance. As in the appellant's case this decision was erroneous, as the respondent recognised eighteen months later. In February 2006 the half brother was granted humanitarian protection. She was not. A system so operating cannot be said to be "predictable, consistent and fair as between one applicant and another" or as yielding "consistency of treatment between one aspiring immigrant and another". To the extent that this is shown to be so, it may have a bearing on the proportionality of removal, or of requiring an applicant to apply from out of country. As Carnwath LJ observed in *Akaeke v SSHD* [2005] EWCA Civ 947, [2005] INLR 575, para 25:

> "Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the tribunal"

142. In this well-known passage, different examples of delay and its effect are identified. It is not permissible to argue the '*if only*' point, ("*if only a decision had been made earlier, I would have met the requirements*"): normally, there is no duty to make a decision within a specified time. Delay in the first of the three categories identified is delay only in the sense of the passage of time. This is obviously relevant in the context of these appeals where, irrespective of who is

responsible for the delay, members of a family have developed a social and domestic life in the UK, particularly outside the family, which has become so embedded in their identity so as to create a stark contrast between their position and that of the new arrival or the mere visitor. That contrast cannot be ignored. The development of closer personal, social, domestic, financial and other ties within the UK and the establishment of deeper roots in the community are what we mean by the effect of the passage of time.

143. Even, however, where the entrant has no substantive right to remain and knows it, inaction on the part of the decision-maker understandably raises hopes and expectations which if established as real or genuine (although not having the character of a legitimate expectation) amount to an established fact which cannot be ignored in the decision-making process.

144. The third category is one based on principles of fairness under which general heading arbitrary decision-making of whatever form falls to be assessed. The one example provided in paragraph 16 of the judgment is of two similar claimants, a sister and her half-brother, who arriving at the same time made similar claims one of which succeeded and one of which failed. This has particular resonance in the circumstances of the present appeals. However, what is clear from the quoted words of Carnwath LJ (as he then was) is that how these factors play in the balance is a matter for the Tribunal.

**The appellants' claim to benefit from the Secretary of State's delay**

145. The appellants' contentions set out in paras 6.1 to 6.38 of their skeleton argument is that by July 2003, the Secretary of State had concluded that the appellants, who had been recognised as refugees, had obtained refugee status by deception and should be removed. It then took the Secretary of State until April and May 2009, about six years, to make lawful removal decisions, in the sense of making decisions that were not legally or procedurally flawed. That delay was attributable to the Secretary of State.

146. The chronology separating those two dates involves the making of decisions beginning in July 2004 to remove the appellants which were withdrawn in response to complaints against them made by the appellants' representatives as to their legality. The withdrawal of a decision necessarily contained a concession that the decision was, or might arguably be, unlawful. The Secretary of State accepted that the complaints were sufficiently well founded to warrant withdrawal of the decisions.

147. The first decisions made against some of the appellants in July 2004 followed their arrest for the offences for which they were later convicted. The decisions were not lawful ones because those who had been granted leave to remain (as refugees or otherwise) could not then be given directions for their removal as illegal entrants. Further, the notices failed to comply with the Immigration (Notices) Regulations 2003 because they incorrectly informed the recipients that

they could only appeal after removal and failed to address, amongst other things, the fact that some or all had been recognised as refugees.

148. The Secretary of State responded by withdrawing those decisions on 9 May 2005 and acknowledging:

> "The Immigration Service is seeking to revoke your clients existing refugee status via the offices of the UNHCR on the grounds that these were obtained by deception. I confirm that should the grant of refugee status be so revoked then your client's [sic] would be entitled to exercise an in country right of appeal."

149. At about the same time, the Secretary of State put the refugee appellants on notice of her intention to cancel their refugee status. This resulted in a complaint from the appellants' solicitor that the action was unfair and precipitate and did not properly engage with the circumstances of the children, whilst admitting to certain deceptions but maintaining the core of the asylum claim.

150. The Secretary of State cancelled the appellants' refugee status on 7 March 2006 at which point she considered the children's circumstances not to be relevant.

151. Further immigration decisions were made on 15 March 2006 wrongly stating there was no in-country right of appeal and without regard to their impact upon the children. A letter of 29 October 2007 from the Treasury Solicitor conceded as such:

> 'I am instructed that having reviewed this matter further and in the light of your various concerns, in particular the continued allegations of unfairness in relation to the procedure with which refugee status was cancelled, that fact that certain members of the immediate families (i.e. spouses and minor children) were not party to the appeal, and the fact that there were outstanding human rights issues arising out of the immigration decisions, my client has decided that the most appropriate course in all the circumstances is to withdraw the decisions to cancel refugee status and to reconsider your clients' submissions afresh. The immigration decisions consequent upon the decision to cancel refugee status are hereby also withdrawn and you will be notified of this separately by the BIA'.

152. The letter repeated that it was still the Secretary of State's intention, subject to representations, to cancel refugee status and once the outcome of the cancellation process was known, and if it was to cancel refugee status, the Secretary of State would then consider human rights and other relevant issues, providing the appellants with an opportunity for an interview if the appellants so wished. The decisions were withdrawn by the Secretary of State on 19 February 2008, nearly 2 years after they had been made. Further representations were made. The parents were interviewed in June 2008.

153. Between September 2008 and January 2009, the Secretary of State cancelled the refugee status of all the parents and their dependants. As part of the process, consideration was given to the impact removal would have upon the children. This was the first time this had been done.

154. Whilst decisions to give removal directions under s. 10 of the 1999 Act were made on 10 October 2008, inexplicably those relating to Noreen Shakila Bi and Ghulam Mehboob Rabani, Rungzaib Mohamed and Qadir Ahmed were said to be appealable in-country whilst those in relation to Noreen Shakila Bi and Ghulam Mehboob Rabani's children, Nasreen Bi (Qadir Ahmed's wife) and the children were said to be appealable only after removal.

155. This anomaly was without any apparent effect as in-country appeals were launched in the Tribunal, without protest, by all those affected, whether or not the right of appeal had been expressed to be exercisable out of country.

156. Decisions to give removal directions under s. 10 of the 1999 Act were made in respect of Mehmood Ahmed, Fazal Jan and their children on 5 February 2009 said to be appealable only after removal, and withdrawn on 29 April 2009.

157. In late April and early May 2009 further immigration decisions, under s. 10 of the 1999 Act, appealable in-country, were made in respect of all of the appellants. It is against these decisions the present appeals are brought. The dates of the relevant removal decisions, insofar as they concern the children, are set out in square brackets on page 4 of this determination.

158. The First-tier Tribunal, speaking of this history, wrote:

> 49. It is true to say that the Respondent made a number of errors which have resulted in the passage of time. However, we do not describe those errors as being the product of a dysfunctional system, and we are not satisfied that they have resulted in a final outcome which can be described as unpredictable, inconsistent and unfair. The errors were more of a technical nature in that the original decisions made by the Respondent are substantively the same as he now relies on, being to cancel the refugee status and indefinite leave to remain of those Appellants to whom it was granted, and to remove all Appellants on the basis that they have no right to be in the UK as their status was as a result of deception.

159. We would not classify errors in this process as being '*more of a technical nature*'. Instead, a series of decisions were made which were, on any view, seriously flawed. This had the effect of requiring the decisions to be re-made until, finally, lawful decisions were made in April and May 2009.

160. There was little impact as a result of the decisions which notified the appellants that they had no in-country rights of appeal, since the appellants' representatives were aware that this was simply wrong. Nevertheless, it resulted in incurring further legal costs and delaying the process. Decisions expressed to carry no in-country rights of appeal limited the scope of appeal rights to exclude asylum issues. However, since the appellants knew they had no arguable asylum claim, they cannot realistically assert they were prejudiced thereby. These decisions also prevented human rights issues being raised. However, the appellants' representatives were not for one moment fooled by this and were quick to point out, properly and correctly, that this was simply

incorrect. Whilst, therefore, the pattern of flawed decision-making was not to the credit of the respondent, the consequences of it were limited in effect, save that the passage of time strengthened the development of these families lives in the UK. We readily infer that this resulted in further uncertainty but the appellants themselves knew both that the Secretary of State was intending to remove them (there has never been the slightest indication that the respondent has ever faltered in this regard) and that they always knew they had no substantive right to remain under the Immigration Rules or as refugees or as persons at risk of serious harm. The uncertainty that was generated by this long-drawn out process almost certainly raised hopes, getting stronger as time passed, that they might find a way of remaining but such hopes were always set against a background that their entry was unlawful and nothing had happened since that might give rise to a claim of a right to remain.

161. Additionally, the appellants assert that the Secretary of State's repeated adoption of an unlawful process to secure their removal from the UK is indicative of *'a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes'* in Lord Bingham's words taken from *EB (Kosovo)* and set out at length above.

162. The appellants further assert that the Secretary of State *is the architect of this statutory framework which, by generating confusion and obscurity is inimical to the rule of law* that *creates systemic dysfunction.* We are bound to question where this submission is designed to lead. If it is suggested that the entire statutory framework should be disregarded by the Tribunal, we reject that submission without feeling the necessity of providing anything further by way of reasoning. If it is confined to cases where the claimants' applications have been refused, it would suggest that all appeals should be allowed. If it is confined simply to these cases, we do not see how it advances the appellants' claims beyond a more intelligible plea of unfairness.

163. We consider that the elusive search for the dysfunctional system is unhelpful. We have described the errors made by a number of decision-makers in the various appeals before us. They have been clearly identified and whether they are then classified as a systemic dysfunction makes them no better and no worse. A finding of fact that there is a dysfunctional system is not a legal test nor, we suggest, was Lord Bingham seeking to create one. The crucial words are not the existence of a dysfunctional system but the creation of unfairness in the sense of spawning '*unpredictable, inconsistent and unfair outcomes*'.

164. For reasons which arise from the way these appeals have been argued, the inconsistency in decision-making has been identified as a separate challenge and we shall therefore deal with it separately. However, the trilogy of '*unpredictable, inconsistent and unfair outcomes'* can properly be assessed by reference to its essential characteristic, that is, whether the delay in making a lawful decision has resulted in unfairness.

165. The appellants contend that by rejecting the shortcomings in the process of decision-making as being technical in nature, the Tribunal attached too little weight to this element of the case and thereby attributed too much weight to the deceit used by or on behalf of the appellants stating, according to paragraph 40 of the determination, *'the overriding factor is that the Appellants never had a lawful right to enter the UK as family visitors, nor to remain as refugees with their dependants'* and according to paragraph 53 *'the only exceptional feature of the case was the depth and extent of the deception used by the Appellants without which they would not have gained entry to the UK and remained for so long at considerable public expense'* and according to paragraph 54, *'it was only on the basis of such sophisticated, cynical and persistent deceptions that the Appellants have remained for so long in the UK'*.

166. The appellants go on to contend that their continued presence in the UK is not attributable to deception. Rather their presence is owing solely to the Secretary of State's failure to make decisions until April 2009 and thereafter, the appeal process. It follows, it is said, that the appellants' continued presence cannot properly be attributed to their *'sophisticated, cynical and persistent deceptions'* as the First-tier Tribunal found. .

167. The First-tier Tribunal's irrational conclusion, it is said, resulted in excessive and unreasonable weight and significance being given to the deceptions involved in the case on the one hand and, on the other, insufficient weight being given to the deficiencies in the Secretary of State's decision making process.

**Our analysis of the effect of delay.**

168. Without seeking to summarise the detailed response made by the Secretary of State to the issue of delay and set out over paragraphs 193 to 227 of her skeleton argument, the respondent broadly contends that the First-tier Tribunal was correct and delay has no material part to play in the assessment of the proportionality of removal. The respective positions of the parties are poles apart.

169. There are however, a number of points which merit attention. The appellants conceded that they were not entitled to refugee status only a matter of days before the hearing before the First-tier Tribunal. In seeking to resist the Secretary of State's contention that they were not entitled to refugee status and seeking the opportunity to be interviewed, the respondent asserts the appellants cannot now take advantage of the time spent by the Secretary of State in resisting, and responding to, those challenges. Whatever may be alleged against the Secretary of State as having caused delay, the appellants have spent time and effort pursuing claims for asylum which have been found to be unmeritorious.

170. We find that the appellants have lied about their origins in Indian Kashmir and that their refugee claims were false. Even were we to be wrong on this, the

appellants have failed to establish this element of the claim even to the lower standard of proof but have continued to advance that case notwithstanding the 'professional decision' not to call evidence from the parents (or indeed the adult children whose credibility has not been challenged) to support it.

171. Either way, the promotion of claims that the appellants have failed to establish and the respondent's decision based on a justifiable rejection of those claims has resulted in an outcome which cannot ultimately be classified as conspicuously unfair. Indeed, insofar as this process has, eventually and without the cooperation of the parents, resulted in a correct assessment of the claims, we would say that the process has been just. Whilst fairness and justice may not always be synonymous, it must be rare for a just result to be an unfair one. Whilst the appellants maintain that the Secretary of State has been guilty of delay, the efforts by the appellants to foil her labours to find the truth inevitably, in our judgment, lessens the weight attached to this factor if the underlying justification for the principle is one of fairness. Hence the First-tier Tribunal was essentially correct when it voiced its opinion in paragraph 49 of the determination that the final outcome could not properly be described as unpredictable, inconsistent and unfair:

> "…the original decisions made by the Respondent are substantively the same as he now relies on, being to cancel the refugee status and indefinite leave to remain of those Appellants to whom it was granted, and to remove all Appellants on the basis that they have no right to be in the UK as their status was as a result of deception."

172. It cannot be said that in the course of the passage of time, the expectation of the appellants to be allowed to remain in the UK has developed because, from the outset, it was apparent that the respondent intended to remove the appellants, and she persisted in that intention by issuing new decisions substantively the same as the original ones. Any delay has not caused the appellants any prejudice. They have not lost any rights as a result of it, and now face largely the same issues as they did at the outset. There has been nothing, of course, to prevent a voluntary return at any time.

173. Whilst the appellants attribute responsibility for their continued presence in the UK to the default and neglect of the Secretary of State, it might also be said that, once an appellant knows he has no right to remain and is made the subject of a removal decision, he should leave the United Kingdom. It matters not that the decision is flawed, since he knows the intention of the United Kingdom authorities. If he does not do so, his continued presence in the United Kingdom has little to do with the action or inaction on the part of the Secretary of State but his own efforts to secure an advantage to which he knows he is not entitled. Once again, the passage of time undoubtedly has a bearing on the issue of proportionality but that is quite distinct from a claim that the applicant should secure an additional benefit from delay which is occasioned by the inefficiency of the Secretary of State but which cannot properly be relied upon as

establishing the Secretary of State gave up interest in the rigorous implementation of immigration controls.

174. A consideration of whether the appellants' removal in 2014 has, by reason of the time it has taken to reach the conclusion, resulted in an outcome which is unfair or unjust is a holistic assessment of benefits and disadvantages. It is undoubtedly correct that if the appellants had been removed in 2006, this would have been the optimum resolution of the appeals. No-one at that stage could have complained that the parents or their children had established a right to remain under any of the routes available to them. The substantive merits of their claims have remained unaltered: an unlawful conspiracy to enter and a claim to be at risk which was fabricated or, at best, which the appellants failed to establish. In the intervening years the families have been provided with accommodation, with state benefits, some of the children have been afforded the right to remain, some have been permitted to work, all have had the opportunity to receive free healthcare and all of the children have received a good education.

175. Far from being prejudiced, it cannot reasonably be argued that the appellants have not gained by their presence in the United Kingdom. The essential complaint is that it is unfair that the families should now no longer be permitted to continue the enjoyment of those benefits indefinitely. There is in our judgment a clear distinction between the development of a protected private and family life when this has been acquired by a person who is settled in the United Kingdom or reasonably considers himself to have been settled, and those who have never been settled and who have developed their private and family life in the teeth (as it were) of opposition to their presence. This is not a legal distinction but the simple identification of a material fact.

176. Given our findings of fact as to the circumstances in which the parents came to the United Kingdom and the fact that the evidence of their integration into the community is limited, the delay has not significantly impacted upon their lives. Hence, the focus of the claim for delay centres upon the impact on the children of the fact that they have been in the United Kingdom since 2001 or 2002. The responsibility for the presence of the children in the United Kingdom is, therefore, primarily that of the parents and the complaint now made is that the Secretary of State should have taken steps to prevent the parents from continuing their wrongful conduct by removing them sooner and that the failure to do so should no longer be seen as the responsibility of the parents but the responsibility of the Secretary of State.

177. The appellants rely on paragraph 53 of the First-tier Tribunal's determination as evidencing a misclassification of the parents' conduct. In it, the First-tier Tribunal said that the *'sophisticated, cynical and persistent deceptions'* was the only reason that the appellants had remained in the United Kingdom for so long. The appellants cavil at this, stating their deceptions were directed towards their initial entry and that, thereafter, no further deception was maintained.

However, that suggests that, upon arrival, the parents' presence was essentially innocent. We do not agree. The parents knew they had no right to remain. The conspiracy on the part of the male parents acknowledges they knew they were not entitled to receive benefits. Each week they remained in the United Kingdom, the parents knew they had no right to remain. Each week, they received benefits in funds, accommodation, education and healthcare, to which they knew that they were not entitled as persons lawfully entitled to a right of settlement on the basis of the claim they had originally put forward. Accordingly, we would regard it as academic whether there was a continuing deception. It is sufficient that the parents knew of their original deception as leading to their presence in this country and the consequences this had for the life that they enjoyed here since their arrival.

178. In respect of the period since the First-tier Tribunal refused the appeals, the precariousness of the appellants' ongoing presence in the UK remains a material factor in assessing any further development of family and private life ties developed in this time. In *AO* [2009] CSOH 168, Lord Menzies in the Outer House of Sessions considered the effect of delay arising from a period of nearly six years during which the petitioner in that matter pursued an appeal that was subject to long delays at various stages of the appellate process. Lord Menzies, said at paragraph 19:

> "There has been no undue delay on the part of the respondent in dealing with any applications made to the respondent. For the most part, elapse of time has occurred because of the procedures of independent tribunals or courts, the timescale of which was outwith the control of the respondent. This case is far removed from the sort of case envisaged by Lord Bingham of Cornhill [in *EB (Kosovo)*], whereby no decision to remove is taken and months become years and year succeeds year. The decision to remove in this case was taken in 2001, and has been robustly maintained since then. The petitioner can have been under no misapprehension about the respondent's intention to remove him from the United Kingdom when this was open to him. Any private life developed by the petitioner in the intervening period requires to be seen against this background."

179. Whilst the delay in *AO* was identified as being attributable to the law's delay, the Secretary of State submits consistently with AO, that the precarious nature of the appellants' status here is a particular feature of these cases. At no stage had the appellants been led to believe that the Secretary of State would do anything other than cancel their refugee status and their ILR. The respondent refers to *Konstatinov v. the Netherlands* (16351/03) [2007] ECHR 336, in which the Court in Strasbourg decided that a delay of seven years, (attributable to the state having lost the applicant's file), did not render the decision to refuse a residence permit disproportionate where the ultimate decision reached was well-founded. By parity of reasoning, the Secretary of State contends that, even if she bore responsibility for delay in decision-making, the appellants were never entitled to refugee status. It must follow that the substantive decisions were correct. Accordingly, and in line with *Konstatinov*, the respondent submits the appeals should fail on the issue of delay.

180. In *Konstatinov v. the Netherlands* the applicant submitted that she had been living for 21 years in the Netherlands, where she met and married Mr G., where their son was born, raised and attended school. All three had strong ties with the Netherlands; both the applicant's husband and son held a Netherlands residence permit. The applicant left Yugoslavia at the age of seven and only spoke Dutch and Romani. Since 1991, she had been trying to obtain a Netherlands residence permit, but her request had been refused on income grounds and because she had a criminal record. She claimed her expulsion from the Netherlands would not only entail a separation from her husband and son, but also from her husband's and her own relatives.

181. An important consideration was whether family life was created at a time when those involved were aware that the immigration status of one of them was such that the continuation of family life within the host State was precarious from the outset. The Court said at paragraphs 48 and 49:

> The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8.
>
> Turning to the circumstances of the present case, the Court notes that the applicant has never held a Netherlands provisional admission or residence title and that the relationships relied on by her were created at a time and developed during a period when the persons involved were aware that the applicant's immigration status was precarious and that, until Mr G. complied with the minimum income requirement under the domestic immigration rules, the persistence of that family life within the Netherlands would remain precarious. This is not altered by the fact that the applicant's second request for a residence permit for stay with Mr G. filed on 1 November 1991 was left undetermined for a period of more than seven years because her file had been mislaid by the responsible immigration authorities, as – like in 1990 in respect of her first request for a residence permit for stay with Mr G. – one of the main reasons why this second request was rejected on 27 November 1998 by the Deputy Minister was because Mr G. failed to meet the minimum income requirement.

182. In *Nnyanzi v United Kingdom* (21878/06) [2008] ECHR 282 the Strasbourg Court rejected Ms Nnyanzi's reliance on Article 8 in the following terms stating in paragraph 78 of its judgment:

> "The Court does not consider it necessary to determine whether the applicant's accountancy studies, involvement with her church and friendship of unspecified duration with a man during her stay of almost ten years in the United Kingdom constitute private life within the meaning of Article 8 § 1 of the Convention. Even assuming this to be the case, it finds that her proposed removal to Uganda is *"in accordance with the law"* and is motivated by a legitimate aim, namely the maintenance and enforcement of immigration control. As to the necessity of the interference, the Court finds that any private life that the applicant has established during her stay in the United Kingdom when balanced against the legitimate public interest in effective immigration control would not render her removal a disproportionate interference. In this regard, the Court notes that, unlike the applicant in the case of *Üner* (cited above), the present applicant is not

a settled migrant and has never been granted a right to remain in the respondent State. Her stay in the United Kingdom, pending the determination of her several asylum and human rights claims, has at all times been precarious and her removal, on rejection of those claims, is not rendered disproportionate by any alleged delay on the part of the authorities in assessing them."

183. We accept that these cases show the significance of the fact of an applicant knowing he has no substantive right to remain in the country in which he seeks to establish a protected private and family life and the clog this presents to his being able to argue that the Secretary of State may no longer rely upon the weight to be attached to firm immigration control by reason of the failure to take effective steps to remove him. The passage of time, that is, their length of stay, is a matter in favour of each of these appellants. Yet the length of stay is the product of the parents' promotion of claims that ultimately had no merit. For the last nine years or so, the parents have known their situation to be precarious; indeed, they knew that better than anyone else. Their situation resembles the claims made in *Nnyanzi* and *Konstatinov*. We do not therefore find that, separate and apart from the passage of time, the appellants have established their case is significantly strengthened by delay on the respondent's part.

**Delay by the Tribunal**

184. The appellants rely upon a second and distinct form of delay. The appellants' appeals were dismissed by the First-tier Tribunal by a decision promulgated in March 2010. Permission to appeal to the Upper Tribunal was granted during the following month. Only now are the appeals being determined in the Upper Tribunal, notwithstanding requests for a hearing to take place. It is therefore said that the weight properly attributable to the requirements of firm and fair immigration control is necessarily diminished. The appellants therefore submit:

> This submission will present the Upper Tribunal with some considerable difficulty. The submission is one in which culpability for significant and material delay is alleged against the Upper Tribunal. In these circumstances it is difficult to see how, if the tribunal rejects the submission, it can do so without being actually or apparently biased since the tribunal's own interests (in avoiding culpability and criticism) are put in issue.

185. We are bound to say we do not consider ourselves in any such difficulty as that identified by the appellants.

186. The Tribunal is not prepared to undertake an exercise in attributing fault to the time the legal process has taken to reach the current position, nor should we. As we have repeatedly said, the fact that the passage of time has inevitably affected the assessment is sufficient in itself. The panel does not need to recuse itself for the delay for which its members are not personally responsible; nor could we recuse the Tribunal itself from performing its statutory function by reason of the delay (even if fault were made out).

187. The notion of attributing fault to the Tribunal as part of a proportionality exercise is a novel one. This is bi-partisan litigation. The Tribunal is not a party to that process. The Secretary of State's delay is significant because the Secretary of State is asserting a public interest in seeking the immediate removal of those not entitled to remain. The strength of that argument is diminished if the party asserting it has, by her inaction, acted in a way that is inconsistent with the stated position. That argument has no traction at all when delay is occasioned by the legal system. The Tribunal or the Courts do not assert their right to advance a claim that there is a public interest in the removal of these appellants; their function is to determine the lawfulness of the Secretary of State's decision in relation to which a delay in the legal process is irrelevant.

188. Further, were the Tribunal required to consider the effect of its own fault-based delay (in addition to the effect of the passage of time) it is impossible to say how that should affect the outcome as between the parties. The appellants' submission implicitly assumes that the effect must operate in favour of the appellants in strengthening their claim to remain. The respondent, however, might equally say that delay has operated to strengthen the public interest in the removal of persons who continue to benefit from being present in the United Kingdom without any underlying right to remain. Both parties have a legal right to have their case determined; neither side has the monopoly. During the appeal process the passage of time is material; the reason for it is not, unless the delay is attributable to the parties.

**Inconsistency in decision-making**

189. Mr Jones, on behalf of all the appellants, identified three significant inconsistencies in the approach adopted by the Secretary of State. First, he drew our attention to the relatively benign consequences for Mohammed Faruq, dubbed '*the evil genius*' when compared with the appellants before us. The power to remove persons from the United Kingdom had to be exercised consistently and fairly. It is not consistent or fair if the appellants were to be removed but other families involved in and prosecuted for the same immigration deceptions are permitted to remain in the United Kingdom and Mohammed Faruq, his wife Khurshid, his brothers and their wives whom the sentencing court had held to be directly involved in arranging the frauds and deceptions and to have secured their and others' leave to remain by deception suffer no immigration consequence. Secondly, he referred to the inconsistency in the system of immigration control that permitted those children over the age of 18 to avoid removal pursuant to s. 10(1)(c). Indeed, relying on the appellants' general submission that all of the children now over the age of 18 cannot be removed, he pointed out the sharp distinction between the adult children and the five minors. Thirdly, he relied upon the very different outcome in the case of the family of Zafar Iqbal and Shazia Kausar who obtained discretionary leave to remain under the legacy programme. Their position, he submitted, was identical to that of these appellants and even, perhaps, less meritorious.

190. In *AA (Somalia) v SSHD* [2007] EWCA Civ 1040, Carnworth LJ described the issue facing the Court as: "In X's asylum/human rights appeal what weight, if any, should be given to a finding of fact made in Y's favour which assists X and which was made by a tribunal when allowing an asylum/human rights appeal in respect of Y?" He went on to deal with consistency as a principle of public law in these terms:

> 63. As I understand his submissions, Mr Kovats for the Secretary of State does not accept that a previous decision should be given any particular weight, at least in a case involving a different appellant. The tribunal may have regard to it, but it is not obliged to follow it, whether or not there is new evidence; its duty is simply to decide the case on its own merits on the evidence before it.
>
> 64. I could understand this submission on the basis of the law as it stood before *Ocampo*. The normal principle is that previous tribunal decisions do not establish a precedent (see *Mukarkar v Home Secretary* [2006] EWCA Civ 1045). "Country guidance" cases are a well-recognised exception (see *S v Home Secretary* [2002] EWCA Civ 539). In *Otshudi v Home Secretary* [2004] EWCA Civ 893, a case involving inconsistent decisions arising out of appeals by two brothers. Sedley LJ noted that no legal submission had been based on the discrepancy as such, and commented:
>
> > "This is not the class of case which involves what Laws LJ has called a "factual precedent" - for example a finding about the political situation in a given country at a given moment. It is an illustration, if an alarming one, of the fact that two conscientious decision-makers can come to opposite or divergent conclusions on the same evidence. But it is no more material to the legal soundness of the present adjudicator's decision than hers would be to the soundness of the second adjudicator's decision…." (para 11)
>
> As he made clear later in the judgment, he regretted that position:
>
> > "The discrepancy between the two decisions, while giving rise to no legal challenge, must be a matter of concern. If the second adjudicator is right, this appellant's life too is at risk. If he is wrong, of course, neither brother may be at risk; but asylum law - for example by demanding something less than proof positive - deliberately errs on the side of caution…." (para 23)
>
> He noted that normally arrangements would have been made for such linked cases to be heard together. He invited the Home Office to reconsider the case on humanitarian grounds.
>
> 65. That, however, was before the decision in *TK (Georgia)*, that the *Devaseelan* principles could be extended to such a situation, and before that extension had been approved by this court in *Ocampo*. In the light of that decision I do not see how we can accept Mr Kovats' argument. I note that Hooper LJ, who was himself a party to *Ocampo*, takes a different view of its significance. Respectfully, however, the reasoning of Auld LJ's judgment seems to me carefully considered and entirely clear. Whether or not it is technically binding, I would not think it right to depart from it unless I thought it clearly wrong, which I do not.

191. In *R(Hussain) v SSHD* [2012] EWHC 1952 (Admin), the Deputy High Court Judge was considering a claim for judicial review by an Iraqi national who was one of the hijackers of a Sudan Airways Airbus which arrived at Stansted airport on 27 August 1996. He contended that he feared being seized by the Sudanese authorities and returned to the former Iraqi regime, which had sentenced him to death. He challenged the decision made by the Secretary of State as being unlawful on the grounds that it was inconsistent with the approach taken by her in relation to other persons involved in the hijacking who were in a similar position. The Deputy Judge said in paragraph 50:

> "I readily accept the proposition that the principle that like cases should be treated alike does not mean that a decision maker needs to trawl through other cases looking for the possibility that there might be a relevant decision to consider. Lawful decision making should not become either formulaic or difficult to achieve. I also accept that conscientious decision makers, applying their minds to the same set of facts, may sometimes come to different conclusions (a graphic example of which occurred in the case of *Otshudi v SSHD* [2004] EWCA Civ 893 to which Ms Broadfoot referred me). However this is not that case. In this case the Claimant arrived in the UK with 6 other persons involved in the hijacking. This is not a significant pool with which to compare his situation. There is no undue burden in requiring a consistency of decision making in relation to the treatment of applications for ILR made by the hijackers."

192. The Judge found that the respondent's decision was flawed by reason of the failure to consider the cases of the other persons involved with the hijacking who had been granted ILR, thereby not treating like cases alike; as well as a failure to consider the applicant's claim to have acted under duress.

193. The Secretary of State contends that this finding is wrong because the decisions in other cases involving different individuals with different individual characteristics cannot be used as a factual precedent for the determination of the Article 8 merits of these appellants' appeals. The respondent relies on an analogy with the position in respect of different Tribunal Judges' approaches to different but related cases and Sedley LJ's comments in *Otshudi v. SSHD* [2004] EWCA Civ 893, cited in paragraph 190, it being '*an illustration, if an alarming one, of the fact that two conscientious decision-makers can come to opposite or divergent conclusions on the same evidence.*'

194. Divergent results suggest that the Home Office should look again at the case. *Otshudi* was applied in *MJ (Iran) v. SSHD* [2008] EWCA Civ 564. In the skeleton argument the respondent sets out her position in these terms:

> "In the present appeals, the Secretary of State is aware of the position of the other individuals referred to by the Appellants. The Secretary of State is now investigating the circumstances of their cases. Whatever the outcome of that investigation, she has taken into account their position in deciding how to proceed with the present Appellants' cases and remains firmly of the view that their removal would not involve a disproportionate interference with their Article 8 rights. That is consistent with the analogous approach in *Otshudi*, *MJ*

*(Iran)* and *Hussain*. The present cases have been carefully considered on their own facts and the conclusion reached is lawful."

195. We do not regard the position of Mohammed Faruq as capable of shedding any light on issues of fairness in relation to these appellants because his position is substantially different. Most importantly, he is a British citizen whom we understand has been in the United Kingdom for 50 odd years. It has always been accepted that he is at the centre of the conspiracy but no comparison can properly be drawn because a British national cannot be deported. It would, of course, have provided a legal symmetry for the Secretary of State to have taken steps to revoke Mohammed Faruq's citizenship in order to place him in a similar position as these appellants but it is impossible for the Tribunal to make an assessment in relation to the merits of this course of action or the legal obstacles (and we anticipate that there would be some) in the way. In such circumstances there is no parallel that can safely be drawn between his position (and those of members of his family) and that of the appellants.

196. Where the decision in one case sheds light on the Secretary of State's thinking, an inconsistent decision may establish that the Secretary of State has failed to apply her own conventional approach resulting in unfairness. Where, however, no useful guidance can be gleaned from the approach conventionally adopted by the Secretary of State and an inconsistent decision adds little or nothing to our understanding of the underlying reasoning behind the Secretary of State's decision (and may simply be a maverick) we see no reason in principle why the Secretary of State should, thereafter, be required to make similar maverick decisions in order to preserve the principle of consistency at the expense of common sense or good decision-making.

197. We do not regard the fact that the adult children who benefited from the decision of the Tribunal in *Ahmad and others* demonstrates a systematic inconsistency because, as adults when the decisions were made, they did not fall within the category of persons who might lawfully be made the subject of the relevant removal decisions. The fact, however, that the adult Ahmad children have been or will be granted settled status is a material factor in the assessment of the private and family lives of those subject to removal decisions but is not an example of inconsistency. The Immigration Rules frequently draw distinctions between a person under the age of 18 and a person over the age of 18. So, too, will a distinction be found between the requirements to be met by a person who is under the age of 65 when compared with the person over 65. These distinctions do not amount to inconsistencies; rather, that different legal provisions apply to different categories of people. Accordingly, the fact that a person over the age of 18 is to be treated differently from a minor, leading perhaps to different outcomes, will not lead to *inconsistent* outcomes such as to render those decisions unfair. Indeed, in many cases it is the minor child who is able to reap the advantages of his age, leaving the adult child to meet the requirements of a more exacting immigration category. In our judgment, it would be perverse to suggest that these differentials should be removed for the

sake of consistency or, where such a differential arises, the person less favourably treated should be given the benefits of his more favoured comparator in order to maintain consistency.

198. We would also point out, as was said in paragraph 39 of *Ahmad and others*, that there was a distinct possibility that the Tribunal was *'faced with a drafting error'* and no more. A drafting error in the legislation cannot be treated as drawing a principled distinction upon which others can properly rely.

199. There is, however, no doubt that the principle of inconsistency applies most strikingly in the case of the family of Zafar Iqbal and Shazia Kauser. It appears that their cases were treated as falling within the Legacy Programme identified in the decision in *R(Hakemi & Ors) v SSHD [*2012] EWHC 1967 and the numerous subsequent decisions that have followed it including *R(Jaku & Ors) v SSHD* [2014] EWHC 605 (Admin) which reviews many of them. It is not part of the appellants' case that they had a right to be considered under the Legacy Programme and therefore to reap the benefits of it. The appellants have not sought to pursue a judicial review seeking to enforce any rights they believed themselves to have under the Legacy Programme and they cannot, therefore, establish that they had a right to be treated in the same way as the family of Zafar Iqbal and Shazia Kauser.

200. Furthermore, there is nothing before us to suggest that the decisions in the case of the family of Zafar Iqbal and Shazia Kauser were made as a result of a careful analysis of the principles with which we are concerned and which will in due course form the basis of our assessment of proportionality. If we reach sustainable decisions, affording due respect to the Article 8 interests of each of the appellants, we will have fulfilled our obligations to them and the respondent. In such circumstances, there can be no rational basis for reaching a different conclusion by reason only of the outcome in the case of the family of Zafar Iqbal and Shazia Kauser being different. Once again, such a result would render consistency in decision-making a determinative factor, preserving the principle of consistency at the expense of an otherwise proportionate outcome.

**The *Zambrano* issue**

201. H, the son of Mehmood Ahmed and Fazal Jan, was born in the United Kingdom on 24 April 2004, at a time when his father had Indefinite Leave to Remain here. It is not in dispute that H is a British citizen by virtue of the operation of s.1(1)(b) of the British Nationality Act 1981.

202. On 12 May 2011 Mehmood Ahmed, and all other members of his immediate family - his wife, Fazal Jan, and their children Wasim, Arfan, Atteqa, Adeel and H - made an application to the Secretary of State:

> "…for leave to remain on the basis of their minor British family member [H] and the recent European Court of Justice (ECJ) case of Zambrano v ONEm (Case C-34/0)"

203. These applications were determined against each family member by way of decisions dated 1 May 2013, supplemented by reasons given in a further decision of 31 May 2013. These decisions gave rise to rights of appeal to the First-tier Tribunal, pursuant to regulation 26 of The Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) (2006 EEA Regulations); a right which each of the family members has sought to exercise. The appeals have yet to come on for hearing before the First-tier Tribunal.

204. We are, of course, hearing appeals in the Upper Tribunal; such appeals having been brought before the First-tier Tribunal pursuant to s. 82 of the Nationality Immigration and Asylum Act 2002, against decisions made by the Secretary of State in 2009. We are not sitting at first instance hearing the appeals brought pursuant to the 2006 EEA Regulations against the decisions of the Secretary of State to refuse to issue Derivative Residence Cards. However, it is plain and was agreed by the parties that, in respect of Mehmood Ahmed and his immediate family, the issue of whether they have EEA derived rights as a consequence of their relationship with H is a relevant consideration in our assessment of Article 8(2) ECHR issues.

205. For this reason, the parties agreed, and we concur, that despite the appellants having an outstanding appeal before the First-tier Tribunal on the issue of their EEA derived rights, we should nevertheless consider that issue for ourselves within the context of Article 8(2) ECHR. In this regard, we have taken into account that an appeal against a decision shall be treated by the Tribunal as including an appeal against *any* decision in respect of which the appellant has a right of appeal under s.82(1). We do not understand that this require us to determine the appeal against the refusal of a derivative residence card when that decision is the subject of discrete proceedings before the Tribunal. If we are wrong on this and statute requires us to determine this issue, the findings that we are about to make are likely to determine the outcome of that appeal, bearing in mind the Upper Tribunal's powers pursuant to s.11(4) of the Tribunals, Courts and Enforcement Act 2007.

**The decision in *Zambrano***

206. Article 20 of the Treaty on the Functioning of the European Union ("TFEU") is in the following terms:

> "1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
>
> > (a) The right to move and reside freely within the territory of the Member States;
>
> … These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

207. Article 21(1) TFEU provides:

> "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

208. In *Ruiz Zambrano v Office National de l'Emploi (ONEm)* [2012] QB 265, the Grand Chamber of the CJEU confirmed that Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State.

209. *Zambrano* concerned the denial of work and residence permits to Colombian national parents of Belgium nationals living in Belgium. Mr Zambrano lost his employment, which he had been undertaking without the required work permit. He was refused unemployment benefits. He sought to argue before the courts in Belgium that Articles 20 and 21 TFEU required Belgium, as a Member State, to grant him, as an ascendant relative upon whom his minor EEA citizen children depended, an exemption from the obligation to hold a work permit.

210. The Grand Chamber, on a reference from the Tribunal du travail de Bruxelles, concluded as follows:

> "41. As the Court has stated several times, citizenship of the European Union is intended to be the fundamental status of nationals of member states…
>
> 42. In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of their rights conferred by virtue of their status as citizens of the Union…
>
> 43. A refusal to grant a right of residence to a third country national with dependent minor children in the member state where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.
>
> 44. It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.
>
> 45. Accordingly, the answer to the question referred is that art 20 TFEU is to be interpreted as meaning that it precludes a member state from refusing a third country national upon which his minor children, who are European Union citizens, are dependent, a right of residence in the member state of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizens."

**Decisions after *Zambrano***

211. The principles set out in the *Zambrano* decision have been further considered by the CJEU in *Dereci v Bundesministerium für Inneres* [2011] EUECJ C-256/11, [2012] All ER (EC) 373; *O, S and L v Maahanmuuttovirasto (Immigration Office)* [2012] EUECJ C-356/11 and C-357/11; *Youshikazu Iida v Stadt Ulm* [2013] 1 C.M.L.R. 47 and *Alokpa v Ministre du Travail* Case 86-12 and *Ymerega v Ministre du Travail* Case C-87/12.

212. From the decisions cited above we draw the following principles:

(i) All nationals of a Member State are EU Citizens;

(ii) It is for each Member State to determine how nationality of that state may be acquired;

(iii) A Union citizen who has never exercised his right of freedom of movement and has always resided in a Member State of which he is a national cannot benefit from Directive 2004/38, and in normal circumstances a family member of that EU national cannot derive rights from the EU national pursuant to Directive 2004/38 - *Dereci* at [54 and 55][1];

(iv) A hypothetical prospect of exercising the right of freedom of movement does not establish a sufficient connection to EU law to justify the application of that law's provisions – *Iida* at [77]

(v) A Union citizen is entitled to enjoy the substance of the rights attached to such status – *Zambrano* at [42];

(vi) The Treaty provisions on citizenship of the Union do not confer any autonomous rights on third country nationals, and any rights conferred on third country nationals by the Treaty provisions on Union citizenship are derived from the rights of a Union citizen - *Iida* at [66];

(vii) The purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere with the Union citizens freedom of movement by discouraging him from exercising his rights of entry into and residence in the EU, including the host Member State – *Iida* at [67 and 68];

(viii) Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of such rights attached to such citizenship. This relates to circumstances whereby the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but

[1] See also O & B –v- Minister voor Immigratie, Integratie en Asiel [2014] CJEU C-456/12

also the territory of the Union as a whole. This is a matter of fact for the national courts to determine – *Dereci* at [66]

213. Turning to the domestic authority, *Damion Harrison (Jamaica) & AB (Morocco) v SSHD* [2012] EWCA Civ 1736 was a case in which the appellants were the subject of deportation proceedings and each had British citizen children. In each case it was found as a fact that if the appellant were to be removed from the United Kingdom, their Union citizen children would not be compelled also to leave.

214. The appellants submitted that if they were to be removed this would adversely affect the quality of life of their British citizen children and that, consequently, Article 20 TFEU, and "the Zambrano principle", would be engaged. In rejecting this submission Elias LJ, giving the judgement of the Court said:

> 63. … [T]here is really no basis for asserting that it is arguable in the light of the authorities that the Zambrano principle extends to cover anything short of a situation where the EU citizen is forced to leave the territory of the EU. If the EU citizen, be it the child or wife, would not in practice be compelled to leave the country if the non-EU family member were to be refused the right of residence, there is in my view nothing in these authorities to suggest that EU law is engaged. Article 8 rights may then come into the picture to protect family life as the court recognised in Dereci, but that is an entirely distinct area of protection…
>
> 66. Even if the non-EU national is not relied upon to provide financial support, typically there will be strong emotional and psychological ties within the family and separation will be likely significantly to rupture those ties, thereby diminishing the enjoyment of life of the family members who remain. Yet it is plainly not the case, as Dereci makes clear and Mr Drabble [Counsel for the appellant] accepts, that this consequence would be sufficient to engage EU law. Furthermore, if Mr Drabble's submission were correct, it would jar with the description of the Zambrano principle as applying only in exceptional circumstances, as the Court in Dereci observed. The principle would regularly be engaged.
>
> 67. As to the submission that EU law might develop in that direction, I accept that it is a general principle of EU law that conduct which materially impedes the exercise of an EU law right is in general forbidden by EU law in precisely the same way as deprivation of the right. But in my judgment it is necessary to focus on the nature of the right in issue and to decide what constitutes an impediment. The right of residence is a right to reside in the territory of the EU. It is not a right to any particular quality of life or to any particular standard of living. Accordingly, there is no impediment to exercising the right to reside if residence remains possible as a matter of substance, albeit that the quality of life is diminished. Of course, to the extent that the quality or standard of life will be seriously impaired by excluding the non-EU national, that is likely in practice to infringe the right of residence itself because it will effectively compel the EU citizen to give up residence and travel with the non-EU national. But in such a case the Zambrano principle would apply and the EU citizen's rights would have to be protected (save for the possibility of a proportionate deprivation of rights). Accordingly, to the extent that the focus is on protecting the substance of the

right, that formulation of the principle already provides protection from certain interferences with the enjoyment of the right."

## United Kingdom provisions – *Zambrano* principle

215. By Article 4(3) of the Consolidated Version of the Treaty on European Union, each member state is required to take appropriate measures to ensure fulfilment of its obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

216. The United Kingdom has sought to fulfil its obligations arising out Article 20 TFEU and the *Zambrano* decision with the insertion by SI 2012/2560, from 8 November 2012, of Regulations 15A (4A) (and other consequential amendments to regulations 11 and 15A) into the 2006 EEA Regulations, which now read:

15A. **Derivative right of residence**

(4) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.

…

(4A) P satisfies the criteria in this paragraph if-

(a) he is the primary carer of a British citizen (" the relevant British citizen")

(b) the relevant British citizen is residing in the United Kingdom; and

(c) the relevant British citizen would be unable to reside in the UK or in another EEA state if P were required to leave.

(6) For the purpose of this regulation –

…

(c) "an exempt person" is a person –

…

(iv) who has indefinite leave to enter or remain in the United Kingdom.

(7) P is to be regarded as a "primary carer" of another person if -

…

(a) P is a direct relative or a legal guardian of that person; and

(b) P —

(i) is the person who has primary responsibility for that person's care; or

(ii) shares equally the responsibility for that person's care with one other person who is not an exempt person

(7A) Where P is to be regarded as a primary carer of another person by virtue of paragraph (7)(b)(ii) the criteria in paragraphs (2)(b)(iii), (4)(b) and (4A)(c) shall be

considered on the basis that both P and the person with whom responsibility is shared would be required to leave the United Kingdom.

(8) P will not be regarded as having responsibility for a person's care for the purpose of paragraph (7) on the sole basis of a financial contribution towards that person's care.

(9) A person who otherwise satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) will not be entitled to a derivative right to reside in the United Kingdom where the Secretary of State has made a decision under regulation 19(3)(b), 20(1) or 20A(1)."

217. Regulation 18A of the 2006 EEA Regulations (added by SI 2012/1547) requires the Secretary of State to issue a person with a Derivative Residence Card on application and production of a valid passport, or EEA identity card, and proof that the applicant has a derivative right of residence under regulation 15A of the 2006 EEA Regulations.

218. Part 4 of the 2006 Regulations (regulations 19 – 21B) is headed 'Refusal of Admission and Removal etc'. Regulation 19(3), *inter alia*, provides power to the Secretary of State to remove the family member of an EEA national if that persons removal is justified on grounds of public policy, public security or public health in accordance with regulation 21. Regulation 20 provides that the Secretary of State may refuse to issue a residence card on the same basis. In relation to rights of residence arising under, *inter alia*, regulation 15(4A) of the 2006 EEA Regulations references to a matter being justified on grounds of public policy, public security or public health in accordance with regulation 21 must be read as referring to a matter being "conducive to the public good".

**Application of 2006 Regulations**

219. It is first necessary for us to consider whether Mehmood Ahmed, and his immediate family, benefit from the domestic legislation brought in to give effect to the *Zambrano principle*.

220. The Secretary of State maintains that Mehmood Ahmed is an 'exempt person' for the purposes of reg. 15A of the 2006 EEA Regulations, because he has Indefinite Leave to Remain (reg. 15A(6)(iv)) and that, therefore, he cannot derive any rights as a consequence of H's European Union citizenship.

221. Section 10 (8) of the 1999 Act reads:

"10(8) - Where a person is notified that a decision has been made to remove him in accordance with this section, the notification invalidates any leave to enter or remain in United Kingdom previously given to him".

222. The immigration decision of the 29 April 2009, in an express application of s.10(8), informing Mr Ahmed of the decision to remove him states, at footnote 1, as follows:

> "Where a decision to remove has been made under s.10 of the Immigration and Asylum Act 1999 any leave previously granted is invalidated by the service of this notice (s.10(8) of that act (as amended))."

223. The focus of the parties' submissions on this aspect of the appeal related to the effect of s.3D of the Immigration Act 1971; Mehmood Ahmed asserting that invalidation of his leave took place upon service of the immigration decision of 29 April 2009 and that such leave was not further extended by s.3D upon the bringing of an appeal, whereas the respondent submitted that Mr Ahmed's Indefinite Leave to Remain continues while his appeal against the s. 10 decision is pending, as a consequence of the operation of s. 3D.

224. Section 3D of the 1971 Act states:

> 3D - **Continuation of leave following revocation**
>
> (1) This section applies if a person's leave to enter or remain in the United Kingdom –
>
> (a) is *varied* with the result that he has no leave to enter or remain United Kingdom, or
>
> (b) is *revoked*.
>
> (2) The person's leave is extended by virtue of this section during any period when –
>
> (a) an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 could be brought, while the person is in the United Kingdom, against the variation or revocation…
>
> (b) an appeal under that section against the variation or revocation, brought while the appellant is in the United Kingdom, is pending…

225. It is immediately apparent upon reading s. 3D that the term 'invalidates', used in s. 10(8), does not appear therein. One effect on a person who has been served with notice of a s. 10(1) decision is that, on service, any leave to enter or remain is brought to an immediate end. This consequence is identical in practice to the Secretary of State making a decision to vary a person's leave to enter or remain in the United Kingdom such that when the variation takes effect the person has no leave to enter or remain.

226. The appellants argue that the decision refusing Mehmood Ahmed a residence card is erroneous because it is wrong to treat him as having continuing leave under s. 3D of the 1971 Act. This, it is alleged, is because his leave to remain was "invalidated" whereas s. 3D only provides for the continuation of leave to remain in circumstances where the person's leave is "*varied with the result he has no leave to enter or remain*" or is "*revoked*". It is said that leave does not continue under s. 3D where it is *invalidated*. It is also argued in the alternative that it is "mendacious" (by which we take it to mean that it is unlawful) to treat temporary leave deemed to operate prior to a removal decision as protective of a British citizen child's residence and citizenship rights under *Zambrano*.

227. As the Secretary of State points out the appellants' primary argument is a surprising one. The purpose of s. 3D of the 1971 Act is to perform a protective function for those whose leave to remain in the UK has been brought to an end by an appealable immigration decision in that it avoids that person becoming an unlawful overstayer. If the appellants' submission is correct, then Mehmood Ahmed is (and has been at all times since the making of the immigration decision against which he appeals) an overstayer. In the unusual circumstances of this appeal, this may suit Mehmood Ahmed because he manages to avoid falling into the category of an exempt person, but it would be highly undesirable for most whose leave is otherwise brought to an end by a s.10 decision. The Secretary of State further points out that, as overstayers, they would not be able to be employed during the currency of their appeal proceedings. Employers would be at risk of unwittingly employing someone without leave and the related criminal sanctions. Their welfare entitlement would also be adversely affected because they would no longer be lawfully present in the UK. As the present proceedings demonstrate, that is a state of affairs which can, in some cases, last some time.

228. The decision which brought Mehmood Ahmed's indefinite leave to remain to an end was a removal decision under s.10 of the 1999 Act which on notification by virtue of s.10(8) *invalidated* the leave previously granted to him were it not for the protection granted by s.3D of the 1971 Act which applies where a person's leave is *varied* to the extent that he has no leave to remain. The Secretary of State accepts this is not a revocation case. We are, however, satisfied that it is a variation case. Where leave is invalidated by operation of law, there is a change from the situation where he has leave to the situation where he has no leave. That must be a variation.

229. If it is linguistically a variation, it also has the fortuitous result of protecting those many persons whom s. 3D was designed to protect. As the Secretary of State points out, her interpretation protects those immigrants who are being required to leave the UK. If their appeals succeed, they are not subsequently burdened with the consequences of a period of unlawful residence which would often prejudice a future application for further leave. It permits them to continue their lives during the appeal process in the confidence that they continue to have permission to remain in the country. Whilst the difference in language between s. 3D of the 1971 Act and s. 10 of the 1999 Act permits the possibility of a distinction being drawn, it does not necessarily create meanings which are mutually exclusive.

230. We construe s. 3D as giving Mehmood Ahmed a continuation of his leave. That is sufficient to engage the operation of reg. 15A(6)(c)(iv) of the 2006 Regulations such that he is an "exempt person" and he does not, therefore, qualify for a derivative right of residence.

231. The appellants, in their attempt to persuade us to take a different view, placed significant reliance on the decisions of the Court of Appeal in *R (Lim) v SSHD*

[2007] EWCA Civ 773 and *RK (Nepal) v SSHD* [2009] EWCA Civ 359, but we have found such decisions to be of little assistance in our considerations.

232. In *Lim* the Secretary of State appealed against a decision that the respondent, Mr Lim, a Malaysian citizen, was entitled to challenge by way of judicial review the legality of removal directions imposed against him following a finding of fact that he had failed to observe a condition of his leave to remain in the United Kingdom. It was asserted that Mr Lim had breached a condition of his leave, and the Secretary of State proposed to remove him pursuant to s.10 of the 1999 Act. Although the judge at first instance had reminded himself that judicial review was a remedy of last resort to be entertained only where there was no suitable statutory appeal, he had found Mr Lim's case to be exceptional and that the alternative remedy of an out-of-country appeal to the Asylum and Immigration Tribunal under the Nationality, Immigration and Asylum Act 2002 s.82 did not provide fair, adequate or proportionate protection. The appeal to the Court of Appeal turned on the propriety of using judicial review to challenge the factual basis of a removal direction against which an out-of-country appeal lay. The Secretary of State submitted that there was no proper foundation for the High Court judge's finding that the immigration appeals system was not equipped to deal with the particular features of the case. The Secretary of State maintained that the hardship of losing one's job, income and home to pursue an out-of-country appeal was an inevitable consequence of the system and, while distressing, was neither unusual nor exceptional. The Court of Appeal allowed the Secretary of State's appeal ostensibly for the reasons she put forward.

233. In *RK (Nepal)*, the applicants were sisters and nationals of Nepal. Each applied for permission to appeal against the refusal of their application for judicial review of a decision of the respondent Secretary of State to remove them to Nepal. The applicants had been granted leave to enter or remain as students. It had been found that they had been working for more than the 20 hours a week that was permitted during term time to non-British citizens with such leave. The issue was whether the applicants had the right to an in-country appeal against the Secretary of State's decision to remove them. The answer to that question depended on whether the Secretary of State's decisions fell within the scope of s.82(2)(e) of the Nationality, Immigration and Asylum Act 2002.

234. In refusing the application, the Court used "as its starting point" the decision in *Lim* and concluded:

> "33. The importance of that decision lies in its emphasis on the appeal structure that Parliament has laid down in the 2002 Act with respect to various types of "*immigration decision*". The courts must respect that framework, which is not open to challenge in the courts by way of judicial review unless there are "*special or exceptional factors*" at play. Therefore, except when such "*special or exceptional factors*" can successfully be invoked so as to give rise to a right to judicial review, the court must accept that an out of country right of appeal is regarded by

> Parliament as an adequate safeguard for those who are removed under section 10 of the 1999 Act .
>
> 34. It is plain in this case that the immigration decisions made against the applicants was one under section 10(1)(a) of the 1999 Act. That is what was stated in the form IS151A that was served on each of the applicants. There is no issue concerning their non – British citizenship. It is also clear, as a matter of fact, that the reason for the removal from the UK in accordance with directions given by an immigration officer is that they both obtained limited leave to enter and remain in the UK and that this leave was subject to conditions. They have broken those conditions in the manner I have already described. Those facts falls all squarely within section 10(1)(a) of the 1999 Act."

235. In neither of these decisions did the court consider the application of s.3D of the 1971 Act, the focus of each being on the structure of the appeal rights laid down by parliament in s.82 of the 2002 Act. Our conclusions do not offend the *ratio* of either decision, given that s.3D(2)(a) specifies that it is of application *only* in circumstances where a person has an in-country right of appeal. There is, therefore, no prospect of a persons leave being extended pursuant to s.3D after they have left the United Kingdom and thereafter exercised a right of appeal against a s.10 removal decision.

236. Having concluded that Mehmood Ahmed's indefinite leave to remain continues during the course of this appeal process and that, consequently, he is an 'exempt person' and not entitled to a Derivative Residence Card pursuant to regulation 18A of the 2006 EEA regulations', Fazal Jan's application under regulation 15A of the 2006 EEA regulations must also fall to be refused. She is not the primary carer of H for the purposes of that regulation. Such a contention, if it were to be made, would not lie easily with Mehmood Ahmed's claim to share responsibility for H's care with Fazal Jan. Fazal Jan does not share responsibility for H's care with a person who is *not* an exempt person because we have found that Mehmood Ahmed is an 'exempt person'.

237. Our interpretation of s. 3D does not, in its application, stretch outside the scope of EU law in such a way as to be unwarranted. Were we to construe the *Zambrano principle* otherwise, it would distort the clear legislative intention of the section.

*Zambrano* - Consideration outwith the 2006 EEA Regulations

238. The conclusions above only bring to an end our consideration of the application of the *Zambrano principle* if the 2006 Regulations afford the same scope of protection as is afforded by the case law; in our judgment they clearly do not.

239. Although Mehmood Ahmed is an exempt person for the purposes of regulation 15A of the 2006 EEA Regulations, because his indefinite leave to remain continues during the course of these proceedings, the stated intention of the Secretary of State, as reflected by the notification of the s.10 decision, is to remove him, and Fazal Jan, from the territory of the European Union.

240. It is not disputed that if H's parents are removed from the EU then H would be compelled also to leave the territory. It cannot, in our view, be sensibly said that the prospect of H being compelled to leave the EU is purely hypothetical as a consequence of his father, Mehmood Ahmed, currently having indefinite leave to remain by virtue of the operation of s.3D of the 1971 Act. To this end, H's, *Zambrano* rights are, *prima facie*, engaged.

**Abuse**

241. It is the Secretary of State's case that no *Zambrano* rights can be derived from H's British citizenship by the other members of the Mehmood Ahmed family as a consequence of such citizenship having been *"obtained as a result of fraud by the British child's parents"* i.e. Mehmood Ahmed and Fazal Jan

242. In support of submissions the Secretary of State places reliance on the general proposition of EU law, detailed by the ECJ in *Diamantis v. Elliniko Dimosio (Greek State)* (Case C-367/96) [1998] ECR I-2843, that [33]:

> "…community law cannot be relied on for abusive of fraudulent ends."

243. A principle enunciated in such broad form is not, however, by itself, a useful instrument for assessing whether a right arising from community law is being exploited abusively.

244. The Secretary of State makes more nuanced submissions on this issue in paragraphs 274- 277 of her skeleton argument, which read as follows:

> 274. The effect of a fraudulently obtained residence card on the enjoyment of rights arising in EU law was specifically considered in Case C-285/95 Kol v. Land Berlin [1997] ECR I-3069. The case concerned a Turkish national who entered into a marriage of convenience with a German national. He was initially given a residence permit of limited duration. Following a declaration by him that he lived with his wife as man and wife in the matrimonial home, he was granted a residence permit of unlimited duration. The declaration was false as his wife had, by that stage, already commenced divorce proceedings and the spouses had ceased to co-habit some time previously. He was later convicted of, and fined for, having made a false declaration in order to procure a residence permit. His wife was convicted of aiding and abetting him. The national authorities made an expulsion order against him. Having considered its case-law on the legality of residence for the purposes of the Turkish Association Agreement, which established that residence could not be lawful where it was not possible to establish that a person had a stable and legal right to reside, the CJEU held that:
>
>> 25. A fortiori that interpretation must apply in a situation such as that in the main proceedings where the Turkish migrant worker obtained a residence permit of unlimited duration in the host Member State only by means of inaccurate declarations in respect of which he was convicted of fraud.
>>
>> 26. Periods of employment after a residence permit has been obtained only be means of fraudulent conduct which has led to a conviction cannot be regarded as legal for the purposes of application of Article 6(1) of Decision

No 1/80, since the Turkish national did not fulfil the conditions for the grant of such a permit which was, accordingly, liable to be rescinded when the fraud was discovered.

28. Furthermore, employment under a residence permit issued as a result of fraudulent conduct which has led, as in this case, to a conviction, cannot give rise to any rights in favour of the Turkish worker, or arouse any legitimate expectation on his part."

275. In Kol¸ legal residence was a requirement before rights under Decision 1/80 could arise. Fraud in obtaining a residence permit was sufficient to prevent the later derivative rights under Decision 1/80 from arising. A similar result obtained in Case C-63/99 R v. Secretary of State for the Home Department, ex parte Gloszczuk [2001] ECR I-6393. In that case, false representations on entry about the purpose of a visit meant that the person "place[d] himself outside the sphere of protection afforded to him under the [Polish] Association Agreement": paragraph 75. Such a breach was considered sufficiently serious to justify the refusal of a right of residence on the basis of establishment: paragraph 82.

276. Accordingly, it is well-established in EU law that fraudulent conduct cannot be used to establish EU law rights. In particular, fraud in obtaining a residence permit "cannot give rise to any rights" on the part of the party which has acted fraudulently: Kol, paragraph 28. A person who has used deception on entry "places himself outside the sphere of protection" of the EU rules invoked: Gloszczuk, paragraph 75. No EU right arises.

277. That principle applies in the present case so as to disentitle the Mehmood Ahmed family from establishing rights of residence based on Zambrano…"

245. The exact parameters of the principle of abuse in Community law are difficult to synthesise from the authorities.

246. In *Kafelas* [1998] ECR I-2843, a case involving an action brought by shareholders for a declaration that the increase in capital of a public limited company in financial trouble was invalid, in which the shareholders were alleged to have improperly used rights derived from community law, the court concluded that a person abuses a right conferred on him if he exercises it unreasonably to derive, to the detriment of others, an improper advantage manifestly contrary to the objective by the legislator in conferring that particular right on an individual.

247. The case of *Centros Ltd v Erhvervs- og Selskabsstyrelsen* (Case C-212/97) [2000] Ch 446 involved a private limited company registered in the United Kingdom (Centros). The company applied to register a branch in Denmark from where it was trading. The national authorities refused that application, contending that such registration was a way of avoiding national rules on the paying up of minimum share capital. The refusal, it was claimed, was justified in order to protect creditors and to try to prevent fraudulent insolvencies. Centros contended that it was entitled to set up a branch in Denmark under the freedom of establishment conferred by the EC Treaty. The question was referred to the ECJ for a preliminary ruling.

248. In coming to its conclusions the court concluded, as a matter of principle, that the fact that a person (or, on the facts of the case, a company) knowingly placed himself [itself] in a situation which causes a right deriving from Community law to arise in his [its] favour, in order to avoid the application of certain national legislation unfavourable to him [it], does not constitute, in itself, a sufficient basis for the community provision relied upon to be rendered inapplicable [27].

249. In a case more familiar to those who work in this jurisdiction, *Chen v SSHD* [2005] QB 235, the ECJ considered a situation in which C, of Chinese nationality, entered the United Kingdom from China when she was six months pregnant, and travelled to Belfast where her daughter, Z, was born in 2000. By virtue of a law in the Irish Republic whereby any person born in the island of Ireland was at that time entitled to Irish nationality, Z acquired such nationality and thereby became a citizen of the European Union. Having shortly thereafter moved to Cardiff, C applied for a permit for long-term residence in the United Kingdom for Z and herself; however this was refused. On C's appeal, the Immigration Appellate Authority sought a preliminary ruling from the ECJ. In its decision the ECJ, *inter alia*, said:

> 34. The United Kingdom Government contends, finally, that the applicants are not entitled to rely on the Community provisions in question because Mrs Chen's move to Northern Ireland with the aim of having her child acquire the nationality of another member state constitutes an attempt improperly to exploit the provisions of Community law. The aims pursued by those Community provisions are not, in its view, served where a national of a non-member country wishing to reside in a member state, without however moving or wishing to move from one member state to another, arranges matters in such a way as to give birth to a child in a part of the host member state to which another member state applies its rules governing acquisition of nationality jure soli. It is, in their view, settled case law that member states are entitled to take measures to prevent individuals from improperly taking advantage of provisions of Community law or from attempting, under cover of the rights created by the Treaty, illegally to circumvent national legislation. That rule, which is in conformity with the principle that rights must not be abused, was in their view reaffirmed by the Court of Justice in *Centros Ltd v Erhvervs- og Selskabsstyrelsen (Case C-212/97) [2000] Ch 446* .
>
> 35. That argument must also be rejected.
>
> 36. It is true that Mrs Chen admits that the purpose of her stay in the United Kingdom was to create a situation in which the child she was expecting would be able to acquire the nationality of another member state in order thereafter to secure for her child and for herself a long term right to reside in the United Kingdom.
>
> 37. Nevertheless, under international law, it is for each member state, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality: see, in particular, *Micheletti v Delegación del Gobierno en Cantabria* (Case C-369/90) [1992] ECR I-4239 , 4262, para 10, and *R v Secretary of State for the*

*Home Department, Ex parte Manjit Kaur* (Case C-192/99) [2001] ECR I-1237 , 1265, para 19."

250. During the course of his opinion in *Halifax Plc v Customs and Excise Commissioners* (Case C-255/02) [2006] ECR I-1609, Advocate-General Maduro sought to draw together the learning from the Luxembourg court's decisions on the issue of abuse, his analysis later meeting with the approval of the Court of Appeal (Dyson and Maurice-Kay LJJ) in *Sonmez and Others* [2009] EWCA Civ 582 and one which we have accordingly applied to our deliberations of this issue.

251. *Halifax* was a case which concerned transactions entered into for the purpose of gaining a tax advantage in relation to the right to deduct input VAT. In paragraph 63 of his opinion the Advocate General observed that the notion of abuse had been analysed by the European Court in two main contexts:

> "First, when the Community law provisions are abusively invoked in order to evade national law. Second, when Community law provisions are abusively relied upon in order to gain advantages in a manner which conflicts with the purposes and aims of those same provisions."

252. Then, at paragraph 68, the Advocate General summarises the Court's position on the notion of abuse in the following way:

> "In essence there is a consistent pattern in the abovementioned case-law on the notion of abuse (not always referred to as an abuse of rights) whereby the assessment of the abuse is based on whether the right claimed is consonant with the purposes of the rules that formally give rise to it…The person claiming to have the right is barred from invoking it only to the extent to which the Community law provision formally conferring that right is relied upon for the achievement of 'an improper advantage, manifestly contrary to the objective of that provision…"

253. The case of *Kol*, relied upon as being of some significance by the Secretary of State, pre-dates the establishment of the abuse principle in its more developed form, and was decided on the basis that the condition required to acquire the claimed right in the first place had not been fulfilled (in that case the right being conferred under the Turkish Association Agreement), not the disentitlement of a person to rely on a right as a consequence of their abuse and, consequently, we found it to be of little assistance.

254. Turning now to the facts of the instant appeal. It is a matter for individual member states to lay down conditions for the acquisition and maintenance of citizenship, (*Zambrano,* at paragraph 20). It is undisputed that H has not engaged in any fraudulent or abusive conduct. It was by operation of UK law that he became a British Citizen, despite the fact that his father obtained indefinite leave to remain by fraudulent means and that this indefinite leave to remain was one of the precedent facts that enabled H to obtain his British citizenship. In Community law it is not an abuse to take advantage of a national law, (*Chen)*.

255. In such circumstances we must proceed on the basis that H has British citizenship and that he has acquired the rights attached thereto and simultaneously acquired the rights attached to his citizenship of the European Union, including those conferred by Article 20 TFEU.

256. Turning to the question of whether H's parents can, *prima facie*, rely upon *Zambrano rights* derived from H's European citizenship, given the fraud perpetrated by Mehmood Ahmed in the obtaining of his indefinite leave to remain; we must first consider the purpose of the principle from which the right relied upon is derived. Such purpose is clear, that is to prevent the deprivation of the substance of the genuine enjoyment of rights conferred on H by virtue of his European citizenship, including his right to reside within the territory of the Union, (*Zambrano*, paragraph 45).

257. In our conclusion it is plain that once it has been established that H has acquired, and is entitled to rely upon, EU citizenship rights, reliance by his parents on a *Zambrano right* derived therefrom is not manifestly contrary to the purpose of the principle from which that right is derived; indeed quite the opposite is true. It is H's ability to enjoy his right of residence, obtained as a consequence of his Union citizenship, which is at the heart of the considerations in this aspect of the appeal, and the denial caused to that right by his parents' removal. H must be treated as a citizen of the Union, and he is entitled to rely upon all of the rights attached to that citizenship, including in this case the rights set out in Article 20 of the TFEU.

**Derogation and the *Zambrano* right**

258. It is asserted by H's parent's that the rights they derive from H's Union citizenship are absolute and non-derogable. In summary they submit that:

   i. The decision in *Zambrano* does not accord with a diminution of the protection given to the substance of the rights of EU citizen children, such as that which regulation 21A(3)(a) of the 2006 EEA Regulations seeks to justify;

   ii. H has a constitutional right of abode in the United Kingdom by operation of law and a right to move and reside freely within the EU;

   iii. The Upper Tribunal was correct in its approach in *Sanade and Others (British Children – Zambrano – Dereci* [2012] UKUT 00048 (IAC) for the reasons it gave;

   iv. The Treaties and the European Communities Act 1972 do not permit national measures restricting the exercise of Treaty rights;

   v. In any event, refusing H's parents derivative residence cards is not proportionate and neither can it be justified as being conducive to the public good or public policy grounds.

259. The Secretary of State takes a contrary position asserting, *inter alia*:

i. The *Zambrano* derivative right of residence is not autonomous, but derives from the child's citizenship and rights under Article 20 TFEU;

ii. There was no consideration of the impact of the conduct of the carers of an EU citizen in *Zambrano* or in any of the cases that have followed it in the CJEU. The Upper Tribunal have provided divergent views on the issue in *Omotunde* [2011] UKUT 00247 (IAC) and *Sanade*. The conclusions in *Omotunde* are correct and those in *Sanade* are wrong.

iii. It was common ground between the parties in *Harrison* that the issue of whether the state can ever justify refusing to grant to the non-EU national the right to reside even though the effect will be to deprive the EU citizen of his or her right of residence is not *acte clair*. However because the *Zambrano* right did not apply, the Court was not required to deal further with the area of common ground;

iv. There is no principle of international law that a citizen cannot be expelled from their own state in any circumstances and even if there were such a principle, it does not apply to dual nationals;

v. In the context of considering Article 8(1) ECHR, Baroness Hale suggested that there is no absolute prohibition against the deportation of the foreign parent of a child who is a citizen of the deporting state: *Naidike – v – Attorney General of Trinidad* [2005] 1 AC 538, at [75]. In EU Law a similar principle was identified by the CJEU in *Gloszczuk* Case C-63/99).

260. Whether *Zambrano rights* are derogable is a matter of Community law.

261. In *Harrison* the parties agreed [55(4)] that in circumstances where a person has acquired a *Zambrano right* the issue of whether a state can ever justify refusing to grant to such person a right to reside even though the effect will be to deprive the EU citizen of his or her right of residence is not *acte clair*.

262. In this appeal neither party has sought a reference to the CJEU.

263. There is limited domestic consideration of the issue of whether a *Zambrano right* is derogable.

264. In *Omotunde* the Upper Tribunal (President and Upper Tribunal Judge Gleeson) considered an appeal against a deportation decision taken on the basis that the appellant was a foreign criminal within the meaning of s.32 of the UK Borders Act 2007. The appellant had a British national son. His appeal was allowed on Article 8 ECHR grounds. When coming to its conclusions the tribunal observed as follows:

> 31. We further recognise that Tolu's British nationality is not merely an aspect of what his best interests are, but may also afford him a right to reside in his own country in both national and European Law see Case C-34/09 *Ruiz Zambrano* where the Court of Justice in its ruling concluded:

> > Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, *in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."* [Emphasis added]
>
> 32. As a result of this decision national courts must engage with the question whether removal of a particular parent will 'deprive [the child] of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen'. We conclude that either requiring Tolu to live in Nigeria or depriving him or his primary carer would undermine his rights of residence. The Court of Justice did not have to consider how Article 20 would be applied if there were strong public interest reasons to expel a non-national parent. We would conclude (subject to any further guidance from the CJEU or the Court of Appeal) that any right of residence for the parent is not an absolute one but is subject to the Community Law principle of proportionality. We doubt whether there is a substantial difference between the human rights based assessment of proportionality of any interference considered by Lady Hale in *ZH (Tanzania)* and the approach required by Community law.

265. The issue was once again addressed by the Upper Tribunal (President and Upper Tribunal Judge Jordan) in its decision in *Sanade and Others (British Children – Zambrano – Dereci*); this again being a case involving appeals (including from an appellant later considered by the Court of Appeal in *Harrison*) against decisions made under s.32 of the 2007 Act, and again each of the appellants had a British Citizen child living in the United Kingdom.

266. On this occasion the Tribunal engaged more fully with the question of whether any of the appellants had acquired a *Zambrano right* and concluded that they had not; as a consequence of the fact that in all of the appeals before it deportation of the appellant would not have led to the deprivation of the genuine substance of the British Citizen child's EU rights, each being able to remain living in the UK with their respective mothers.

267. During the course of its discussion of this issue the Tribunal said as follows:

> 80. …If exceptions exist in EU law, it is illogical and inconsistent with principle for those restrictions to be determined nationally. The respondent's submission seems to us inconsistent with virtually everything the Court of Justice has had about the need for an EU interpretation of Treaty rights.
>
> 81. We note that in cases of rights afforded to Turkish Nationals under the Ankara Agreement, the European Court has required that public policy derogation be strictly interpreted and precluded purely deterrent measures that might otherwise be available in national law. Thus in C-340/97 Nazli [2000] ECR I-957 at [59] the Court said:
>
> > The Court has thus concluded that Community law precludes the expulsion of a national of a Member State on general preventive grounds,

> that is to say an expulsion ordered for the purpose of deterring other aliens (see, in particular, Case 67/74 *Bonsignore* v *Stadt Köln* [1975] ECR 297, paragraph 7), especially where that measure has automatically followed a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that conduct represents for the requirements of public policy (*Calfa*, cited above, paragraph 27).

82. It is inconceivable that lesser standards would apply to derogations from Treaty rights afforded to European Citizens themselves. In practice we would anticipate that Article 27 Citizens Directive would have to apply. It states:

> Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interest of society. Justifications that are isolated from the particular facts of the case or that rely on considerations of general prevention shall not be accepted.

83. If the residence right is only afforded to the non-citizen parent where otherwise the child would be forced to leave the European Union, it seems difficult to justify that consequence by reason of the criminal wrongdoing of the parent. It is one thing to justify the exclusion of an EU national from one part of the Union requiring him or her to return to their state of nationality, and quite another to require that person to leave the Union altogether. It seems to us that the Court of Justice was applying the principle of international law that a citizen cannot be expelled from their own state in any circumstances, to citizenship of the European Union and concluding that a measure that required an EU citizen to leave the Union would be contrary to EU law.

84. In *Zambrano*, there was no suggestion that the children as Belgian citizens, could be expelled from Belgium. Nor, as Union citizens, could they be expelled from the Union as a whole and, had there been a decision made by the Belgian authorities to that effect, it would have been justiciable by the Court of Justice. But the Court went further: the expulsion of their Colombian parents (not citizens of the Union) amounted to the children's constructive expulsion from the Union. The Court was not therefore directly applying Article 20 but granting rights to non-Union citizens necessary to give effect to the rights of Union citizens. However, *if the collateral right of residence afforded to the parents is a narrow one and limited to cases where it is necessary to enable the child to enjoy his or her rights, it may very well be that there is no room for any derogation at all, and our assumptions to the contrary in Omutunde at paragraph 32… should not be regarded as sound in the absence of a decision of the Court of Justice on the point in a case that raised the issue.*" [Emphasis added]

268. As identified above, in *Harrison* it was agreed between the parties that the issue was not *acte clair*. As it turned out the issue was not live before the Court because it found the *Zambrano* right not to be engaged. Nevertheless, at paragraph 67 of his judgement Elias LJ (with whom Pitchford and Ward LJJ agreed) said, [emphasis added]:

> "… [T]he right of residence is the right to reside in the territory of the EU. It is not a right to any particular quality or [sic] life or to any particular standard of living. Accordingly, there is no impediment to the exercising the right to reside if residence remains possible as a matter of substance, albeit that the quality of life is diminished. Of course, to the extent that the quality or standard of life will be seriously impaired by excluding the non- EU national, that is likely in practice to infringe the right of residence itself because it would effectively compel the EU citizen to give up residence and travel with the non-EU national. But in such a case the *Zambrano* doctrine would apply and the EU citizen's rights would have to be protected *(save for the possibility of a proportionate deprivation of rights)*. Accordingly, to that extent the focus is on protecting the substance of the right, that formulation of the principle already provides protection from certain interferences with the enjoyment of the right."

269. There is no further domestic consideration of this issue. Such domestic consideration as there has been is *obiter,* and the Upper Tribunal has come to differing views in the two cases in which it has considered the issue, albeit the former President was sitting in both constitutions of the Tribunal.

270. Despite Mr Blundell's oral submissions to the contrary, we find that the CJEU in *Zambrano* did not itself consider the question of whether the rights derived by the Zambrano parents were derogable. His attempt to persuade us otherwise in reliance on paragraph 45 of the judgment is unarguable. The use in that paragraph of the phrase *'in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights'* is not a recognition that such rights are derogable. It is a recognition that any action by a Member State which has a consequence short of depriving the EU citizen child of the genuine enjoyment of the substance of his/her EU rights is not precluded by Articles 20 or 21 TFEU.

271. Neither do we accept the appellants' submission that the fact that the Court did not consider the issue for itself provides support for the contention that the derived rights of the Zambrano parents were considered to be absolute. The Court set out the questions referred to it for preliminary ruling in the following terms [36]:

> "By its questions, which it is appropriate to considered together, the referring Court asks, essentially, whether the provisions of the Treaty on the Functioning of the European Union on European Union citizenship are to be interpreted as meaning that they conferred on a relative in the ascending line who is a third country national, on whom his minor children, who are European citizens, are dependent, a right of residence in the member state of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that member state."

272. It is readily identifiable from the above citation that the Court was only asked to consider whether a right was conferred on the Zambrano parents, not whether such right was absolute. The fact that the Court did not therefore consider the

latter issue, even though Advocate General Sharpston did in her opinion, cannot possibly be indicative of it having taken a particular view.

273. The Advocate General's opinion in *Zambrano* [2012] QB 265 is extensive. In paragraphs 104 and 108 of her opinion she first asks, and then answers, the question: *Can the interference be justified?* Concluding:

> "108. In my view, therefore, the potential interference with European Union citizenship rights that arise if the ascendant family member does not enjoy an automatic derivative right of residence in the European Union citizens member state of nationality is acceptable in principle. However, it may not be a permissible interference in certain circumstances (in particular, because it may not be proportionate)."

274. Immediately thereafter [109 to 122] the Advocate General goes on to consider the issue of whether interference would be permissible in the context of the facts of that case. When doing so she states at [100]:

> "Here, as so often, the situation is one that involves exercise of a right and a potential justification for interfering with (or derogating from) that right; and the question comes down to one of proportionality. Is it proportionate, in the circumstances of this case, to refuse to recognise a right of residence for Mr Ruiz Zambrano, derived from his children's rights as European Union citizens? … the decision on proportionality is (as usual) ultimately a matter for the national court…"

275. No further assistance can be drawn on this issue from subsequent cases in which the CJEU has considered the *Zambrano principle*.

276. As we have identified above, the parties have adopted wholly divergent positions on this issue. We remind ourselves that this is exclusively a question of Community law. We consider that the correct answer is not definitively provided by the Treaty, or the subsequent CJEU, or domestic, jurisprudence.

277. Article 267 TFEU provides:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties….
>
> Where such a question is raised before any Court or Tribunal of a Member State, that Court or Tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon."

278. We have awaited the promulgation of this determination to await the outcome of the Tribunal's decision in CS v Secretary of State for the Home Department (DA/00416/2013), on which one of our members sat (President and Upper Tribunal Judge O'Connor). We note that the Tribunal has now made a reference to the CJEU on this issue. On 6 June 2014, the Court registered the reference as (C-304/14). However, we do not consider, for the reasons we set

out below, that the decision on this issue before the Court of Justice is necessary to enable us to determine this appeal.

**Qadir Ahmed and Nasreen Bi's family**

279. Qadir Ahmed's family came to the United Kingdom in 2001, some 12 years ago. In his latest statement of 7 March 2013, Qadir Ahmed confirmed as true his earlier statement as to the circumstances in which he came to the United Kingdom.

280. As a result of the fact that he and his wife made separate claims in which different children were cited as dependents, the family's claims resulted in different decisions, one successful and the other not. No criticism can be made of the respondent for that. The effect, however, was that the eldest, Toukeer, born on August 1988, now 25 years old, as a dependent on his mother's claim was not given leave to remain. In contrast, however, Tousif, a dependant on his father's claim, born 10 February 1990, now aged 23, was granted refugee status and was, accordingly, provided with the benefits associated with the right to remain. Indeed, we were provided with a letter dated 30 August 2013, in the form of an invitation to Tousif to attend his Citizenship Ceremony on 26 September 2013 to mark his successful application for British Citizenship. Nothing, therefore, could contrast the outcome better than this. As a result of the outcome of the appeal in *Ahmad and others*, his position is secure. His elder brother's is not.

281. The effect of this can easily be imagined. Tousif has been at UCK, the London College, since 2011 studying business and working part-time. This course will by now have finished. He has successfully completed the course work. He would like to continue his studies at Royal Holloway. He has developed in confidence and is able to contribute to the family's finances. In contrast Toukeer, although older than Tousif, is not able to continue in education or to obtain work. This, inevitably, has affected his confidence and his domestic, social and career prospects.

282. In his statement, Toukeer speaks of the fact that he has grown up in Oxford, has friends there who visit each others' homes. He plays cricket. Although he would have liked to study mechanics, he was not able to do so because of his lack of immigration status. Unlike his brother, Tousif, he cannot drive.

283. Their daughter Sulva finished at Oxford Spires Academy in 2012 and has not been able to find work. She was born on 20 April 1994 and was a minor at the date of the decision in May 2009. Consequently, the removal directions made against her (or her younger sister) were not affected by the decision in *Ahmad and others.* However, as a dependent on her father's claim, she was granted refugee status and leave to remain. Her mother tells us that she has started helping at East Oxford Primary School doing unpaid work and has difficulties with her memory. She lacks confidence.

284. Sulva's younger sister, Salma, was born on 10 December 1998. She is a minor. She was 2½ years old on arrival and is now aged 14. Because, serendipitously, she was a dependant on her mother's unsuccessful claim for asylum, she has never been given leave. However, it appears that she is doing well at school. She is studying for her GCSEs and would wish to continue in her education. Unlike her elder sister, Sulva (who was given leave), Salma is unable to advance the claim that her sister advanced that removal under s.10(1)(c) was unlawful because that submission is dependent upon the applicant having leave to remain. However, for the reasons we have given, Sulva is not able to benefit from the decision in *Ahmad and others* and consequently, that distinction does not arise.

285. Each member of the family expresses a strong wish not to leave the United Kingdom.

286. Sulva and Salma claim the benefit of paragraph 276 ADE (iv) or (v).

**Ghulam Rabani and Noreen Shakila's family**

287. Ghulam Rabani's family arrived in the United Kingdom in 2000. Three of his children, Mohammed Atif, Mobushara and Furah Begum were dependents on their mother's successful claim for refugee status. Accordingly, they were granted leave to remain. Mohammed Atif was 14 years old on entry and 23 years old at the date when the decision was made to issue a removal notice in May 2009. His sister Mobushara was 11 years old on entry and 20 at the date of decision. Furah Begum was 10 years old on arrival and 19 at the date of decision. They are now aged 27, 24 and 23 respectively. Each of them benefited from the decision in *Ahmad and others*. We are told that they are obtaining advice on applying to become British citizens.

288. Their three siblings were joined as dependents of their father's unsuccessful claim and were not, therefore, granted leave to remain. Had Nusrat Bi been joined to her mother's claim, she, too, would have been granted leave to remain. She was born on 2 January 1987 and was 13 years old at the date of entry. She is, in fact, the second oldest of Ghulam Rabani's six children. She was 21 at the date of decision and is now aged 26.

289. The remaining two children Mohammed Rustam and Zahra Bi were aged 8 and 7 respectively on arrival in United Kingdom and 16 and 15 respectively at the date of decision. They are now aged 21 and 19.

290. Once again, there is a sharp contrast between those associated with their mother's successful, though unjustified, asylum claim and those associated with their father's unsuccessful claim. Mohammed Atif and Mobushara are working, as they are allowed to do, and help to support the family. Mobushara works as the Duty Manager in the Co-op hoping to progress to assistant manager. She also works for TK Maxx. It is apparent that Mobushara is a

competent and independent woman. She compares this with the situation that would have been the case were she to be in Pakistan.

291. Furah Begum, a beneficiary of *Ahmad and others*, suffers from a disability and has the assistance of a support worker. Her sister, Mobushara, describes how Furah can now dress and bath herself. Furah's family have taught her how to use the bus and to pay for things. Mobushara spoke of the support that was provided by the Children's Society.

292. All of the children continue to live with their parents in Oxford. Of the three children who are, accordingly, subject to removal decisions, Rustam was unable to continue with his college studies because as a student aged 21 without settled status, he was required to pay fees which the family could not afford. He obtained some GCSEs and wanted to study engineering. He has no permission to work. His recent statement seethes with anger and resentment. There was a statement produced by Alex Barratt of the Harbour Project on 28 June 2007 which spoke of Rustam's unsettled school life, expressed in inappropriate classroom behaviour and lack of concentration. His mother tells us that he plays football and cricket and goes out with his friends. Both Nusrut and Rustam are bored because they can neither work nor study.

293. Zahra, who works with children, goes to college for two or three days a week and works, as part of her course, for a further two days. She is studying child care NVQ level 3 at Oxford Cherwell Valley College in a 2-year course which would qualify her to teach in a primary school or as a nursery teacher. She has progressed well from the days when Alex Barratt was counselling her when her father was in prison.

294. In a statement he made in July 2007, [Bundle 2, Tab C, p.275 @ 279] Ghulam Rabani conceded the responsibility he felt for what has happened:

> "I would, however, add that it was myself who directed that my children had to go along with the pretence that we were single-parent families and about our journey to England. They would not question this and simply went along with it. Nevertheless all of this has caused a great deal of harm and distress to them. Some of them are understandably upset and indeed angry at what myself and my wife have done. At the time it was done without any explanation to them. They were simply expected to go along with what I was telling them. Whatever problems have been caused, I must take responsibility for that. But I have tried to stress upon them that I did it with their interest in mind and not for any other reason."

295. In the same statement he accepted that none of his children had been provided with the opportunity of any education before they arrived in the United Kingdom. Since then, doubtless with some pride, he speaks of them all having done '*remarkably well*'.

296. Rustam and Zahra claim the benefit of paragraph 277 ADE (iv) or (v).

**Rungzaib Mohamed and Jamila Kauser's family**

297. Rungzaib Mohamed and his wife Jamila Kauser and their six children arrived in the United Kingdom on 5 August 2000, some 13 years ago. Once again, three of the children were named as dependants on their father's claim and it was this claim that proved successful. The remaining three were placed as dependants on their mother's unsuccessful claim. The father's dependants were recognised, unjustifiably, as refugees and granted leave to remain whilst their mother's dependants were not.

298. The result has been that the eldest child, Kamran who was born on 3 October 1985 and was 15 at the date of entry and 23 at the date of decision was not entitled to benefit from the decision in *Ahmad and others* because he entered as a dependent of his mother's unsuccessful claim and did not have leave to remain. By contrast, his younger brother, Jehan Mohammed born on 3 January 1988, was the recipient of leave to remain on the basis of his father's claim.. Accordingly, he was one of the successful appellants in *Ahmad and others.* He was aged 12 on entry and 21 at the date of decision and is now aged 25. His younger sister, Ishrut Tonzeela Begum, born 12 January 1990, aged 10 on entry and 19 at the date of decision in May 2009 and now aged 23 was also a beneficiary of the decision in *Ahmad and others.*

299. Idris Mohammed was born on 10 February 1993, was aged 7 on entry but remained a minor (aged 16) at the date of decision. Although a dependant on his father's successful claim, the removal decision made against him in May 2009 was a lawful one since he was then under 18. Thus, although the subject of a grant of leave to remain, he did not benefit from the decision in *Ahmad and others.* Although his counsel sought to argue that he benefited from the operation of s. 10(1)(c), we have rejected that submission.

300. Mohammed Alam ("Alam") was born on 6 January 1992. He was aged 8 on arrival in the United Kingdom in August 2000; 17 at the date of decision. He is now 21.

301. His younger sister, Hina Bi, was born on the 20 May 1997 was aged 3 on arrival and remains a minor, aged 16. Neither she nor Alam have been granted leave to remain.

302. Rungzaib Mohamed describes how there is much in the United Kingdom that he would miss, were he required to leave. He describes it as peaceful:

> "There is no violence and you do not need to be afraid that someone will break into your house. There is good healthcare here, and the children's education is very good. In this country they value people, and the people here are good. I would miss that. In this country I can work hard and look after my children."

303. Doubtless that is a sentiment which is shared by all the other parents. The family speak a mixture of Punjabi, Urdu and English. Rungzaib regularly attends the mosque.

304. Kamran, Rungzaib Mohamed and Jamila's eldest child, attended Oxford Community School between 2000 and 2005 obtaining GCSEs in English, Maths, Double Science and Urdu. He continued his education at Blackbird Leys College but was unable to continue because, without settled status, he was required to pay fees that the family could not afford. Like some others, he is not permitted to study or work as he has no immigration status. He plays cricket and has attended a course on cricket coaching.

305. His younger brother and sister, Jehan and Ishrut, both work. Both support the family financially. Jehan is a driver for Royal Cars as well as working in the company's office, and is an accredited driver on school runs. According to a statement Ishrut made on 7 May 2013 [Bundle 3, Tab A, p.16] she continues to work for TK Maxx part-time. In paragraph 10 [p.18] she said:

> "I know that I have won my appeal. I want to stay in the UK as this is my home, and where I see my future. I do not want to go to Pakistan. I hear that women are not given much freedom there, and that they are treated badly. I also cannot think what it would be like for some of our family to have to go back to Pakistan when others are allowed to stay in the UK. That would be horrid. We are a family."

306. Pausing here, it was submitted that we should infer from this passage that Ishrut would return to Pakistan were other members of her family to be removed. However, Ishrut did not give evidence and the stance adopted by her, set out above, is equivocal. In any event, Ishrut could not have been aware of the outcome of these appeals and, in particular, the position adopted by the Secretary of State in the course of the hearing in relation to Alam. As she is not subject to removal and may well be granted leave to remain or, indeed, British Citizenship, we are not prepared to speculate on what she or her brother, Jehan, will do. Jehan is in a similar position to Ishrut, having benefited from the decision in *Ahmad and others* and standing in line to receive settled status.

307. Idris studied at Oxford Spires Academy until 2010 sitting GCSEs in six subjects and a BTEC in Business Level II. Since finishing school, he has had a variety of temporary jobs for Domino's pizzas and Chicken Hut. He had hoped to study carpentry at college and then complete an apprenticeship but was unable to afford the fees.

308. Idris, Alam and Hina claim the benefit of paragraph 277 ADE (iv) or (v).

309. Alam is currently seriously ill. In a report dated 26 November 2009, Dr Andrew Clark of the Greater Manchester West NHS Foundation Trust provided an opinion about Alam who was then detained under ss.48 and 49 of the Mental Health Act 1983. These provisions permit a person who has been remanded in custody or detained under the Immigration Act 1971 and who is suffering from a mental disorder requiring his detention in a hospital for urgent medical treatment, to be transferred to hospital and made the subject of a restriction direction preventing him from leaving. He was at that time detained in a

medium secure forensic adolescent mental health unit, having been remanded in custody on charges of criminal damage, assault, robbery and wounding. He was treated with anti-psychotic medication but did not accept he was suffering from any mental disorder or that he should be in hospital or receiving medication. He was initially admitted on 8 September 2009 in an aggressive paranoid state accusing others of reading his mind. He was showing hostility towards staff. His original condition was sufficiently serious to require the first 10 days of his admission in isolation. He was then 17 years old. He has remained in a secure hospital accommodation for the last four years.

310. Doctor Clark considered that Alam presented as suffering from an emerging psychotic illness. The natural outcome of any psychotic episode was difficult to predict, suggesting that in the majority of cases it presages an enduring or relapsing and remitting illness such as schizophrenia. He was fit to plead. There is a further, and much lengthier, report of 19 March 2010 at which time Alam was awaiting sentence at Oxford Crown Court on 26 March 2010. He was then an inpatient at an adolescent forensic inpatient unit in Southampton. In his report, Dr Oliver White spoke of Alam suffering from paranoia, delusions and auditory hallucinations which, whilst improved, were replaced by various negative symptoms including poor insight into his illness and its treatment.

311. His psychotic illness appears to have been precipitated by extensive cannabis smoking as well as the use of cocaine but his illness could not be attributed solely to drug-induced psychosis. He met the criteria for a diagnosis of paranoid schizophrenia from which he was apparently suffering at the time of the index offences. It was then difficult to predict the outcome. 20% of patients fully recover. A further 40% will regain full functionality although experiencing episodes of relapse in future. The remaining 40% will not attain full recovery and have long-term, ongoing symptoms. There were positive prognostic factors in Alam's case but these were overshadowed by a number of negative prognostic factors including the fact that he is male, was of a very young age at the onset of his illness, had only partially responded to medication and had developed negative symptoms relating to his poor insight into both illness and treatment. A s. 41 restriction order was recommended.

312. More recently, Dr Suzanne Coghlan prepared a report on 27 March 2013 in which she concluded Alam had an established diagnosis of paranoid schizophrenia. Dr Coghlan is a specialist registrar in forensic psychiatry. Although, by then, some 3½ years had elapsed since the August 2009 offences, he was still detained but making good progress. She was concerned about a potential adverse effect upon his mental health if returned to Pakistan. Having reviewed the medical evidence, it was her view that Alam required ongoing treatment and rehabilitation both as an inpatient and as an outpatient. The prognosis envisaged many months of escorted leave (permission for which was then being sought) which, if successful, would progress to conditions of low security. Were he to be discharged, a suitable placement in the community would need to be identified, requiring intensive input from a community

forensic mental health team. Ongoing antipsychotic medication, random drug testing and the imposition of conditions for his release would be required. She considered that there were numerous negative prognostic factors, one of which appears to be his reluctance to take psychotropic medication voluntarily.

313. In a report dated 11 April 2013, Kate Helsby, a Senior Social Worker at Littlemore Mental Health Centre provided information about Alam. He had been able to make some escorted visits to the family home. Although his family would like to live with them, Alam remains ambivalent about this and, we suspect, particularly in view of his mother's conduct. The next step would be a move to Lambourn House, Littlemore, an open pre-discharge unit where patients become more independent in preparation for leaving hospital. A discharge back to his family would require an application to a Mental Health Tribunal or the Ministry of Justice, probably on the basis of a conditional discharge with conditions of residence and treatment. Members of the forensic community mental health team would be involved including weekly visits from a social worker and outpatient appointments with reporting to the Ministry of Justice. Alam has most contact with Ishrut and Jehan whom we know both have leave to remain. She stated:

> "In this complex situation that Mr Mohammed finds himself in, his older siblings have become his main family support and link between him and his parents. If separated from any of his siblings, particularly the older ones, in my view, Mr Mohammed would struggle emotionally… He needs to remain in hospital for a longer period to ensure that his mental health stabilises and he can be tested in the community without escorts. Once discharged, he will be closely supervised and monitored to manage any risk he might present and with the aim of supporting him to remain mentally well. Without this support and without adequate treatment, in my view, Mr Mohammed would be at risk of relapse and possible further offending and would then require further treatment in hospital…To remain here would give him the best chance of good mental health and opportunities for the future."

314. In a further report dated 29 April 2013, Kate Helsby, the Senior Social Worker involved in Alam's care also provided information about Jamila. Ms Helsby first met Jamila in December 2009. At the meeting she presented herself as very distressed, refusing to accept that her son had a mental disorder or that he had committed any offences. It was not possible to '*move her on*' from this. On the second meeting, following Alam's admission to the Oxford Clinic, she behaved in much the same way. Her visits to Alam have been very emotional. Having reviewed the earlier medical evidence in relation to her, it appears that her present mental state was precipitated by Alam's admission to hospital. She refused to take medication. Her son, Kamran, explained that she was reluctant to attend medical appointments and was subject to patterns of bizarre behaviour, tearing up documents and shouting. This behaviour occurs both inside and outside the house.

315. In the course of 2012, concern for her mental health increased. Her behaviour included making inappropriate efforts to see her son, Alam, in hospital and, when refused, becoming agitated and distressed to the extent that consideration was given to calling the police. The family were – and remain - reluctant to involve mental health professionals in making any assessment under the Mental Health Act fearing that she might be involuntarily admitted to hospital. Attempts to liaise with Kamran proved unsuccessful. Ms Helsby concluded:

> "In summary, it seems likely that Jamila Kauser is suffering from some sort of mental disorder but it is not possible to fully assess her. There is evidence of emotional distress and some disturbed thinking but insufficient evidence to suggest a formal mental illness."

**Mehmood Ahmed and Fazal Jan's family**

316. The single most significant factor about Mehmood Ahmed and Fazal Jan's family is that, alone amongst the other children involved in these appeals, their son H was born in the United Kingdom at a time when his father had succeeded in obtaining recognition as a refugee and, on the strength of this, obtained settled status. He was born in the United Kingdom on 24 April 2004 and has remained here ever since. He is now aged 9½. Accordingly, H became, by the operation of s. 1(1)(b) of the British Nationality Act 1981, a British citizen. On the strength of this, and applying *Zambrano* principles, the entire family, including the parents, assert that their removal is unlawful because its effect would be to deprive H of the benefits of his British nationality.

317. This factor apart, Mehmood Ahmed and Fazal Jan's family exhibit some of the same divisions that we have seen elsewhere. None of the children, however, were capable of benefitting from the decision in *Ahmad and others* because all of their children were minors at the date of decision in April 2009. It was Mehmood Ahmed's asylum claim that was successful, whilst Fazal Jan's was not. Hence, Wasim Mohammed, being a dependant on her claim, failed to obtain leave to remain. In contrast, Arfan as a dependant to his father's successful, though unjustified, claim was not. This is the paradigm example: Wasim and Arfan are twins. Both were born on 12 April 1993 and are now aged 20. It was the appellants' case that, because Arfan had been granted leave to remain, he was entitled to benefit from their submissions as to the effect of s. 10(1)(c). It was never suggested that Wasim could similarly benefit. For the reasons we have given, we do not consider that such a distinction is permissible, far less that it would be desirable.

318. Mehmood Ahmed and Fazal Jan have 5 children. Between the twins and H are Atteqa Safdar and Adeel Ahmed, both minors. It is said that Atteqa Safdar was adopted by Fazal Jan's brother, Safdar, who brought her into the United Kingdom in 2000 as a dependent to her uncle's claim. She was granted indefinite leave to remain in or about 2001 in line with the claim of her uncle which grant was invalidated by service of a removal direction on 29 April 2009.

Atteqa Safdar was aged 4 on entry into the United Kingdom and was 12 at the date of the decision in April 2009. She is now aged 17.

319. Her younger brother, Adeel Ahmed, was born on 25 June 1997. It is also said that he was adopted but, in his case, by Mohammed Zafar. He too was granted leave to remain (ELR) until 30 January 2005 as his dependant. He has no continuing leave. He was aged 3 on entry and was aged 11 at the date of decision to remove him on 29 April 2009. He is now aged 16.

320. All of the children of Mehmood Ahmed and Fazal Jan rely upon paragraph 276ADE, save for H who, as a British/European Union citizen, relies upon his nationality to prevent removal.

321. Arfan was not able to benefit from the decision in *Ahmad and others*. He was not entitled to funding as a settled migrant and was not, therefore, entitled to continue his education at Oxford Brookes University. His father considers this to be unfair. Arfan completed his A-levels in 2012 very successfully, obtaining two 'A' grades for Business Studies and a 'C' grade for Information Technology. His immigration status prevented him from obtaining funding and, unsurprisingly, he is frustrated.

322. Atteqa has both hearing and learning difficulties. She has finished her schooling and has not gone on to further education. Her brother describes her as being behind in her development compared to other children of her age.

323. Adeel is studying for his GCSEs. According to his statement, he plans to go into the sixth form and study either business or economics and then to go on to college. He would like to be involved in cars or motor engineering and understands that apprenticeships are available in this area.

324. None in the family is permitted to work and, apart from occasional casual work carried out by Mehmood Ahmed, the family are dependent on benefits.

325. Wasim has been most affected. After finishing school he chose a very occasional course in carpentry at Kidlington Ace College in Oxford. He completed the first half of the two-year course in the summer of 2012 but gave it up suffering from depression. He went to his GP who prescribed medication. He continues in the hope that he can commence a different course, this time in plumbing.

**The evidence of the professional witnesses**

326. None of the appellants gave oral evidence. The oral evidence was provided only by professional witnesses.

***Diane Jackson's evidence***

327. Diane Jackson, an independent social worker, provided a report dated 8 May 2013, [Bundle 6, Tab D, p. 56]. She conducted interviews with members of each of the four families. The interviews were not designed to be an in-depth

interview with each individual. Rather they were interviews with the whole families, albeit some of the discussion took place without all members being present. She was attempting to understand the effects on family members and family life of the differential restrictions arising from the differing immigration status of the individuals concerned. She was also concerned about the children's integration into the community. She focused upon the children, both minor and adult.

*Rungzaib Mohamed and Jamila Kauser's family*

328. Diane Jackson described the bizarre behaviour of Jamila Kauser in her report. At paragraph 4.15, she described how the interview was disrupted by her behaviour and Jamila's repeated actions in pushing small pieces of paper at her with her son's name, Alam, written on them and declaring that he was a good son. She kept repeating things over and over again. The family obviously found her behaviour embarrassing and distressing but, as Kamran said, "*We have to live with it.*" He also told Diane Jackson of his mother's fixation on Alam coming home. Although Jamila keeps house, she no longer prepares food for guests, apparently because she blames everyone for Alam's absence. Although the family had tried to encourage Jamila to see a doctor, she had refused to visit her general practitioner and when a psychiatrist and social worker visited with a view to her formal admission to a psychiatric hospital, she refused to communicate with them. All members of the family appear to think that she would become well once again were Alam to return home.

329. According to Diane Jackson, all of the family go to visit Alam in hospital. Rungzaib Mohamed visited his son some three months before her report of May 2013 but he speaks to him on the telephone and was pleased that Alam had had two escorted visits home. It is Kamran who takes responsibility for attending the regular meetings at the hospital regarding Alam's progress. Ms Jackson said:

> 4.22 [68] "I formed the opinion that the family did not have a clear understanding of mental illness and live in hope that Alam and his mother would simply recover if he were released."

330. It is apparent that Diane Jackson says nothing to associate herself with that opinion. In her oral evidence she described this as "*hope over experience*".

331. Jamila was outside the house of Ghulam Rabani and Noreen Bi during the course of Diane Jackson's interview with them. She was talking loudly and Mobushara advised Ms Jackson that it was the better course to ignore her. At one stage Jamila pushed the end of a garden hose (unattached to a water supply) through the front window but, having been ignored, left the premises. Ms Huyg spoke of Jamila "*ranting at her in her own language*".

*Ghulam Rabani and Noreen Bi's family*

332. According to Diane Jackson's report, Nusrut was allowed to stay at school until she was 20 years old, having commenced her English education at the age of 13 with no previous education and no English. She described how she had lost confidence as she cannot drive or work or plan for her future.

*Qadir Ahmed and Nasreen Bi's family*

333. Salma was described by the head of House in a letter dated 28 May 2012 as "*one of the most mature, intelligent and hard-working students we have in year 9"*

334. Sulva was described to Diane Jackson by Johanna Huyg of the Children's Society as capable but anxious.

*Mehmood Ahmed and Fazal Jan*

335. It is quite obviously impossible to summarise a 44-page report in a few sentences. However, if there is a single recurring theme, it is the fact that both parents and children want, above all, to remain in the United Kingdom where the children, in particular, feel at home and want the uncertainty of their present situation to be resolved in favour of their remaining. Inevitably, they wish to be able to move on but it is also clear that they only wish to do so by remaining in the United Kingdom without the limitations that are placed upon them restricting their ability to work or to study or to pursue further training or to be able to drive. Although the parents were prepared to admit the mistakes they had made, it is a consistent thread that the children were not responsible for their parents' mistakes and that because it has been so long since their arrival, they should be allowed to remain and the restrictions that exist upon them developing their lives should be removed.

*Generally*

336. Although Diane Jackson is not a country expert, she described how the children have lived as "English children" for most if not all their childhood and adolescence and that the identities that they have fashioned are strong ones and the relocation would be to a very different and more restrictive society in Pakistan. As a result, she considered this would cause confusion, and no doubt, loss of confidence and likely depression. It was her view that the children, collectively, were intelligent, articulate, talented and delightful. She considered that their removal from the United Kingdom would result in their suffering bereavement by their departure from what is obviously a familiar environment.

337. In the oral evidence, Diane Jackson spoke of the elder children thinking of themselves as first generation British Asians. They respect their parents and their values but are moving on and, in doing so, taking their parents with them. The younger ones have been educated totally in the United Kingdom. They

present as British children, speak with a local accent and engage normally with other people in the area. She considered that the children would suffer a loss of identity were they to be returned to Pakistan. They would lose that which is familiar to them and be required to acclimatise themselves to a culture that is relatively alien to them. Their hopes and plans would be unfulfilled and they would suffer a kind of bereavement. They would experience anger both with themselves and their parents or other family members for what has happened to them. She described how she thought they would be better and that there was "*no future*" for them. It would seem so unfair to them. Indeed she went to far so far as to say that she did not think they could "*re-forge*" their identity because their identity is built on a society that they know. Children, she said, had a very strong sense of fairness: as suggested in the phrase so often used by children: "*It is not fair*".

338. This would be particularly difficult for anybody suffering from mental health problems. In the case of Wasim, removal could only exacerbate his mental health problems and his depression, if it existed, could only get worse. She considered that some of his depression related to what he was schooled to lie about. Indeed, she went so far as to say that she thought it could cause him to have some suicidal intention. We note however, there was no medical report expressing a view as to suicidal ideation. When cross-examined on this, Diane Jackson said she thought she had read it somewhere. She did not ask Wasim and he did not volunteer the information. It was not an in-depth interview.

339. In general terms she thought that the family units were operating and that they were very strong families working out a way in which they could survive. Those children who worked did so and those who could not work (which she described as the result of the vagaries resulting from rights to stay arising from their original claims) helped out with money. She described how everyone was pulling together and that the children had the ability to attend further education but were not able to do so. She was filled with praise for the benefits the children have received from the agencies, particularly the Children's Society. She spoke of the impact of the differential positions of the various children involved of how those children who are able to work and earn money have found their confidence had increased whilst those who could not do so feel they cannot pull their weight. Those who are unable to work appear fed up, occasionally depressed and not able to adapt so much. They are, however, grateful for the help offered by their siblings but would find it difficult to adapt if some of their siblings were not to return. Whilst those remaining would be pleased that they could stay, the impact would be serious. It would result in leading much more separate lives.

***Johanna Huyg's evidence***

340. In her statement [Bundle 6 Tab D p.45], Ms Huyg describes how she has been working in a supportive role with young people since 1999 and in January 2009 started working for the Children's Society as a project worker based at Oxford

Spires Academy. In another statement [Bundle 1, Tab G, p. 19], she describes how the service at Oxford Spires Academy provides drop-in access enabling her to see young people on a daily basis and to get to know them well. She acts as an advocate for young people, a job built around creating strong trusting relationships. She sees young people in a range of different settings including during lessons, on a personal basis in drop-in sessions and during school activities trips and meetings.

341. She told us that she has had specific responsibilities in relation to Sulva and Salma Bi of Qadir Ahmed and Nasreen Bi's family; Zahra Bi of Ghulam Rabani and Noreen Bi's family; Wasim Mohammed of Mehmood Ahmed and Fazal Jan's family and Arfan of Mehmood Ahmed and Fazal Jan's family. She gave her view that removing them from home surroundings – friends, roots, their identity based around Oxford - would be highly detrimental.

342. She gave evidence [Bundle 4, Tab, F p.4] in relation to Arfan. She commenced work with him in September 2010 and simply supported Arfan in his progression from school to university. He was unable to progress this because he no longer had leave to remain. She described how Arfan had worked hard at school and thought that he would be eligible for the same support as any other young person. It was hard for him to find out that his progress was halted indefinitely and that his future potential is held in a state of limbo. She had seen how his friends had moved on and how much they had gained and changed through accessing higher education. He has real academic potential and it would be detrimental to him that this should be stunted. She told Ms Cronin that it was difficult when he was told that there was no financial support available. He had planned to remain in the United Kingdom and none of this could be achieved if he were removed.

343. In relation to Bundle 4, Tab G p.12-14, Ms Huyg, speaking of Wasim, described how Wasim had always been open with her about how he suffers from depression. He told her he had been getting support for this but it was not something she had addressed with him. His low mood, he told her, was associated with the on-going appeal. She described how he had struggled academically with school work and found it hard to concentrate. Since leaving school he had attended a carpentry course but did not progress in it. In her view, removing Wasim from his current community and support networks could be detrimental. He needed a clear and settled future. He needed to have the rights and the security to move on from the restrictions and uncertainty that have affected him so much. She told Ms Cronin how difficult it was when Wasim became depressed, with feelings that he could not look forward. His lack of motivation could be compared with his brother Arfan who had moved forward whereas Wasim had not. She described how she supposed that he had had such limited experiences for such a long time, not knowing how he could progress. The comparison between his situation and those around him with different prospects was hard.

344. In relation to Bundle 2 Tab I p.43 and her report on Zahra Bi, Ms Huyg first came into contact with Zahra when she started work at Oxford Spires Academy. She supported her with her coursework. She spoke of Zahra requiring the engagement of the Children's Society therapy service and had observed that Zahra suffered from low motivation and low energy levels.

345. In answer to questions asked by Mr Toal, she described how Zahra lacked motivation. She was not able to say to what her lack of sleep was attributable. She described how she was affected by uncertainty and that she would see her future in the United Kingdom studying at college, where she currently is. She was unable to imagine her not being in the United Kingdom. Her friends would be worse off were she to be in Pakistan. Ms Huyg sees her in the Cowley Road with her friends. It is not within their comprehension that a person would have to go to a country they have not known for 10 years.

346. In relation to her report of 28 May 2012 [Bundle 1 Tab G p.19] relating to Sulva and Salma, Ms Huyg said she had provided Sulva with intensive support when she joined the sixth-form, coming into office on a daily basis and often staying for long periods chatting and doing her coursework. She struggled with the more academic aspects of learning but Ms Huyg described Sulva as determined and working hard. She suffered from the uncertainty of not knowing what would happen to her family. Some days she would be very low for long periods of time and Ms Huyg contrasted this with those occasions when she was normally so bubbly. Sulva finds it upsetting when others talk about their future opportunities. She has a strong friendship group which means a lot to her. They support each other and are as close as sisters. Ms Huyg spoke warmly of seeing them growing up together. When Sulva was down, the whole group became upset. It is clear that Ms Huyg is very attached to Sulva. In answer to questions from Mr Jones, Ms Huyg spoke about Sulva being hard to support when her mood is low:

> "You want to say it will get better. But you do not know."

347. When speaking of the effect of removal, Ms Huyg thought that it would "*blow her life apart*". She described how she has learning difficulties but is very good at speaking to people who find learning hard. This is what she has always wanted to do. However, even when volunteering, she was worried that she would not be allowed to do it. Then she was worried about how her mother would react. It was a good moment when she received approval. To remove her would be like starting again. She would not be where she is without the support services from teachers, therapists and the Children's Society. She considered her to be a very vulnerable person. It was Ms Huyg's wish that she goes into teaching which would, in doing so, remove her from some of the difficulties associated with her present environment.

348. Ms Huyg has also worked with Salma over the preceding two years. Salma works hard.

349. Ms Huyg told us that Salma and Sulva were very close to each other and "wonderful as sisters" although voicing some concern that they should be so solely reliant upon each other.

350. She also spoke of the role played by Tousif who has assumed responsibility for the family. She described how everyone relies upon him. He works. He has a car. His sisters are reliant upon him for their independence. She described how she and her colleagues explained things to him. As he drives a car, he is able to provide transportation. She contemplated the prospect of one outcome being the removal of the family leaving Tousif behind. Since members of the family have had to look after each other because of their particular circumstances, any one person being separated from the others would be detrimental to them all.

351. Tousif had been to see Chloe Purcell [Bundle1, Tab F p36] for help on practical issues. She described how he holds an 'elevated position' as a breadwinner and car-driver whom Ms Purcell often sees delivering and collecting the children to and from school. He is much more of a carer and elder brother than Toukeer.

352. Ms Huyg's view was that the rest of the family "*needed to finally be able to look forward to the future and have the certainty of knowing what will happen next*". For those children this was a country they know and have settled in and Oxford Spires School had provided them with an opportunity for learning and a "*home from home*".

***Chloe Purcell's evidence***

353. Chloe Purcell in confirming the contents of her statement [Bundle 6, Tab D, p.40] said she had worked with Sulva [Bundle 1, Tab G p.77], Tousif Ahmed [Bundle 1 Tab F pp.35-36] and Nusrut Bi [Bundle 7, p.19] although she has also had contact with a number of the other children through her role as a project worker based at Oxford Community School and in activities arranged by the Children's Society. The thrust of her evidence in relation to Sulva has already been summarised, through the evidence of the other professionals. Sulva shies away from talking about a return to Pakistan. She is not able to progress her future plans and focuses instead on the positive elements of her life, her friends and the societies she is involved with and the voluntary work she does at the local primary school. Sulva has clearly benefitted from the services that have been made available to her.

354. In answer to questions from Mr Toal, Chloe Purcell spoke of Nusrut who appears to her '*quite together*': '*This is the way life is. Not much I can do about it.*' She also spoke of her frustration and how she seemed to put a lot of time into keeping fit as a means of remaining positive in outlook. Undoubtedly, she said, Nusrut sees her future in the United Kingdom.

355. Like the other professionals concerned, she sees see the prospect of separation as devastating.

***Sue Conlan's evidence***

356. Sue Conlan [Bundle 6, Tab C, p. 1, Tab D p.100, Bundle 7] is presently the Chief Executive Officer of the Irish Refugee Council (IRC) in Dublin, a position she has held since January 2010. At that time she ceased to work for Tyndallwoods, Solicitors. She first met the children within a few days of their parents' arrest in 2004 and has had long experience as their legal representative. She has continued to maintain contact with them as a friend and has visited all four families in their Oxford homes on two or three occasions, the last being 7 August 2013 and 19 August 2013. She recalls, in particular, the '*terrible position*' in which the children found themselves after their parents had been arrested. She also speaks of the sharp contrasts, epitomised in the situation of the twins Arfan and Wasim: the one, confident and capable; the other, withdrawn and unable to participate. In her recent visit, she commented upon the deterioration in the condition of Jamila whom she had last seen some two years before. She was agitated and verbally abusive, dominating the visit. It is obvious that this deeply affected the other members of the family, particularly Kamran who '*bears much of the brunt of her condition although all of them suffer to some extent*'.

357. She concludes:

> Despite the length of time that I have specialised in immigration and asylum work (over 26 years), I cannot recall a case having such widespread impact on children. In my opinion this extended uncertainty has been like an extended punishment for the families including the children. The removal of these families now would be simply terrible for each and all of the family members. I know this from my long and close association and now friendship with them.

358. Atteqa had been granted indefinite leave to remain as the child of Zafir who became British citizens in 2004. However, as she is the child of Mehmood Ahmed and Fazal Jan, the grant of indefinite leave to remain was invalidated by the service of removal directions on 29 April 2009. She considers the impact of this would be '*exceptionally harsh*' upon Atteqa. In contrast, Adeel returned to the family at an earlier stage. She was granted exceptional leave to remain to 30 January 2005 but she, like Atteqa, is now subject to a removal notice of 29 April 2009.

359. Ms Conlan, in relation to the family of Rungzaib Mohamed and Jamila Kauser, spoke of Hina Bi being visibly upset by her mother's behaviour, '*It is dominating the whole family.*' However, given the length of time that Alam has been detained (since 2009) they are worried about the effect on the family were Jamila to be hospitalised.

360. She spoke of the differences between those with immigration status and those without it. Those without it are glad for those who have obtained it. Those with it are happy for themselves but sad for those without it. She considered it remarkable that there was no rancour.

***Kate Helsby's evidence***

361. Kate Helsby has been a social worker in mental health for 25 years or more. She currently works as part of the forensic team at Littlemore. Speaking in relation to the family of Rungzaib Mohamed and Jamila Kauser, she stated that she first saw Alam in 2009. Although she described the length of time that he has been detained under the Mental Health Act, she also spoke of his positive decision not to appeal his continued hospitalisation because it indicated his willingness to engage with treatment. Although he required less supervision than before, at the time she wrote her report the level of supervision remained high. There was an agreed plan in place: weekly visits to the mosque; family visits; trips to the gym and swimming pool with the aim of re-integrating him into the community. There were regular psychotherapy and substance-abuse sessions, alongside daily oral medication.

362. The next stage was for him to move to the pre-discharge unit within the hospital grounds where patients are free to come and go at will. A referral was to be made at the end of 2013 with a view to his moving in the Spring of 2014. Thereafter, there would be a period of 6 to 12 months spent in the unit at which point those treating him would start looking for accommodation in the community. If the clinical team consider that he should be discharged, this advice is given to the Ministry of Justice which makes the decision outside the Tribunal system. There remain some issues about his behaviour: he can be impulsive. Discharge into the community would be under the terms of a 'conditional discharge' and subject to Ministry of Justice restrictions, such as conditions affecting residence, treatment, attending regular sessions with his supervisor and restricting the use of drugs and alcohol. Kate Helsby's team would also provide close supervision, alongside the clinician, each reporting back to the Ministry of Justice.

363. There were features of Alam's case which were negative including a period without medication which resulted in a severe and immediate relapse. On the positive side, however, is the fact that he has responded to treatment. He requires stable accommodation and support, structured activities, on-going psychological help and engagement with the on-going work relating to substance abuse.

364. She spoke of the difficulties he would face if removed from the United Kingdom at a number of levels. Major changes in family life significantly affect those suffering from schizophrenia. It was important to have stability. On-going support was most important – constantly reinforcing the requirement to take the medication and monitor its use and avoid substance abuse. Having got to know the family dynamics, Ms Helsby said that he relates to Jehan and Ishrut best (the two siblings who have leave to remain in the United Kingdom) as they are most active in '*keeping things together*'. Kamran, who is the eldest but unable to work, had '*great responsibilities*' and '*it would be a lot for him to manage*'.

365. When speaking of Jamila, Ms Helsby said that Jamila was unable to accept Alam is unwell and there was no useful conversation in her presence. A similar meeting had been arranged in 2010 which the interpreter had ended, obviously for much the same reasons. The family are keen to deal with her at home. Ms Helsby told us that the team would *not* support Alam living at home. He needed independence from the home:

> "I suspect he finds it very difficult to cope with his mother's position."

366. Having said that, he remains very attached to his mother. He is concerned and worried. He feels he has let the family down.

367. She described how motivated he was to engage in activities but also how there is a strong possibility of relapse. The team can identify the warning signs but a relapse happens very quickly. Close supervision is able to pick up the warnings at an early stage.

**Paragraph 276ADE**

368. Paragraph 276ADE provides:

> 276ADE. The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
>
> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
>
> (vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

369. The grounds to which paragraph 276ADE (i) refers are:

> S-LTR.1.1. The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2 to 1.7 apply.
>
> S-LTR.1.2. The applicant is at the date of application the subject of a deportation order.

> S-LTR.1.3. The presence of the applicant in the UK is not conducive to the public good because they have been convicted of an offence for which they have been sentenced to imprisonment for at least 4 years.
>
> S-LTR.1.4. The presence of the applicant in the UK is not conducive to the public good because they have been convicted of an offence for which they have been sentenced to imprisonment for less than 4 years but at least 12 months.
>
> S-LTR.1.5. The presence of the applicant in the UK is not conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law.
>
> S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK…

370. These provisions were introduced into the Immigration Rules on 9 July 2012.

371. The appellants contend that there are four children who qualify with reference to paragraph 276ADE (iv), i.e. being under 18 and having lived in the UK continuously for at least 7 years:

Qadir Ahmed family:
 Salma Bi (10 December 1998, aged 15)

Rungzaib Mohamed family:
 Hina Bi, (aged 17)

Mehmood Ahmed family:
 (i) Atteqa Safdar, (aged 18)
 (ii) Adeel Ahmed, (aged 17)

372. In addition, the appellants contend there are a further seven children who have now become adults and who qualify with reference to paragraph 276ADE (v) i.e. being over 18, under 25 and having spent at least half of their lives living continuously in the UK:

Qadir Ahmed family:
 Sulva Bi (aged 7 on entry, now 20)

Rungzaib Mohamed family,
 (i) Idris Mohammed, (aged 7 on entry, now 21)
 (ii) Mohammed Alam, (aged 8 on entry, now 22)

Ghulam Rabani family:
 (i) Mohammed Rustam Rabani, (aged 8 on entry, now 22)
 (ii) Zahra Bi, (aged 7 on entry, now 20)

Mehmood Ahmed family:

(i) Wasim Mohamed, (aged 8 on entry, now 21 )

(ii) Arfan Mohamed, Wasim's twin, (aged 8 on entry, now 21)

373. Our consideration of paragraph 276ADE falls into two distinct parts:

(i) Does paragraph 276ADE have any application in relation to decisions made before its introduction?

(ii) If it does apply, what is its effect?

374. Both of these questions must be considered in light of the decision in *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192 given on 8 October 2013, after the hearing of these appeals was concluded.

375. The first issue that requires consideration as a preliminary point arises from the decision of the Upper Tribunal in *MF (Article 8 – new rules)* Nigeria [2012] UKUT 00393(IAC) in which the Tribunal dealt with the application of the new rules in relation to decisions made before they were introduced:

> Retrospectivity
>
> 58. Mr Ahluwalia urged us to find that the provisions of the new rules relating to deportation, A362 in particular, are inapplicable to the appellant's appeal because (i) the deportation order was signed almost two years ago, before any plans were made for the introduction of the new rules; (ii) a fortiori the reasons for refusal letter makes no reference to the new criteria; (iii) there has been no new reasons for refusal letter by the respondent; (iv) "it seems particularly unfair that A is subjected to the new rules given that his appeal was heard 18 months ago on 24.1.2011" and that, had the FtT not erred in law, then his appeal would have been dealt with under the old rules.
>
> 59. We do not find the arguments on this issue all one way. In *Odelola (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2009] UKHL 25 it was held that, unless specified to the contrary, changes in the immigration rules "take effect whenever they say they take effect." (Lord Brown paragraph 39, see also Lord Hope, paragraph 7); see also *R (on the application of Munir and Anor) v the Secretary of State for the Home Department* [2012] UKSC 32. Even though their Lordships in *Odelola* were not agreed as to whether the common law presumption against retrospectivity applied to the immigration rules, all agreed that the central issue was the fairness of retroactive changes, and that to decide fairness it is necessary to have regard to a range of factors, including the extent to which the value of the rights which the appellant had under the old law or rules is now diminished to any significant extent. If one applied these dicta in the abstract to the context of the new rules on deportation in relation to the appellant, it is difficult to see any significant diminution of the appellant's rights. At the time of the decision he was already subject to s.32(5) of the 2007 Act so that there was a statutory presumption that his continued presence was not conducive to the public good. Further, for reasons given already, we do not consider that the new rules can be exhaustive of the issue of whether the deportation order was contrary to a person's Article 8 rights. Judges have to decide that question by applying existing Strasbourg jurisprudence as

> interpreted by the higher courts. Under both the pre-9 July 2012 rules (which would have applied if no error of law being found) and the new rules, he was entitled to the protection afforded to him by s.6 of the Human Rights Act which we as judges must always accord.
>
> 60. However, whilst for reasons which will become clear the issue is not material to the outcome of this case, we think that the arguments against treating A362 as having retrospective effect carry more weight. In *Odelola* their Lordships were concerned with decisions of the Secretary of State made under the rules in force on or after that date. The case did not establish that new rules are capable of governing appeals heard after that date in respect of decisions taken before it. Since the new rules concern how the Secretary of State decides claims, it would need very clear words to show that A362 was intended to bind courts and tribunals hearing appeals against decisions that were made and appealed before A362 came into force. The wording of the new rule (which refers to "…when the notice of intention to deport or deportation order, as appropriate, was served") is not couched in language one would expect if its retrospective effect was as contended for by Mr Deller; it does not say, for example, "regardless of when the decision was made". We remind ourselves that when s. 85A of the 2002 Act was brought into force, the drafters decided that an elaborate transitional provision was needed, as regards the effect of that section on current appeals: see *Alam* [2012] EWCA Civ 960. If one of the purposes of A362 is to regulate appeals against decisions taken long before 9 July 2012, it is difficult to see that this is within the scope of the enabling power to make rules under s.3(2) of the Immigration Act 1971. Further, If Mr Deller were right then, if the FtT when hearing this appeal had not been found to have erred in law, its determination would have been (and could only have been) made under the old rules, yet solely because an error of law has been found, it would transmogrify into a case under the new rules. For these reasons we are not persuaded that the new rules apply to the decision under appeal in this case. However, in case we are wrong in that conclusion we shall proceed to address the situation of the appellant under the new rules.

376. When the Upper Tribunal's decision was considered by the Court of Appeal in *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192, the Court went through the Upper Tribunal's determination in sequence dealing with paragraph 56 in paragraph 24 of the Court of Appeal's judgment and paragraph 64 of the Upper Tribunal's determination in paragraph 26. The passage which we have set out above, paragraphs 58 to 60 entitled '*Retrospectivity*', was mentioned in passing in paragraph 25 of the judgment of the Court of Appeal:

> "Leaving aside a retrospectivity argument with which we are not concerned, it was conceded on behalf of the appellant before the UT that he could only succeed under the new rules if…"

377. It is difficult to know how to construe this passage. On the one hand, if the Court of Appeal was no longer concerned with a retrospectivity argument, this would suggest that the appellants failed to establish the Upper Tribunal was in error. It would have required specific findings to have reached such a conclusion. On the other hand, the mere fact that the Court of Appeal then went on to deal with the new rules suggests that they were in play which

would not have been the case had the Upper Tribunal's conclusion on retrospectivity been accepted.

378. In her skeleton argument, the Secretary of State contends:

> 185. The Appellants' solicitor wrote to the Secretary of State on 7 December 2012 asking that certain of the Appellants be granted ILR on the basis of paragraph 276ADE of the Rules. In light of the forthcoming appeals, the Secretary of State refused to consider those arguments.
>
> 186. The Appellants have revived them in their Skeleton Argument. They have not explained on what basis they are entitled to rely on these arguments in the present appeals: see, in this respect, the finding of the Tribunal in MF (Article 8 – new rules) Nigeria) [2012] UKUT 00393 (IAC), at paragraph 60, where it considered that the new Rules did not apply to a case decided under the older Rules, where an appeal to the FTT had taken place under the old Rules but a further appeal to the Upper Tribunal involving a rehearing of an Article 8 claim took place after the new Rules came into force on 9 July 2012. That is the situation in the present case. Thus, the Appellants' attempted reliance on the new Rules is flawed.

379. The appellants make no substantive response to that argument in the reply. Thus, it seems to us that the retrospectivity finding made by the Upper Tribunal has not been successfully challenged by the appellants in *MF (Nigeria) v SSHD* in the Court of Appeal and has not been challenged by anything advanced before us. In such circumstances we adopt the conclusions of the tribunal in *MF (Nigeria)* on this issue – a conclusion which in our view is unaffected by the recent decisions of the Court of Appeal in *Edgehill & Others v SSHD* [2014] EWCA Civ 402 and *Haleemudeen v SSHD* [2014] EWCA Civ 558. Furthermore, given the appellants' request of 7 December 2012 that some of their number be granted ILR on the basis of paragraph 276ADE and the Secretary of State's refusal to consider those arguments, we do not see how paragraph 276ADE is before us.

380. However, in a situation redolent of irony, we feel bound to deal with paragraph 276ADE in any event, just as the Upper Tribunal did in *MF (Article 8 – new rules)* and just as the Court of Appeal did in *MF (Nigeria) v SSHD.* We may be forgiven for wondering what is the point of our conclusion that paragraph 276ADE does not apply.

381. We thus proceed to deal with the application of paragraph 276ADE.

382. There is no doubt that the 11 children, both minor and adult, mentioned above meet the requirements of either sub-paragraphs (iv) or (v) of paragraph 276 ADE either as being under 18 years and having lived continuously in the UK for at least 7 years or as being 18 or over but under 25 years and having spent at least half of their lives in the UK. The minor children having also to establish that it would not be reasonable to expect them to leave (a requirement which is omitted from sub-paragraph (v) but which, in the circumstances of these appellants, does not materially strengthen or weaken their respective claims).

383. The issue is whether the overall circumstances fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM. The respondent contends that the presence of *the applicant* in the United Kingdom is not conducive to the public good because *their* conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow *them* to remain in the United Kingdom.

384. The juxtaposition of 'the applicant' in the singular and 'their conduct' and 'them' in the plural does *not* mean that the character conduct or associations refers to anyone other than the *applicant*. It appears to be an example of drafting that is gender-sensitive. All of the children are innocent of wrong-doing; hence their applications do not fall to be refused for *their* conduct or characters or associations. The Secretary of State relies upon the fact that, when the circumstances are assessed in the round, (which includes all of the factors weighing in favour of the children), it nevertheless remains the fact that their removal is conducive to the public good. Hence, it is said, paragraph 276ADE does not assist the appellants.

385. Whilst the ultimate decision on whether the removal of these 11 appellants would be conducive to the public good remains a matter of balance to which we will return later, we do not agree that paragraph 276ADE does not materially assist the appellants. Were paragraphs (iv) and (v) omitted from the Rules, the presence of children and young persons in the United Kingdom for substantial periods of their lives would not compel specific consideration to the fact by the Home Office or by judges. The express provisions within the Rules, not only acknowledging the time spent in the United Kingdom by children and young children as a material factor but, in addition, that *specific periods* of time (7 years or half a lifetime) have a *qualifying* significance increases the weight to be attached to this factor. Looked at from a different perspective, if these children had spent less than 7 years in the United Kingdom or less than half their lives, the Respondent would rightly rely on this as taking them outside the scope of paragraph 276ADE. Since, it is accepted that the affected children *do* stand to be considered as qualifying under sub-paragraphs 276ADE (iv) and (v), it cannot be said this does not assist them. It may not be determinative. There may be other reasons, notwithstanding the fact that they meet the qualifying conditions, that render it proportionate to remove them. Nevertheless, the fact that they qualify according to the Secretary of State's own precepts, is a weighty factor in their favour which cannot properly be marginalised.

**Article 8 and the new rules**

386. The significance of these new Immigration Rules must now be assessed by reference to the decision in the Court of Appeal in *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192.

387. In *MF (Nigeria) v SSHD*, the Court of Appeal (the Master of the Rolls, Davis and Gloster LLJ) considered in what circumstances the deportation of a foreign national criminal was contrary to Article 8 in the context of paragraphs 398, 399 and 399A of the new Immigration Rules introduced in 2012.

388. Under paragraph 398 entitled '*Deportation and Article 8*' where a person claims his deportation would violate his Article 8 rights and the Secretary of State considers his removal from the UK is conducive to the public good because of the seriousness of the offending or because the offending has caused serious harm or the individual is a persistent offender who has shown a particular disregard for the law, the Secretary of State will first consider whether paragraph 399 or 399A apply and, if they do not, it will only be in '*exceptional circumstances*' that the public interest in deportation will be outweighed by other factors. See Kabia (MF: para 398 - "exceptional circumstances") [2013] UKUT 569 at paragraph 17:

> In this context, ""exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a deportation would not be proportionate".

389. Whilst the Court of Appeal was dealing with a deportation case and not a s.10 removal appeal, it considered the decision in *R (Nagre) v SSHD* [2013] EWHC 720 (Admin), in which Sales J dealt with a case *not* involving the deportation of a foreign criminal. The Court of Appeal thought the difference between the two types of case was immaterial.

390. On 13 June 2012, the Home Office issued a statement entitled "*Immigration Rules on Family and Private Life: Grounds of Compatibility with Article 8 of the European Convention on Human Rights*". Paragraph 20 of the statement read:

> "The intention is that the Rules will state how the balance should be struck between the public interest and individual right, taking into account relevant case law, and thereby provide for a consistent and fair decision-making process. Therefore, if the Rules are proportionate, a decision taken in accordance with the Rules will, other than in exceptional cases, be compatible with A8."

391. The Upper Tribunal in *MF (Article 8 – new rules)* Nigeria [2012] UKUT 00393(IAC) had decided that what was required was a two stage process of first applying the Immigration Rules and, if the claimant failed under the Rules, then applying a proportionality test *outside* the Rules. This was the approach adopted in the arguments before us.

392. The Court of Appeal adopted a somewhat different approach: the new rules provide that where the Rules do not assist an applicant, "*it will only be in exceptional circumstances that the public interest in deportation* [or removal] *will be outweighed by other factors*". The central question was whether the use of the phrase "*exceptional circumstances*" meant that the weighing exercise contemplated by the new Rules was to be carried out compatibly with the Convention *inside* the Rules or, as the Upper Tribunal suggested, *outside* the

Rules. At paragraph 40 of *R (Nagre) v SSHD* [2013] EWHC 720 (Admin), Sales J said that in '*precarious cases*', it was '*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*'. This had been repeated and adopted by the ECtHR in near identical terms in many cases. We have alluded to this by reference to *Konstatinov v the Netherlands* (16351/03) [2007] ECHR 336 in which the Court said, in paragraph 48

> Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest…. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 39, ECHR 2006 ...)

393. The Court of Appeal said that this was not the application of a test of exceptionality but merely that, in approaching the question of whether removal is a proportionate interference with an individual's Article 8 rights, the scales are heavily weighted in favour of deportation or removal and something very compelling (which will be "*exceptional*") is required to outweigh the public interest in removal. In other words, it was no coincidence that the phrase "*exceptional circumstances*" was used in the new Rules. Whilst the word "*exceptional*" was often used to denote a departure from a general rule, in the case of a foreign prisoner to whom paras 399 and 399A did not apply, very compelling reasons would be required to outweigh the public interest in deportation. Those compelling reasons were, by their very nature, "*exceptional circumstances*". The Court of Appeal concluded in paragraph 44:

> We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. We accordingly respectfully do not agree with the UT that the decision-maker is not "mandated or directed" to take all the relevant Article 8 criteria into account….

394. Even were the Court of Appeal to be wrong, it would have been necessary to apply a proportionality test outside the new Rules as was done by the Upper Tribunal and the result should (and would) have been the same.

395. No doubt there are some difficulties in imposing an 'exceptional circumstances' exemption in removal cases. The reason is obvious, such an exemption is expressly to be found in deportation cases in the words of paragraph 398, '…*the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors*.' No such exemption is found in paragraph 276ADE.

396. However, the decision of the Court of Appeal in imposing such a test/exemption is clearly correct since the proper application of the Immigration Rules is not legally capable of producing results which violate an individual's human rights, at least so long as the Convention remains domesticated into United Kingdom law pursuant to s.1(2) of the human rights Act 1998. In any event, decision makers are to exercise their functions in accordance with those rights, see s.6 of the Act and paragraph 2 of the Immigration Rules which provides:

> Immigration Officers, Entry Clearance Officers and all staff of the Home Office Immigration and Nationality Directorate will carry out their duties … in compliance with the provisions of the Human Rights Act 1998.

397. Hence, there is no room for the Rules to be construed, or for them to be applied, in such a way that violates the Convention rights of an individual.

398. These principles have been developed further in the months that have followed the Court of Appeal's judgment in *MF (Nigeria)*. *Patel & Ors v SSHD* [2013] UKSC 72 (20 November 2013) speaks of the relationship between the Immigration Rules and Article 8 and of the continued relevance of Lord Bingham's words in *Huang* [2007] UKHL 11 that the focus must always be on the preservation of protected rights. In particular, Article 8 is not a general dispensing power but an applicant's failure to qualify under the Rules is the point at which to begin, not end, consideration of the claim under Article 8. The terms of the Rules are relevant to that consideration, but they are not determinative.

399. The Tribunal in *Nasim and others* [2014] UKUT 25 (IAC) reminded itself that Article 8 had limited impact upon a private and family life far removed from an individual's moral and physical integrity: a claim was not enhanced by the absence of offending or a non-reliance on public funds. Such matters clearly went beyond the protection of an individual's private life and appeared to engage no more than an unwarranted assessment of that individual's personal qualities. *Gulshan (Article 8 – new Rules – correct approach)* [2013] UKUT 00640 (Cranston J and Upper Tribunal Judge Taylor) considered the relationship as a two-stage process whereby, after applying the requirements of the Rules, it was only if there were arguably good grounds for granting leave to remain outside them was it necessary, applying *Nagre,* to go on to consider Article 8. This approach has been endorsed by *Shahzad (Art 8: legitimate aim)* [2014] UKUT 00085 (IAC) (Upper Tribunal Judges Storey and Pitt) in which the Tribunal pointed out that paragraph 398 of the Rules requires the application of a test of exceptional circumstances and other factors and therefore amounted to a complete code for the consideration of Article 8 as identified in *MF (Nigeria)*. It followed that any other rule which has a similar provision would constitute such a complete code. Where, however, the Rules provided no such express mechanism, the approach in *Nagre* and *Gulshan* applied, namely, after applying the requirements of the Rules, it was only if there may be arguably good grounds for granting leave to remain outside them was it necessary for Article 8

purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under them to merit the grant of leave.

400. In the context of this case, however, we are not considering a departure from the Rules at all but rather the application of them and, in particular, whether there are adequate reasons applicable in the separate appeals of these appellants that render their removal proportionate notwithstanding the fact that the affected children meet the qualifying conditions of paragraph 276ADE.

**The assessment of proportionality**

401. The appellants contend that the appeals should be allowed on the grounds that the decisions in respect of the child appellants breach their rights to respect for private life having regard to the following matters:

(i) the length of time that the 'child' appellants have been in the UK;

(ii) the significant proportion of their lives represented by that time spent in the UK;

(iii) the formation of their identities by their time in the UK. (As the First-tier Tribunal found; 'it is significant that many of the child appellants now consider themselves as British' (para. 64));

(iv) the innocence of the 'child' appellants in relation to the deceptions by which entry was obtained and leave to remain was sought or obtained and their status as victims of trafficking;

(v) the prolongation of their time residing in the UK by the Secretary of State's protracted failure to make lawful decisions to remove them and by the tribunal's delay in dealing with their appeals;

(vi) the differential treatment of the 'child' appellants that will result if they are not given leave to remain; – one cohort have already succeeded in their appeals - those who were given indefinite leave to remain and who were 18 at the time of the immigration decisions; another cohort, those who have turned 18, should also succeed;

(vii) the difficulties that the 'child' appellants will experience if removed to Pakistan, bearing in mind that they have no real and effective ties there;

(viii) their best interests and the protection and promotion of their welfare and that removal of the minor and young adult appellants could not be characterised as in their best interests and no justification of sufficient moment has been advanced capable of founding a contention that those primary considerations fall to be displaced in the public interest;

(ix) that removal to Pakistan will have particular and profound adverse consequences for the private life rights of the young women and girl appellants. Save for Qadir Ahmed and Fazal Jan, all other adult

parties associated with this case have contracted arranged marriages to close relatives. The children (boys and girls) immersed in English culture are likely to want the option to choose their own spouse. The case facts reveal the serious social consequences for disobeying family marriage decisions. It is important to recognise the protection available to all the children in the UK concerning these decisions and the complete lack of protection for them in such matters in Pakistan;

(x) that removal of those suffering from severe mental illness has a disproportionate adverse effect and will remove them from the care of professionals and mentors on whom they have come to rely. This issue is particularly relevant to the removal decisions concerning Wasim and Alam.

402. The appellants appear to seek to argue that, as here, where there are children who have been in the UK for a significant period of time, there is a legal test that circumstances have to be very exceptional, an expression used by Mr John Howell QC, sitting as a Deputy High Court Judge in *A v Secretary of State for the Home Department* [2008] EWHC 2488 (Admin) when speaking of the now withdrawn policy, DP5/96 policy. For the reasons we have given, we do not import such a legal test.

403. Further reliance is made of the OEM chapter 53 in which it is 'made clear' that criminal convictions do not necessarily justify removal.

404. As a result, the appellants contend:

> "It is submitted, therefore, that reliance on a false identity and partially false account for the purpose of making an asylum claim does not make a case 'very exceptional' and by implication there is no legal justification for the removal of the children and by extension their parents".

405. Support, it is argued, is derived from case law and in particular *ZH (Tanzania) v SSHD* [2011] UKSC 4 which will be considered later. Her '*immigration history has rightly been described as "appalling". She made a claim for asylum on arrival in her own name which was refused in 1997 and her appeal was dismissed in 1998, shortly after the birth of her daughter. She then made two further asylum applications, pretending to be a Somali, both of which were refused…*' (para. 5). Notwithstanding this history and notwithstanding that the family life on which the appellant relied was established during her unlawful presence in the United Kingdom, the Secretary of State eventually conceded that it would breach Article 8 to remove her (para. 13). In respect of that, Lady Hale said '*the Secretary of State was clearly right to concede that there could only be one answer*' (para. 33).

406. We do not regard *ZH (Tanzania) v SSHD* as establishing a principle of law that those who have an appalling immigration history and have children in the United Kingdom are therefore protected against removal. These cases are fact sensitive and the Secretary of State's concession in that case was clearly made

on the facts as she saw them, including the fact that the children involved therein were British Citizens.

407. The Secretary of State does not shrink from the consequences of the decision in *Ahmad and others* and the effect that this will have on the three families concerned (the family of Mehmood Ahmed and Fazal Jan is not affected by this decision because their children were all minors at the time of the relevant decisions). The Secretary of State highlights a number of factors which she deems to be uncontroversial and which, she argues, condition the approach to the Article 8 balancing exercise in respect of both family and private life rights, having regard to the following matters:

(i) The appellants lied in order to obtain entry clearance to the United Kingdom;

(ii) They thus obtained entry clearance to which they were not entitled;

(iii) They should, accordingly, never have been in the United Kingdom;

(iv) Once here, they advanced claims for refugee status which they accept were false in a number of material respects (the Secretary of State's case is that they were entirely false);

(v) They are, even on their own case, entitled to citizenship of Pakistan and have no basis to advance a claim to refugee status as nationals of India;

(vi) Those who obtained leave to remain thus did so as a result of deception and were not entitled to it;

(vii) No protection claim is advanced in relation to Pakistan;

(viii) They have obtained and continue to obtain substantial public benefits at taxpayers' expense – the children have all received a full state education, all appellants have had full access to the NHS, their housing has been paid for by the state, they have received substantial welfare support, their legal representation in their immigration proceedings has been publicly funded throughout and, as the *Zambrano* decision-letters for the Mehood Ahmed family demonstrate, they have received very substantial payments of social security benefits (the total benefit paid to the Mehmood Ahmed family is £29,608.04 *per annum*)

(ix) On the strength of these factors, the presence of the appellants in the United Kingdom has at all times been the result of deception and fraud. They should never have been here. Any private life rights which have developed have done so throughout under the shadow of deception and fraud which infects every aspect of their presence in the United Kingdom. The same characteristic applies to the family life rights that would be interfered with by removal. In all respects, therefore, the appellants' presence in the United Kingdom has at all times been precarious.

**Family life**

408. In *Advic v. United Kingdom* (1995) 20 EHRR CD 125, the Commission reaffirmed its decision in *S v United Kingdom* (1984) 40 DR 196. The applicant was relying on links with an adult brother and with his adult children who lived in Scotland. The Commission held:

> "However, the Commission notes that both children are adults. Although it is claimed that until their arrival in the United Kingdom the children had lived with the applicant, there is no indication that the applicant depends on them financially. It must be noted in this connection that both children are students who depend themselves on the support of a Scottish local authority."

409. The Strasbourg Court applied the same reasoning in *Konstatinov v. The Netherlands* [2007] 2 FCR 194, holding that:

> "[A]ccording to its well-established case-law under Article 8, relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional."

410. On the strength of these passages the Secretary of State contended that there was no family life for the purposes of Article 8 between the Appellants with leave to remain and those who will be removed. The Article 8 family life claim accordingly fails at the first hurdle.

411. In *Ghising (family life - adults - Gurkha policy)* [2012] UKUT 00160 (IAC) (Lang J and Upper Tribunal Judge Jordan) considered at what stage the child/parent bond of family life comes to an end; in other words, when does an adult child cease to enjoy family life with his parents, for the purposes of Article 8?

412. It started with the Commission's observation in *S v United Kingdom*:

> "Generally the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties."

413. The Tribunal noted that the facts of *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 were 'strikingly different' from the facts in *Ghising*. Mr Kugathas was a national of Sri Lanka, aged about 38, who had moved to Germany with his mother and siblings, as refugees, about 17 years earlier. Mr Kugathas had been living on his own in the UK for about 3 years, and the only contact he had had with his family was one visit of 3 weeks duration from his sister, her husband and child, and periodic telephone calls. Unsurprisingly, perhaps the Court of Appeal decided that he did not enjoy Article 8 family life with his family in Germany. Sedley LJ accepted the

submission that 'dependency' was not limited to economic dependency. He added at paragraph 17:

> "But if dependency is read down as meaning "support" in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents in my view the irreducible minimum of what family life implies."

Arden LJ said at paragraphs 24 and 25:

> "There is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life.
>
> Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties... Such tie might exist if the appellant were dependent on his family or vice versa."

414. The Tribunal in *Ghising* went on to find that that the judgments in *Kugathas* had been interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts. Family life may continue between parent and child even after the child has attained his majority: see *Etti-Adegbola v SSHD* [2009] EWCA Civ 1319. *"Undoubtedly he had family life while he was growing up and I would not regard it as suddenly cut off when he reached his majority" per* Sir Scott Baker in *SSHD v HK (Turkey)* [2010] EWCA Civ 583. It would be '*unreal*' to dispute that the 23 year old appellant enjoyed family life with her parents with whom she 'had lived pretty well continuously with her parents and siblings all her life, per Sedley LJ in *RP (Zimbabwe) & Anor v SSHD* [2008] EWCA Civ 825.

415. The Tribunal cited various examples from the ECtHR in which family life had been found to exist between a parent and an adult, at least when they had been and wished to continue to live together as a family unit. See, for example, *Bouchelkia v France* (1998) 25 EHRR 686 in which the ECtHR held that a deportation order interfered with the family life of a 20 year old man living with his parents and siblings. More recently the ECtHR has reviewed the case law in *AA v United Kingdom* (Application no 8000/08). The Court cited those cases where family life had been held to exist but continued:

> "However, in two recent cases against the United Kingdom the Court has declined to find "family life" between an adult child and his parents. Thus in *Onur v United Kingdom*, no. 27319/07, § 43-45, 17 February 2009,the Court noted that the applicant, aged around 29 years old at the time of his deportation, had not demonstrated the additional amount of dependence normally required to establish "family life" between adult parents and adult children. In *A.W. Khan v United Kingdom*, no. 47486/06, § 32, 12 January 2010. the Court reiterated the need

for additional elements of dependence in order to establish family life between parents and adult children and found that the 34 year old applicant in that case did not have "family life" with his mother and siblings, notwithstanding the fact that he was living with them and that they suffered a variety of different health problems. It is noteworthy, however, that both applicants had a child or children of their own following relationships of some duration."

416. The Tribunal went on to conclude that differing outcome were merely the effect of the issue under Article 8(1) being highly fact-sensitive:

> "In our judgment, rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1)."

417. The Secretary of State however makes the much stronger point that the circumstances in which the appellants find themselves impose a dependency which arises of necessity. United Kingdom law does not permit many of the family members to work, unsurprisingly since they have no leave to remain. Accordingly, those whose immigration status permits them to work inevitably assist those unable to do so. The financial dependency therefore becomes a self-fulfilling consequence of their different immigration situations. In the same way as an overstayer who is unable to work cannot rely upon the support provided to him by a relative who has a right to remain as establishing a dependency, neither can these appellants rely upon the mutual support that each offers the other as establishing further elements of dependency. The Secretary of State argues since the parents' inability to support themselves stems back from their own fraud the fact that there is a dependency adds nothing to the strength of their claims to remain.

418. The Secretary of State therefore contends:

> "It would be wrong in principle for the Appellants to be able to rely on any alleged closeness with their parents and other siblings resulting from them "pulling together" in light of what they characterise as the "difficult" position they have found themselves in since their fraud came to light. That would be to allow them to profit from their own wrong in order to establish family life rights. There are strong public policy arguments against such a state of affairs."

419. The Secretary of State is plainly correct in looking behind the dependency in order to determine in what way it has arisen. We are satisfied that such contributions as the adult *Ahmad* children make to the family finances is the inevitable corollary of the different outcomes that have arisen in the treatment of the appellants. For the reasons we have stated this is not the result of inconsistent application of the same policies by the Secretary of State but the fact that some of the parents managed to persuade the Secretary of State that their claims were true, though without justification, and others did not. But the dynamics of the family relationships in these appeals goes beyond merely differing financial contributions. It is inevitable that the situation in which these four families have found themselves is one of significant adversity and

this will have resulted in the families individually and collectively pulling together.

420. We approach the appeals on the basis that there is family life between all members of the four families and (to a much lesser extent that has not been explored before us) family life between the four families themselves related by blood and marriage but, in assessing proportionality, we pay regard to the circumstances in which the families find themselves and the reasons for it.

**The legal principles**

421. It is common ground that the best interests of the children are a primary consideration. There is no need to refer to the well-known case law on the subject. Indeed, in the context of this case, their interests are the most significant factor of all. Were their parents to have come alone into the United Kingdom using deception and to have remained here ever since, never establishing a substantive right to remain, their claim to remain would hardly be arguable. It is the presence of the children that has fuelled their claim that they should be allowed to remain. It is the effect upon the children that is at the heart of the proportionality balance. The situation of the parents adds little of real substance given that we have found that they are the authors of the position in which they find themselves. It is also common ground that the best interests of the children are not determinative. As innocent participants - although 'victims' might be as apt an expression - of their parents' conduct, the effect upon them of removal informs every aspect of the proportionality balance.

422. A starting-point may be found in *Maslov v Austria* [2008] ECHR 546 where dealing with the removal of children or young adults with reference to crimes *they themselves* committed as minors, the Court provided broad guidance as to the approach to be adopted. These remarks, found in paragraphs 73 to 75, have all the more force when the removal of children, innocent of wrong-doing, is in contemplation:

> "73. In turn, when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. This tendency is also reflected in various Council of Europe instruments, in particular in Committee of Ministers Recommendations Rec (2001)15 and Rec (2002)4 (see paragraphs 34-35 above).
>
> 74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see Üner, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent

most, if not all, their childhood in the host country, were brought up there and received their education there (see Üner, § 58 in fine).

75.In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

423. In *Nunez v Norway* (55597/09) [2011] ECHR 1047 (28 June 2011) the ECtHR was concerned with whether the applicant's expulsion from Norway with a two-year re-entry ban would entail a violation of Article 8 of the Convention. It decided that it would. As the facts of the case reveal, the Court was considering the removal of the mother in circumstances where it was found that the children had long lasting and close bonds to her, there was a decision in custody proceedings to move the children to the father, the children had already experienced disruption and stress and there had been a long period that elapsed before the immigration authorities took their decision to order the applicant's expulsion with a re-entry ban. The Court was not, therefore, considering the permanent severing of the relationship between mother and children but a case where the relationship would continue and the issue was the length of the ban upon its resumption. The fact sensitive nature of the case is revealed in the Court's conclusion that it was '*not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention*.'

424. In reaching that conclusion, the Court provided the principles for assessment where a person had entered the country irregularly and sought to remain on the grounds of a family relationship:

"68. The Court recalls that, while the essential object of this provision is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation….

69.Since the applicable principles are similar, the Court does not find it necessary to determine whether in the present case the impugned decision, namely the order to expel the applicant with a two-year prohibition on re-entry, constitutes an interference with her exercise of the right to respect for her family life or is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation.

70. The Court further reiterates that Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's

obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest…. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion…). Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious…Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances….”

425. The Court was also concerned with the process of decision-making. The applicant’s stay in Norway was unlawful and was brought to the authorities’ attention in 2001 and she admitted it to the police in December 2001. It was not until 26 April 2005 that the Directorate of Immigration decided to order her expulsion with a prohibition on re-entering for two years. Although this state of affairs could to some extent be explained by the immigration authorities’ choice to process the revocation of her work and settlement permits separately, and not in parallel, the Court did not consider the government’s actions adequately fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of the administrative measures as found by the national court.

426. In *Antwi and others v Norway* (26940/10) [2012] ECHR 259, the Court was concerned with an applicant who in 1998 had obtained a forged passport and birth certificate stating a false identity, indicating that he was a Portuguese national. He submitted that passport when he applied to the Norwegian authorities for a work and residence permit in Norway as an EEA citizen, which was granted to him for five years from 13 April 2000 to 13 April 2005 on the basis of the false identity. The applicant successfully applied for renewal of the permit on two occasions and for Norwegian citizenship on the strength of his false identity. He had not been entitled to any of the permits obtained and at no time had his residence in Norway been lawful. The Court relied on paragraphs 68 to 70 in the *Nunez* judgment as properly setting out the relevant principles.

427. In *Butt v Norway* (47017/09), the Court once again relying upon *Nunez* stated:

“In the case under consideration, the Norwegian immigration authorities had granted the applicants’ mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and,

> following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see *Üner*, § 59; and *Maslov*, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned *Nunez* judgment, the Court will have regard to the following principles stated therein…:" [quoting paragraphs 68 to 70 of *Nunez*]

The Court continued in paragraph 79 in these terms:

> "…strong immigration policy considerations would in principle militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that parents exploited the situation of their children in order to secure a residence permit for themselves and for their children."

On this basis, the Court concluded, at paragraph 79, that

> "…the removal of the applicants would be incompatible with Article 8 only in exceptional circumstances."

428. In her written argument, the Secretary of State places much emphasis on this passage describing it as an extremely important statement of legal principle by the Strasbourg Court with clear implications for the consideration of the appellants' Article 8 case:

> "The twin factors of "strong" immigration policy considerations which support the identification of children with their parents' wrong-doing and the "great" risk of parents otherwise seeking to "exploit" the situation of their children applies precisely in the present case. The conduct identified in Butt was deception in obtaining a residence permit through the failure to acknowledge a temporary return to the country of origin. In the present case, it is the "web of lies" identified by the FTT which has continued from the making of entry clearance applications in Pakistan until the present date. It is notable that the Strasbourg Court identified the risk as extending not only to the parents obtaining residence cards, but also the children."

429. In asserting that the decision in *Butt v Norway* was a recognition that there was a strong immigration policy imperative in favour of identifying children with the wrong-doing of their parents in order to prevent abuse of the immigration system, the Secretary of State submitted this justified the First-tier Tribunal's approach that the children's response to their parents' requests for them to lie was not a mitigating factor and, by analogy, neither was the wives' obedience to their husbands' requests to lie.

430. Central to a consideration of United Kingdom case law is the decision in *ZH (Tanzania) v SSHD* [2011] UKSC 4. The mother arrived in the United Kingdom in December 1995 at the age of 20. She made three unsuccessful claims for asylum, one in her own identity and two in false identities. In 1997 she met and formed a relationship with a British citizen by whom she had two children, then 12 and 9. Both were British citizens and had lived in the United Kingdom with

their mother all their lives. Their parents separated in 2005 but their father continued to see them regularly. He was diagnosed with HIV, was living on disability living allowance and apparently drinking a great deal. The Tribunal did not consider there were necessarily practical difficulties in the children living with him, a view which, unsurprisingly, found little favour in the Court of Appeal. However, the Court of Appeal upheld the Tribunal's finding that the children could reasonably be expected to follow their mother to Tanzania. It was conceded by the Secretary of State that any decision which was taken without having regard to the need to safeguard and promote the welfare of any children would not be "in accordance with the law" for the purpose of Article 8(2). That did not mean that identifying the children's best interests would lead inexorably to a decision in conformity with those interests:

> "Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first."

431. Those interests could, of course, be outweighed by the cumulative effect of other considerations, for example, the countervailing consideration of the need to maintain firm and fair immigration control, coupled with what was described as the mother's 'appalling immigration history and the precariousness of her position when family life was created' but, that said:

> "…as the Tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. On the facts, it is as least as strong a case as *Edore v Secretary of State for the Home Department* [2003] 1 WLR 2979, where Simon Brown LJ held that "there really is only room for one view" (para 26). In those circumstances, the Secretary of State was clearly right to concede that there could be only one answer."

432. In paragraph 42 of the decision, the Supreme Court spoke of a second error which lay at the heart of the appeal:

> "The tribunal found that the mother knew full well that her immigration status was precarious before the youngest child was born. On looking at all the evidence in the round, it was not satisfied that her decisions to have her children were not in some measure motivated by a belief that having children in the United Kingdom of a British citizen would make her more difficult to remove. It accepted that the children were innocent of the mother's shortcomings. But it went on to say that the eventual need to take a decision as to where the children were to live must have been apparent both to the father and the mother ever since they began their relationship and decided to have children together. It was upon the importance of maintaining a proper and efficient system of immigration in this respect that in the final analysis the tribunal placed the greatest weight. The best interests of the children melted away into the background."

433. The Supreme Court identified the tension between the need to maintain a proper and efficient system of immigration control and the principle that, where children were involved, the best interests of the children had to be a

primary consideration. Whilst the fact that the mother's immigration status was precarious when they were conceived might lead to a suspicion that the parents saw this as a way of strengthening her case, considerations of that kind could not be held against the children:

> "It would be wrong in principle to devalue what was in their best interests by something for which they could in no way be held to be responsible."

434. The Supreme Court has recently had an opportunity to draw together the judicial learning on the best interests of the child, in an immigration context, in Zoumbas v Secretary of State for the Home Department [2013] UKSC 74, where Lord Hodge, delivering the judgment of the Court, identified seven legal principles, which "are not in doubt":

> "(1) The best interests of a child are an integral part of the proportionality assessment under Article 8 ECHR;
>
> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
>
> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
>
> (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
>
> (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
>
> (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment; and
>
> (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

His Lordship then added the following "comments" to these seven principles:

> "[13]…First, the decision-maker is required to assess the proportionality of the interference with private and family life in the particular circumstances in which the decision is made. The evaluative exercise in assessing the proportionality of a measure under Article 8 ECHR excludes any "hard-edged or bright-line rule to be applied to the generality of cases": *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159, *per* Lord Bingham at para 12. Secondly, as Lord Mance pointed out in *H(H)* (at para 98) the decision-maker must evaluate the child's best interests and in some cases they may point only marginally in one, rather than another, direction. Thirdly, as the case of *H(H)* shows in the context of extradition, there may be circumstances in which the weight of another primary consideration can tip the balance and make the interference proportionate even

> where it has very severe consequences for children…The third principle in para 10 above is subject to the first and second qualifications and may, depending on the circumstances, be subject to the third. But in our view, it is not likely that a court would reach in the context of an immigration decision what Lord Wilson described in *H(H)* (at para 172) as the "firm if bleak" conclusion in that case, which separated young children from their parents."

435. In *JO (Uganda) v Secretary of State for the Home Department* [2010] EWCA Civ 10 the Court of Appeal drew a distinction between deportation cases and removal cases in that, generally, the two involve the pursuit of different legitimate aims. In deportation cases it is the prevention of disorder or crime. In removal cases it is the maintenance of effective immigration control. The difference in aim was potentially important because the factors in favour of expulsion were capable of carrying greater weight in a deportation case than in a removal case. The maintenance of effective immigration control was important but the protection of society against serious crime was more so with the consequence that it attracted greater weight in the balancing exercise but with the inevitable result that the public interest might be less in a removal case. In principle family and private life considerations may be sufficiently weighty to render expulsion disproportionate in a removal case, yet insufficient to render expulsion disproportionate in a deportation case. The *actual* weight to be placed on the criminal offending must of course depend on the seriousness of the offences and the other circumstances of the case:

> "But if reliance is placed only on effective immigration control, it is difficult to see how the person's criminal offending would relate to that aim or, therefore, count as a factor positively favouring removal. On the other hand, it might still have a significant effect on the proportionality balance by reducing the weight to be placed on the person's family or private life: to take an obvious example, where a person has spent long periods in detention, his family ties and social ties are likely to be fewer or weaker than if he has been in the community throughout. Criminal offending can therefore remain relevant even if the maintenance of effective immigration control is the only aim of the removal decision; but careful account must be taken of how it bears on that decision."

436. The Court of Appeal accepted the Tribunal had taken into account the fact that the child had been in the United Kingdom since early childhood but said there was nothing to show that it did so with a proper understanding of the importance of this for the issue of private life. (Nor to the fact that his criminal offences were committed as a juvenile.)

**<u>Our assessment</u>**

**General considerations**

437. Both sides in this litigation have adopted extreme positions in relationship to the factors that support their respective cases. Perhaps that is the inevitable result of the United Kingdom's adversarial system. In particular, great effort has been taken by the representatives to emphasise highly selective passages in

European case law as if this represented the words of a statute. Thus authorities covering many hundreds of pages have been scoured for the purple prose that best represents a single answer to proportionality. Hence, 'very serious reasons are required to justify expulsion', 'insurmountable obstacles' or 'the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances'. All of these expressions struggle with the line that has to be drawn between recognising the serious - and distressing - impact on the lives of those who are to be removed from a country with which they have established deep links and the recognition that there is a public interest in maintaining a humane system of immigration control because no country – that is, the citizens who contribute to its welfare - can afford to house and feed the rest of humanity without imposing restrictions on those who may enter.

438. It is, on any view, an unequal comparison. The innocent child is readily identifiable as an individual who *will* suffer and inevitably becomes the focus of an Article 8 claim. The public interest, by its very nature, is not susceptible to that type of suffering but the detriment to the community as a whole which a breach of immigration control may bring, whilst shared amongst many, is real enough.

**General considerations - The oral evidence**

439. We were enormously impressed by all of the professional witnesses (including the appellants' former solicitor, Ms Conlan) whose commitment to the families goes far beyond simply performing their jobs. It is to their great credit (and to the community at large) that they have taken such infinite care in trying to pull the children through the experiences they have been through. In these circumstances, (and we treat this as very much going in their favour, rather than the reverse) they have become the advocates for the children. Indeed, for more than one of them, that is their professional title. Nor do we see this as skewing their objective evaluation that the children would be better off remaining in the United Kingdom. It would, we feel, fail to do justice to their professionalism that any the less weight should be attached to their evidence because they have befriended the families and the children in particular and, to that extent, identify themselves with the children in a strong, almost emotional, commitment. We are indebted to them for their clear insights into the damage that has been done to these children by the actions of the adults around them and their assessment of the effects upon them of removal. Nor do we apprehend that the Secretary of State took a different view of their evidence. Mr Blundell's muted cross-examination made it perfectly plain that it is not the Secretary of State's contention that the evidence from these witnesses should not be given its full weight.

440. It is not, of course, the function of the professional witnesses to take to themselves the Tribunal's task of balancing these considerations against the public interest. Nor did they attempt to do so. Their function was entirely

focussed on the individuals for whom they have a professional responsibility. Inevitably, this results in an imbalance but it is not of their making, rather the inevitable consequence of their function within the appeal process. Further, as children appellants who are innocent of wrong-doing, there is no call for them to engage in any objective evaluation of their conduct. They were, properly, astute to avoid pointing the finger of blame at the parents. Such an approach could only damage the work they do, and have done, for the children.

**General considerations - The public interest**

441. There is a marked difference in the application of Article 8 in a case where the individual establishes a right to remain by fulfilling the substantive requirements of the Immigration Rules for leave to enter or remain in the capacity sought. In such a case, his removal will deprive him of that right or the enjoyment of that right. It is a deprivation and has a very different character compared with the case of a person who has no substantive right to remain or who does not enjoy settled status. His removal is merely the corollary of having no right to remain. More importantly, to acknowledge his having a right to remain (that is, to defeat removal) by reason of his presence is the United Kingdom is to create for him a right that he does not possess. This is not the creation of absolute principles but rather the acknowledgment of different situations.

442. Whilst these considerations will apply to an overstayer, they apply with particular force to a person whose presence in the United Kingdom has never had any underlying or substantive right to support it. They apply with greater force still to the person who has acquired entry by some form of deception because the active participation in concealment from the United Kingdom authorities of his true position is the means by which he has secured his entry. Where, on a proper assessment of the facts, a person's presence in the United Kingdom is only attributable to such a course of concealment, the recognition of a right to remain sanctions the very outcome that the appellant has engineered by his initial deception. That is a very weighty factor against permitting these families to remain.

443. In this appeal, the Secretary of State categorises this as sending out the wrong message but that, to some extent, misses the point. Whilst it will, of course, encourage others to commit the same deception if no effective sanction is provided against it, it will also result in the specific unfairness that arises in this case as far as the parents are concerned for it will sanction their benefitting from that which they had no right to benefit from in the first place. There is therefore a force behind the public interest which is based on a fundamental principle of fairness.

444. There are no absolutes in this. The pressing public interest in preventing the person who uses dishonesty from achieving his goal will, in appropriate circumstances, give way to a wider interest that there are other forces in play.

Hence, a sufficiently long period of residence (even unlawfully) might displace the public interest in removal or the existence of a policy which permits derogation. So, too, the weight to be attached to the interest of those who are innocent of wrong-doing, such as the children. This does not operate to diminish the public interest; rather it acknowledges the weight attached to countervailing factors.

**Conclusions - The families**

**Qadir Ahmed and Nasreen Bi's family**

445. Whilst being careful to avoid taking responsibility themselves, Qadir Ahmed and his wife Nasreen Bi repeat the claim that they were both new to the country, illiterate and uneducated and were merely acting under the directions of Mohammed Faruq, we do not accept that self-description. We are, however, prepared to accept that they have sufficient awareness that they have placed their children in this difficult position. Doubtless they are speaking the truth when they said they thought they would provide their children with a better life in the United Kingdom but we have rejected their claim that they were unaware that what they were doing was wrong. Whilst the differences that we have pointed out are the result of the actions of their parents, the children have all received the benefit of an education in the United Kingdom which was one of the motives in bringing them here. Removal will, of course, prevent the fulfilment of that aspiration but the children will still return having received a better education than they would have received in Pakistan and at no cost. The family have also been supported by benefits during the period they have remained in the United Kingdom which would not have been the case had they remained in Pakistan. Whether or not they have had need to recourse to it, the family has benefited from the provision of health care. Qadir Ahmed tells us that he suffers from bad asthma.

446. Qadir Ahmed speaks of his daughters having more freedom in the United Kingdom than they would do in Pakistan and the opportunity to receive both an education and a worthwhile career, and that these are benefits that they would not have received had they remained in Pakistan.

447. Further, whilst we have pointed out the sharp distinctions that exist between those children who happened to be named as dependants on their successful parent's claim and those who happened to be named as dependants to their unsuccessful parent's claim, (between, as it were, the *haves* and the *have-nots*) this was at the very core of the scheme that had been devised. Whilst we do not say that any of the parents had the sophistication to devise this refinement, it was a classic example of hedging their bets. Each set of parents might have made a single unmeritorious asylum claim with all their children as dependants. Had that single claim failed, none would have benefitted from being recognised as a refugee. Yet, with two separate claims, the chance of success was doubled and the unsuccessful claimants might then hope to join

themselves with the fate of their successful spouse or siblings. Despite the passage of time, this remains, essentially, the same argument. All of the unsuccessful siblings rely on the fate of their successful family members as a cardinal feature of their claims to benefit from consistent or equal treatment. Unsurprisingly, none of the successful siblings seek to rely on the fate of their unsuccessful siblings. The *haves* are used as a lever to advance the claims of the *have-nots* but not vice-versa.

448. It is a mark of the damaging position in which the parents have placed their children that, in his statement, Tousif speaks of the difficult time they faced when the family arrived in the United Kingdom. At that time, he was only 11 years old. He said:

> "I do remember that it was a shock. I did not really understand why we were brought here. Then we were told to lie, and told that we would have to leave the country if we did not lie. I did not understand why all this was happening. I was a child. I remember feeling stressed about it, and then feeling embarrassed and upset when people found out about the lies. This was a horrible time, but it is a long time since all of this happened. We have kept going and have worked hard to make lives in the UK."

449. It is, of course, a feature of this appeal that the children have been required to continue with the untruthful account of what occurred to them in India. For example, in his statement of 25 October 2009, Toukeer continued to speak of his upbringing in India and the fact that the Indian Army took his father away on two or three occasions which prompted their departure from India.

450. The sharp divisions that exist in the various families arise because some of the applications for asylum were accepted by the Secretary of State as truthful and this resulted in the grant of settled status to those children who, by chance, were placed as dependants to the claim of the successful parent. There is, therefore, an obvious inconsistency of treatment. However, the appellants have not sought to rely upon this as an inconsistency which supports their claims. Nor could they rightly do so. It cannot properly be argued that the decision-maker who accepted as credible the account of the applicant-parent was acting irrationally in doing so. Plainly the decision-maker who did not accept as credible the account of the applicant-parent was *not* acting irrationally in doing so since the account was untruthful. The division that exists within these families is, in our judgment, the inevitable consequence of the false claims being made. Had those claims not been advanced, none would have been granted leave to remain and the different consequences which have arisen as between some children on the one hand and their siblings on the other would not have arisen. The Secretary of State is not responsible for this situation having arisen and it cannot be classified as the result of a dysfunctional decision-making process.

451. Notwithstanding the length of time the families have been in the United Kingdom, it is noticeable that Diane Jackson and Johanne Huyg refer to using

interpreters in the interviews they have conducted with the parents. The clear inference is that the parents do not speak English. This means that the children, when at home, have to converse in the language used by their parents, at least when speaking to them. We treat with some scepticism the claims made by the parents that they live in polyglot households where communication is a problem, see for example Rungzaib Mohamed's statement [Bundle 3 Tab A p.2 para 7] in which he describes children and adults not being able fully to understand each other. Thus, whilst we accept the extent to which the children have become integrated into English life (indeed, they were described as 'British Asians') inevitably they retain many cultural, religious and linguistic ties with Pakistan.

452. Given the fact that, ultimately, this family's presence in the United Kingdom was, has always been and remains, the result of deception, there is a compelling public interest in removing those whose presence is not the result of having satisfied the requirements for entry clearance or leave to remain but has been achieved through wrong-doing.

453. This applies with its full force in the case of the parents. There is a legitimate public interest in seeing that an individual should not be permitted to benefit from his wrong-doing and, once discovered, be permitted to retain what he has got by unlawful means. The proposition is so simple that it hardly needs be stated.

454. The public interest however is both realistic and humane and the substance of this appeal has been to seek ways by which the public interest should properly be regarded as reduced by demonstrating that the parents had little personal responsibility for what took place, that they should be seen as victims rather than as offenders and that this principle in its most acute form is their categorisation as the victims of trafficking. The arguments have included claims that they have been unfairly treated by a system – including the appeal process - that has delayed decisions in their cases, that has produced inconsistent decisions and – in general terms - has unfairly operated as between one person and another. For the reasons we have given, we have largely discounted the weight that should be attached to these countervailing arguments directed at reducing the public interest in removal. The stark reality remains that if the parents succeed in establishing a claim to remain, it will be to have achieved the very thing that their wrong-doing was designed to achieve. They will not have established a claim to have been recognised as refugees or in need of humanitarian protection or at risk of harm; it will not be because they meet the requirements of the Immigration Rules which are an expression of the policy - social and political - aimed at distinguishing between those who are permitted to enter or remain and those who are not. Further, having made use of resources in terms of maintenance, accommodation, and education as well as the right to access healthcare (whether provided or not) to which no legitimate entitlement existed, the parents will, if entitled to remain, continue to benefit

from these sources irrespective of whether or not they contribute. It is a matter of substance and not form: it is not about sending out the "wrong message".

455. If this is the nature of the public interest, and in our view it remains a compelling one, this has to be weighed against the situation as it presents itself now, after the passage of many years during which time, both individually and collectively, the family members have pursued their lives in the United Kingdom. There can be no escaping the fact that the parents could have resolved this years before. If they knew their arrival was on a false basis, they knew by 2004 that the authorities were aware of this and planning their removal. More than anybody else, irrespective of what they told their advisers, they knew their claim had no foundation to it. We have considered at length the weight that is to be attached to delay on the part of the United Kingdom authorities, including the Tribunal, but this should divert attention from the fact that the parents' continued presence in the United Kingdom was a matter of choice without there being a sound basis that they were somehow entitled to remain. In many respects, the reticence on the parents' part to leave was understandable. We daresay they hoped it would all work out in their favour in the end. The longer they remained, the better the prospects. However, there was never any legitimate basis for those hopes and there was no-one in a better position than they were to know that underlying all their claims was the fundamental fragility of a claim to have a right to remain. Were there to be no children involved, none of these parents would have a significant claim that their hopes outweighed the public interest.

456. It is easy to see, therefore, why the children must be our primary consideration, as their best interests fuel the balance operating in favour of them – and their parents - being permitted to remain, notwithstanding the grudging acceptance that this will mean the parents have, to put it colloquially, 'won the day'. Much time and effort has been expended on the almost biblical significance of what are said to be two competing legal principles: 'the wrongdoing of the fathers must not be visited upon the children' and 'strong policy considerations favour identifying children with the conduct of their parents'. The reality, of course, is that neither amounts to a legal principle but broadly reflect the dichotomy faced by immigration authorities in searching for a solution when children become enmeshed in the unlawful actions of their parents.

457. There is no doubt that these children have already suffered by the conduct of their parents and others. They have been abused. Nowhere is this clearer than in the accounts of being drilled with a false account of the loss of a parent and being forced to lie and then suffer the humiliation of discovery and their parents' convictions. We can hardly imagine the sense of shame those old enough to comprehend their own situation must have felt and the position this must have placed them in in relation to their friends and teachers and support workers. Understandably, the witnesses called on their behalf did not dwell on this element. We greatly respect these children for the manner in which they have dealt with what they were expected to do; indeed, forced to do. In none of

the material is there a suggestion of a sense of grievance or recrimination for the pain that this must have caused them. However misguided this was, the children must have felt that their parents' intentions were for their own good.

458. It is hardly necessary to re-state that the children are innocent of their parents' wrongdoing; indeed they have suffered by it. Yet, this fact alone cannot be determinative or otherwise the parents' removal might never be sanctioned as proportionate however serious their wrongdoing. The two elements remain in competition; neither determinative either as a matter of law or of fact. The obvious tension that exists between them can only be resolved as part of the balance that needs to be struck.

459. Sulva Bi, now aged 19 does not benefit from the *Ahmad and others* decision and was 7 at the date of entry. Those speaking of her do so with the utmost respect and sympathy. Indeed, her vulnerability is one of the characteristics that comes across most clearly. She has started helping at East Oxford Primary School doing unpaid work and has some intellectual difficulties. She lacks confidence. Her younger sister Salma appears to be doing well at school where she is studying for her GCSEs and whatever consequences may flow from her successfully achieving them. Sulva and Salma fall within the qualifying condition of paragraph 276 ADE (iv) or (v) either under 18 and having spent 7 years in the United Kingdom or between 18 and 25 and having spent more than half their life in the United Kingdom. No useful distinction can be drawn because Sulva achieved refugee status and indefinite leave to remain on the basis of the father's claim whereas her sister did not.

460. Both will return to a country with which they have not lost all ties notwithstanding the fact that Salma was only 2 ½ at the time of her departure. The home in which they live and the parents with whom they live have not abandoned their cultural, linguistic and social links with Pakistan. The experts speak of them as a normal British Asian family and there may well be very little to differentiate them from other such families who have settled in the United Kingdom. However, there is the significant difference that this family's presence has never been legitimate. The family as a whole and the parents in particular have not become so immersed in western values as to have lost their cultural roots. We accept that the children have adapted more readily and to a much greater extent into a British society having spent so long within the British education system. However, this has been of immense value to them and has undoubtedly provided them with opportunities that they could not have hoped to have had if they had remained in Pakistan. Indeed, these very benefits are relied upon as a principal reason for their continuation.

461. We do not accept that the consequences for the young women and girl appellants will be so profoundly adverse as to prevent their removal. It is submitted on their behalf that they will face a series of risks, including forced marriage and the associated lack of free choice in decisions they will make about ther future. It seems to us that if the parents are putting this forward as a

reason why their children should not be removed, the solution is largely within their own hands. If, as a result of their presence in the United Kingdom, the parents have become less sympathetic to cultural norms in Pakistan, we see this as operating both in the United Kingdom and on return to Pakistan. Whilst, doubtless, wider social pressures may well be different in Pakistan, if the families as a whole have taken upon themselves a different approach to forced marriages or the exercise of greater freedom of choice, no mechanism has been identified by which these families will be prevented from reflecting that difference in outlook on return. This consideration is not confined to the children of this family; nor is it confined to the female members of the family.

462. The children include Toukeer and Tousif. Toukeer is the elder, but overshadowed by his younger brother Tousif (an adult *Ahmad and others* beneficiary) who does not fall within the category of those liable to be removed by our decision. For the reasons we have given, we do not regard the decision in *Ahmad and others* as requiring Toukeer to be equated with his brother by reason of the operation of the Immigration Acts which distinguish between the removal of those previously granted indefinite leave to remain (and able to benefit by the *Ahmad and others* decision) and those like Toukeer who never had leave to remain and could not benefit from it. There does not appear to us to be any principled reason why the application of immigration law which has given his younger brother a benefit should be read across to provide Toukeer with an equivalent status. The disparity of outcome is not the result of a dysfunctional or irrational system of law but the effect of distinctions created by statute that have had the effect of benefitting Tousif but which do not apply to Toukeer. The same disparity exists, according to our view, between the adult *Ahmad* children and other children, now adult, like Sulva, who do not benefit from it. It inevitably causes a decision-maker to reflect deeply but does not cause us to conclude that the way to resolve the difficulty is to equate Toukeer or Sulva (or for that matter Salma who remains a minor) with their brother, Tousif. Toukeer has yet to develop his full potential because of the limitations imposed upon him by reason of his immigration status. Those limitations cannot be categorised, either now or in retrospect, as unreasonable or unfair. He failed to be recognised as a refugee and to become entitled to indefinite leave to remain because he was a dependant on his mother's unsuccessful claim. The decision to reject her claim was legally and factually correct and remains so. His present position is the consequence of those events. As an adult now aged 25, his entitlement to remain has no compelling features about it. His claim has many unusual features about it but they do not establish that an exception needs to be made in the assessment of his claim.

463. The effect of this consideration is that we conclude that it is proportionate to return Toukeer, Sulva and Salma to Pakistan with their parents as a family. Tousif, now aged 23, is under no pressure to accompany them. He is a fully independent young man, able to reap the advantages of his immigration status as he chooses. He may wish to remain here and offer some financial support to the other members of his family or he may choose (either temporarily or

permanently) to return to Pakistan where his prospects of success are significantly better (like all his siblings) as a result of the period spent in the United Kingdom. That decision must be a matter for him but, if he chooses to remain, it will not render our decision disproportionate as far as the other family members are concerned. The family will be split but then such a split may have occurred in any event, if he had decided to leave the family home and settle elsewhere, perhaps seeking entry clearance as a student. Many families disperse as the children become young adults. It is the very nature of growing up.

**Ghulam Rabani and Noreen Shakila's family**

464. Atif, Mobushra and Farah, aged 27, 25 and 23 respectively are able to rely on the decision in *Ahmad and others* for an entitlement to remain. Hence, three out of the six children are not subject to removal.

465. As to Nusrat, given the combined effect of her not being responsible for her unlawful entry into the United Kingdom, and thereafter remaining here, and the time she has spent in the United Kingdom, there is no public interest in requiring her to make an out-of-country application for entry clearance as a spouse if it is established the outcome of her application is not in doubt. This is not a case where Nusrat should be held responsible for breaching United Kingdom immigration law. Where such responsibility arises, there may be a significant public interest in requiring the individual to legitimise his or her stay by returning to the country of origin and meeting the formalities of entry clearance in accordance with principles set out in *Chikwamba v SSHD* [2008] UKHL 40 and *SSHD v Treebhowan and Hayat* [2012] EWCA Civ 1054.

466. We understand that Nusrat Bi went through an Islamic marriage ceremony on 20 October 2013 with Brendan Walker, a British citizen. This is not a marriage which is recognised under English law and, therefore, Nusrat is not legally married to Mr Walker. However, we have no reason to question either the validity of the Islamic form of marriage or whether the couple enjoy a genuine and subsisting relationship. We are not satisfied, however, that, *on the limited material before us*, this tips the balance in favour of Nusrat Bi being permitted to remain in the United Kingdom pursuant to Article 8.

467. This is an appeal where the particular circumstances of Nusrut's case have not been fully articulated as they would have been had she made an application as a sole appellant. For example we have insufficient evidence to ascertain whether she can meet the financial requirements of the Immigration Rules.

468. We are not satisfied that the material before us is sufficient to establish a right to remain under the Immigration Rules, but that situation may very well be remediable by the provision of further information along the lines we have suggested without the necessity for her removal, there being no sensible reason for enforcing it if the only reasons she cannot meet the requirements of the Rules is her lack of entry clearance, and her unlawful status here. The fact that

the specific circumstances of her case have not been put before us in any detail is understandable given there are some 20 or more appellants in this appeal and the failure cannot properly be taken against her.

469. Rustam and Zahra Bi are the remaining children. They are now aged 21 and 19 respectively. They do not benefit from the decision in *Ahmad and others*. They were 8 and 7 respectively when they arrived and were 16 and 15 respectively when the relevant decisions were made in their cases.

470. Rustam has obtained some GCSEs but has been hampered by the fact that his further studies were halted because of his immigration status and the fact that he lacked permission to work. Doubtless this has been the cause of his resentment, his unsettled school life and inability to concentrate. In contrast, Zahra has progressed well.

471. Whilst there is a marked disparity of outcome between the prospects faced by Rustam and Zahra when compared with the outcome for Atif, Mobushra and Furah, (between the *haves* who succeeded in *Ahmad and others* and the *have-nots* who do not), we see no principled reason why the difficulty should be resolved by equating Rustam and Zahra with Atif, Mobushra and Furah. Rustam and Zahra, both now adult, will be returning with their parents and will have significantly benefitted from the time they have spent in the United Kingdom. They are not able to establish a right to remain under the Immigration Rules and, notwithstanding the period they have spent in the United Kingdom, it is not disproportionate to require them to leave.

**Rungzaib Mohamed and Jamila Kauser's family**

472. Ishrut and Jehan, as benefitting from the decision in *Ahmad and others*, are entitled to remain in the United Kingdom. They are young independent adults and free to make their own decision to remain or leave. If other members of the family are required to leave, they may decide to do so but that will be a matter for them. They cannot assert, for example, that their parents must be permitted to remain in order to provide them with a fuller enjoyment of their own leave to remain.

473. Alam, now adult, cannot currently be removed. The progress of his treatment which has been on-going for many years, is at a critical stage because for the first time since September 2009 he has been assessed as capable of being given limited autonomy with the envisaged move to Lambourn House, the open pre-discharge unit where patients become more independent in preparation for leaving hospital. This is a step-by-step approach and his removal at this stage in his progress to good or better health cannot be arrested. We feel certain that this lies behind the respondent's concession.

474. We do not consider that this is dependent upon his parents remaining in the United Kingdom. Our reasons are as follows:

(i) Both Ishrut and Jehan are in the process of being granted leave to remain with the probable outcome of acquiring British citizenship in due course. As we have stated above [305] we do not construe the contents of Ishrut's statement as evidencing a firm resolve to return to Pakistan; indeed, how could it reasonably be so when she did not know that the Secretary of State accepted that Alam would remain in the United Kingdom?

(ii) Jehan is in a similar position to Ishrut.

(iii) Kate Helsby spoke of Alam having most contact with Ishrut and Jehan. Having got to know the family dynamics, Ms Helsby said that Alam related to Jehan and Ishrut best as they were most active in 'keeping things together'. She stated in express terms that, if separated from any of his siblings, particularly the older ones, Ishrut and Jehan , Alam would struggle emotionally.

(iv) Whilst we accept that Alam remains very attached to his mother, Jamila's visits to Alam have not been positive and her own mental state was precipitated by Alam's admission to hospital. According to Ms Helsby, Jamila is unable to accept Alam is unwell.

(v) Critically, Ms Helsby said the team would *not* support Alam living at home because she suspected Alam found it difficult to cope with his mother's position.

(vi) We accept that a separation of Alam from his mother will have a negative impact on him but so, too, does her presence.

475. There are significant differences between the family's approach to Jamila's mental illness and that of Alam's. Alam is in hospital under powers requiring him to remain as an inpatient, Jamila is not. The family have taken the positive stance of not seeking help for her. The family are reluctant to involve mental health professionals in making any assessment under the Mental Health Act fearing that she might be involuntarily admitted to hospital. Although the family had tried to encourage Jamila to see a doctor, she had refused to visit her general practitioner. When a psychiatrist and social worker visited with a view to her formal admission to a psychiatric hospital, Jamila refused to communicate with them. She refuses to take medication. It is apparent that the family do not have a clear understanding of mental illness and live in hope – unfounded, though that is - that Alam and his mother will recover if he were discharged.

476. Notwithstanding the fact that the family finds her behaviour embarrassing and distressing, they have managed to achieve a sort of equilibrium. She is accepted in the family as the mother figure and her behaviour is accepted without resulting in destructive friction within the family although, no doubt, with extreme sadness. As Kamran said, "*We have to live with it.*" There is no realistic prospect of her receiving voluntary treatment under the NHS and there is no credible material before us to establish she will be admitted involuntarily. The situation has continued for a sufficient number of years to make this

prospect a realistic assessment of the future. We see this situation as prevailing in very much the same way in Pakistan as in the United Kingdom. The family will rally round her without seeking out medical treatment and avoiding what the family believe is the alternative solution of following the path that Alam has, involuntarily, been required to follow. This is not how we would view the ideal solution but we are satisfied that the obvious route of treatment and medication will not happen. Jamila's continued presence in the United Kingdom is not, therefore, reliant on the provision of healthcare here or the result of its absence in Pakistan.

477. We would certainly not view Jamila's departure from the United Kingdom as the end of the relationship between herself and her children. Once the children's immigration status is settled, there will be opportunities for them to visit their parents in Pakistan. It is likely that those able to do so will provide financial support to their family in Pakistan.

478. As we have seen, Kamran aged 23 at the date of decision and now 27, has fared very differently from his younger brothers, Jehan and Ishrut, two of the successful appellants in *Ahmad and others*. However, for the reasons we have given in relation to the similar distinction that arises for similar reasons in the cases of Toukeer and Tousif, we do not regard the disparity as meriting Kamran being equated with the position of his younger siblings, Jehan and Ishrut.

479. Idris, now 20, studied at Oxford Aspires Academy until 2010 sitting GCSEs in six subjects and a BTEC in Business Level II. Since finishing school, he has had a variety of temporary jobs for Domino's pizzas and Chicken Hut. He had hoped to study carpentry at college and then completed an apprenticeship but was unable to afford the fees. We do not consider that, given the underlying circumstances, it would be disproportionate to remove him along with his parents and elder brother Kamran. They will return as a family, albeit a family reduced by the absence of Jehan, Ishrut and Alam. We consider the family retain sufficient social, cultural and linguistic ties with Pakistan to render this reasonable and proportionate.

480. Similar considerations apply to Hina Bi, who will return with her parents and two of her brothers.

481. Kamran, Idris and Hina have all benefitted from the education they have received in the United Kingdom but they will not be returning to an alien culture, notwithstanding the fact that Hina has been in the United Kingdom since she was 3 years old.

**Mehmood Ahmed and Fazal Jan's family**

482. The Secretary of State accepts that, as a matter of domestic law, she has no power to remove any of her own nationals, save through the process, inapplicable here, of extradition. This places H in a position which is not exactly replicated elsewhere. As we have identified above, it is the case of

Mehmood Ahmed and Fazal Jan that they derive rights to remain in the United Kingdom as a consequence of H's nationality and the fact that their removal would lead to a genuine denial of H's right to remain living in the territory of the European Union. They also maintain that such rights are not defeasable, despite their deceptive and fraudulent acts.

483. If they are right in this submission then, given the findings we have made above in relation to H, it would be unlawful for the Secretary of State to remove them, at the present time, to Pakistan. If they are wrong in this submission, then we must determine whether their removal would be proportionate to the legitimate aim pursued in this case.

484. Although the issue of whether H's parents rights are defeasable is a matter of EU law and is not *acte clare*, we have declined to make a reference to the CJEU because, for the reasons given below, the determination of this issue is not necessary to determine the outcome of the appeal.

485. We are not herein considering an appeal against a decision not to provide EEA residence documentation. The appeal against such decision remains pending before the First-tier Tribunal. Our consideration of whether the *Zambrano rights* acquired by H's parents are derogable is performed within the confines of a proportionality assessment under Article 8 of the Human Rights Convention. Having performed such an assessment we find, for the reasons set out below, that removal of Mehmood Ahmed and Fazal Jan to Pakistan would not be proportionate.

486. The Secretary of State submits that, on the assumption that H accompanies his parents and that his enjoyment of his EU citizenship rights would be suspended, this would only be a temporary suspension. If his citizenship were not revoked, he would be free to return to the United Kingdom, once he was old enough, and live here permanently. On this basis, the suspension of H's citizenship, it is argued, would be proportionate when balancing the strong public interest in the removal of his parents. In other words, H's constructive removal from the United Kingdom accompanying his parents in their enforced removal would balance the competing force of respect for the public interest in removal while acknowledging his right to remain to the United Kingdom in due course.

487. The Secretary of State says in paragraph 320 of her skeleton argument:

> "…the fraud and deception practised by the family members goes to the heart of [H's] British citizenship. In these circumstances, the Secretary of State would be entitled to revoke that citizenship under the conduciveness provisions of section 40(2) of th BNA 1981. For the moment, she has not done so. However, that is an option which she is keeping under review, depending on the outcome of the present proceedings."

Even if the Secretary of State is permitted to challenge the decision in *Ahmad and others* only at the conclusion of the appeals before us, she cannot realistically

entertain such an appeal when she has acted upon the decision at least in the case of some of the adult children by granting them British citizenship.

488. There is another weighty factor against removal of H in the circumstances of this case. A consideration of proportionality must require the Tribunal to assess where the future of this child lies. The respondent's resolution of the tension between H's rights as a British citizen and the removal of his parents whilst he is still a minor expressly acknowledges his right to resume the full enjoyment of his rights in due course if, when H has reached his majority (or perhaps earlier), he chooses to return to the United Kingdom. Whilst such a consideration is inevitably speculative, there are some indications in the present appeal that render it more likely than not that he will return. He has relatives in this country. He is conversant with it. It is accepted that his circumstances in Pakistan will offer limited opportunities to further his education or to find work save of a modest type. The relative advantages of life in the United Kingdom are obvious notwithstanding the separation that this would entail from his parents and siblings if they are removed. Indeed, even ready access to state benefits would offer an incentive.

489. We therefore find that H is likely to return to the United Kingdom provided he retains the right to do so presently encapsulated in his British citizenship. However, he will do so substantially disadvantaged by reason of the curtailment for the foreseeable future of his right to education and training which will permit him to make effective use of his British citizenship. Further, whilst this directly prejudices him, it may not be altogether in the wider interest of society to have within it any citizen who is poorly educated and poorly trained. Nor is it an answer to say that, in due course, H will have the opportunity of resuming his education and commencing training because the late acquisition of such skills places him at a comparative disadvantage to one who has acquired them in the course of his minority.

490. In our judgment therefore these are weighty factors in favour of H's remaining in the UK. These considerations disappear, of course, were the respondent to have established that she had a power to deprive him of his citizenship and had taken steps to do so before the hearing of this appeal. Even if, therefore, removal of H's parents, and consequently constructively of H, is permissible when it is proportionate to do so, the factors weighing in the balance against removal demonstrate just what significant hurdles the Secretary of State has to overcome before she can establish it is proportionate to do so.

491. It is possible to contemplate a case where the public interest in removing a person who has been convicted of the most heinous crimes outweigh the interests of a British child of whom he is the sole carer but H's case is not such a case. Even were it to be one, the child's removal might then be avoided by the intervention of care proceedings designed to place the child in an alternative home in the United Kingdom. Whilst a possible outcome might have been the placement of H within the home of a relative (perhaps even an adult child), this

is not a solution which has been suggested by the Secretary of State in the circumstances of this appeal. None of his own adult siblings has established a right to remain and therefore to have carved out the identity as a potential carer.

492. Since both parents bear a similar responsibility for the situation that has arisen, the solution is not to be found in the removal of one parent whilst permitting the other to remain. This will often be the result where one parent is convicted of serious crime and the other, with a right to remain, is innocent. Ironically, the fact that *both* parents have been convicted of a conspiracy affords a greater barrier to their removal than if only one parent had been the wrong-doer. Further, the respondent has never suggested that this was a viable solution.

493. The effect of these considerations is that the removal of H's parents is impermissible as this will effectively deprive their son of his right to exercise the benefits of being a British citizen in a way that amounts to a disproportionate interference.

494. Inevitably, this impacts upon the fate of his minor siblings who cannot be removed if their parents remain. This leaves the adult twins, Wasim and Arfan.

495. As we have already pointed out, these appeals raise significant issue as to disparity of treatment. Wasim and Arfan are themselves such an example. However, this has been the result of their parents' behaviour, not the effect of failings in the system of immigration control. It has resulted in families being split into those members who have been relatively more successful than others. As we have pointed out, Wasim has been most affected in this family, giving up a course he started suffering from the effects of depression, for which he was prescribed medication by his GP. It is entirely understandable that those who have suffered most from the disparities that have emerged in these cases will have become depressed by the situation created, fundamentally, by their parents. However, Wasim's condition does not approach that of Alam in terms of the severity of the mental heath difficulties he faces.

496. We have reached the conclusion that, as adults who do not have the responsibility of looking after H, it is proportionate to require them to leave the United Kingdom. In reaching this conclusion, we accept that this has created a disparity between them (as the innocent victims of their parents' wrongdoing) and their parents who bear that burden of responsibility and yet have been permitted to remain. We have this well in mind. The parents, however, have not established a right to remain in recognition of their actions; rather, H should be permitted to have them remain with him in recognition of his rights. Nor do we necessarily say that their right to remain must be made permanent. All we conclude is that, during the minority of H, it would be disproportionate to remove them. It will be for the respondent to determine what should happen when H reaches adulthood.

497. The result in this case is analogous to the *Ahmad* children. They were distinguished by the way that the law operated in their respective cases, brought about by age and differences arising from those with settled status and those without. Distinctions were drawn by the operation of the legal system but this does not mean that the system is dysfunctional or discriminatory; merely that lines have to be drawn. In the case of H, this has resulted in his parents being permitted to remain in circumstances where, were it for their own efforts or actions, this result would not have ensued. For them, the result is not based on merit but upon due recognition of the rights that are attracted to the rights of another.

DECISION

The panel made an error on a point of law and we substitute a determination in the following terms:

**Family 1 Qadir Ahmed's family**

1. The appeals of (i) Qadir Ahmed and (ii) Nasreen Bi are dismissed.
2. The appeals of their children Toukeer, Sulva and Salma are dismissed.
3. Tousif Ahmed has succeeded by reason of the decision in *Ahmad and others (removal of children over 18)* [2012] UKUT 00267(IAC).

**Family 2 Ghulam Rabani's family**

4. The appeals of (i) Ghulam Rabani and (ii) Noreen Shakila are dismissed.
5. The appeals of their children Nusrat Bi, Rustam and Zahra Bi are dismissed.
6. Mohammed Atif, Mobushra Begum and Farah Begum have succeeded by reason of the decision in *Ahmad and others.*

**Family 3 Rungzaib Mohamed's family**

7. The appeals of (i) Rungzaib Mohamed and (ii) Jamila Kauser are dismissed.
8. The appeals of their children Kamran Idris and Hina Bi are dismissed.
9. The appeal of their son, Alam, is allowed.
10. Jehan and Ishrut have succeeded by reason of the decision in *Ahmad and others (removal of children over 18)* [2012] UKUT 00267(IAC).

**Family 4 Mehmood Ahmed's family**

11. The appeals of (i) Mehmood Ahmed and (ii) Fazal Jan are allowed.
12. The appeals of their minor children, Atteqa and Adeel, are allowed.
13. The appeals of their adult children, Wasim and Arfan, are dismissed.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
10 July 2014

## ADDENDUM

1. The hearing resumed on 14 October 2014 by which time a draft of our determination had been sent to the parties under embargo for the purposes of checking errors and omissions and in order to consider questions of anonymity. The determination in this draft form, as corrected, appears above, otherwise without alteration.

2. On 14 October 2014, there were two significant new matters. First, the provisions of the Nationality, Immigration and Asylum Act, 2002 had been amended by the introduction of Part 5A and sections 117-117D by operation of s. 19 of the Immigration Act 2014. Second, a few days before the resumed hearing, the Court of Appeal had decided *YM (Uganda) v SSHD* [2014] EWCA Civ 1292 (10 October 2014) which touched upon these new provisions. *YM (Uganda)* had been heard by the Court of Appeal on 19 June 2014. On 28 July 2014 part 5A came into force prior to the judgment in *YM (Uganda)*. On 10 October 2014, the Court of Appeal handed down its judgment in *YM (Uganda)* which by then had taken into account the provisions of Part 5A.

3. We gave directions for consolidated written submissions as to the relevance to our decision of (i) the new Part 5A of the 2002 Act and (ii) the decision in *YM (Uganda)*. The Secretary of State's submissions were submitted by Mr Blundell on 4 November 2014 and those by Mr Toal on 28 November 2014 to which Mr Blundell replied on 12 December 2014. We were only able to resume the hearing on 12 February 2015 in order to permit Mr Blundell and Mr Toal to address us orally on these matters.

4. In the meantime, Mr Blundell had been involved in the appeal of *Singh and Khalid v SSHD* [2015] EWCA Civ 74 (12 February 2015) in which the Court of Appeal agreed to hand down its judgment at 9.30 that morning to enable us to have sight of it for the purposes of our resumed consideration later that morning. The following is our determination on these additional matters.

## Legal Background

### *Part 5A of the 2002 Act*

5. We begin by setting out the provisions of Part 5A, emboldening those parts which have particular significance:

   **117A** *Application of this Part*

   (1) This Part applies **where a court or tribunal** is required to determine whether a decision made under the Immigration Acts—

   (a) breaches a person's right to respect for private and family life under Article 8, and

   (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal **must (in particular) have regard—**

(a) **in all cases**, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

**117B** *Article 8: public interest* ***considerations*** *applicable in all cases*

(1)The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) **Little weight** should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) **Little weight** should be given to a private life established by a person at a time when the person's immigration status is precarious.

**(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—**

**(a) the person has a genuine and subsisting parental relationship with a qualifying child, and**

**(b) it would not be reasonable to expect the child to leave the United Kingdom.**

**117C** *Article 8 additional* ***considerations*** *in cases involving foreign criminals.*

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are **to be taken into account** where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

**117D Interpretation of this Part**

(1) In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who—

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

…

(2) In this Part, "foreign criminal" means a person—

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who –

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

(3) …

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

***YM (Uganda) v SSHD***

6. In *YM (Uganda) v SSHD* [2014] EWCA Civ 1292 (10 October 2014), YM who was born on 24 June 1984, was sentenced to 3 years 5 months imprisonment for terrorist offences. On 22 May 2008 (then aged 23) he was served with a deportation notice by the SSHD.

7. As a result of a successful appeal, the re-making of the decision was delayed until 2 May 2013 by which time significant changes have been introduced on 9 July 2012 to the approach to be adopted in Article 8 cases. By this time YM's case fell to be determined, potentially, by reference to three different legal regimes.

8. Unsurprisingly, the issue of whether the First-tier Tribunal or the Upper Tribunal had made an error of law had to be ascertained by reference to the law as it applied to the date on which the earlier appeals had been determined. Both the new Part 5A to the 2002 Act and the 2014 Rules were irrelevant to the Court's first task in deciding whether the making of the decision involved the making of an error on a point of law. The issue, however, arose as to which regime applied at the various stages in the appeal process. YM was a deportation case. Paragraph A362 of the Immigration Rules expressly provided that the Rule changes of 9 July 2012 were to apply regardless of when the deportation order was made. Thus, the Upper Tribunal was bound to consider the approach to Article 8 introduced in 2012.

***Singh and Khalid v SSHD***

9. In *Singh and Khalid v SSHD* [2015] EWCA Civ 74 (12 February 2015), the Court of Appeal confirmed in Foot Note 7 that as different provisions apply to the deportation of foreign criminals *YM (Uganda)* had no bearing on the case before it. This supports our approach to *YM (Uganda)*.

10. Singh and Khalid each received decisions which post-dated the introduction of the new Rules on 9 July 2012 although in each case their respective applications had been made before their introduction. The general issue raised was whether the new Rules should have been applied notwithstanding the fact that in both the original application was made before 9 July 2012. The issue was the subject of apparently conflicting decisions in the Court of Appeal: *Edgehill v Secretary of*

*State for the Home Department* [2014] EWCA Civ 402 and *Haleemudeen v Secretary of State for the Home Department* [2014] EWCA Civ 558. Mr Blundell had contended that there was in truth no conflict between the decisions in *Edgehill* and *Haleemudeen* but Underhill LJ did not accept that contention. Underhill LJ had no doubt that *Edgehill* and *Haleemudeen* were indeed inconsistent and, given a choice, he would follow *Edgehill*. Given the terms of the implementation provisions to the effect that if an application has been made before 9 July 2012 and not yet decided, 'it will be decided in accordance with the rules in force on 8 July 2012', this plainly constituted a contrary indication of the kind envisaged in *Odelola v SSHD* [2009] UKHL 25, with the result that the new Rules should be ignored in considering any application made prior to 9 July 2012: the Secretary of State was not entitled to take into account the provisions of the new Rules (either directly or by treating them as a statement of her current policy) when making decisions on private or family life applications made prior to that date but not yet decided. That was because, as decided in *Edgehill*, the implementation provision displaced the usual *Odelola* principle. But that position was altered by HC 565 – specifically by the introduction of the new paragraph A277C – with effect from 6 September 2012. As from that date the Secretary of State was entitled to take into account the provisions of Appendix FM and paragraphs 276ADE–276DH in deciding private or family life applications even if they were made prior to 9 July 2012. The result is that the law as it was held to be in *Edgehill* only obtained as regards decisions taken in the two-month window between 9 July and 6 September 2012. Neither decision fell within that window. Accordingly the Secretary of State was entitled to apply the new Rules in reaching the decisions as both the decisions with which this Court was concerned in *Edgehill* were made after 5 September 2012, outside the window referred to in *Singh and Khalid*.

## Decision and discussion

### *New Immigration Rules introduced on, or after, 9 July 2012*

11. We have already found that the 9 July 2012 changes to the Immigration Rules, or those brought in by amendments in 2014, do not apply to our considerations in this case because it is a case involving administrative removal where both the applications and the Secretary of State's decisions were made prior to 9 July 2012. Paragraph A362 is not of application because deportation is not proposed. Our conclusion in this regard is re-enforced by the decision in *Singh and Khalid*.

12. We made alternative findings which included a consideration of paragraph 276ADE (iv) of the Rules. It follows, however, from what we have stated above that anything we said in relation to these alternative findings remains *obiter.*

13. Our conclusion was that, ultimately, the issue remained one of proportionality. By its very nature, this requires consideration of all material factors; the Secretary of State's legitimate public interest factors on the one hand; the appellant's legitimate assertions as to the impact upon the individuals concerned on the

other. As we have pointed out in paragraph 382 above, when contrasting paragraph 276ADE (iv) and (v) the fact that it is only (iv) that contains a consideration of whether it is reasonable to expect the individual to leave the United Kingdom does not materially strengthen or weaken the respective claims of those who fall within this category since the distinction is not determinative and claimants in both categories are protected by the proportionality exercise that has to be conducted on their behalves.

14. Our finding that the decision to remove an individual is proportionate in all the circumstances (including the parents' conduct) prevents the Tribunal also finding that it is unreasonable to remove that individual in consideration of the same circumstances (including the parents' conduct). Proportionality and reasonableness must, for all practical purposes, go hand-in-hand in any rational assessment of the same set of circumstances when considered 'in the round'. Furthermore, if there is a distinction, it is proportionality that trumps all else because of the over-arching place of Article 8 in the hierarchy.

*Part 5A of the 2002 Act*

15. The relevance of Part 5 A of the 2002 Act arises before us in the cases of three of the minor children:

    a. SB, daughter of the appellants Qadir Ahmed and Nasreen Bi. She was born on 10 December 1998 and is 15 years old. She has been in the UK for more than 12 years;

    b. HB, daughter of the appellants Rungzaib Mohamed and Jamila Kauser. She was born on 20 May 1997 and is 17 years old. She has been in the UK for more than 14 years (her family having arrived on 5 August 2000);

    c. AA, son of Mehmood Ahmed and Fazal Jan. He was born on 25 June 1997 and is now 17 years old. He has been in the UK for more than 13 years.

16. The parents of each child have a 'genuine and subsisting parental relationship' with the child and they are not liable to deportation.

***The nature and scope of a consideration of proportionality***

17. It as well to remind ourselves of what the Tribunal is required to do when applying s.6 of the Human Rights Act 1968. Where proportionality is engaged, a lawful decision cannot be made unless there is compliance with its requirements. In *Huang v SSHD* [2007] UKHL 11 (21 March 2007), the opinion of the Judicial Committee was expressed in these terms:

    > "The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind:

the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on. In some cases much more particular reasons will be relied on to justify refusal…The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational judicial decision-maker is likely to proceed." [16]

***"…it would not be reasonable to expect the child to leave the United Kingdom"***

18. The central issue in this part of the appeal concerns the meaning to be attributed to the expression '*it would not be reasonable to expect the child to leave the United Kingdom*' as found in s.117B (6) of Part 5A.

19. In *ZH (Tanzania) v SSHD* [2011] UKSC 4 (1 February 2011), Lady Hale, with whom Lord Brown and Lord Mance agreed, was focussing upon the best interests of the child. Indeed, in paragraph 1 of her judgment, she identified the best interests of the children as being '[t]he over-arching issue in this case'. However, she recognised competing considerations:

> "On the other hand, the reason for deporting may be very strong, or it may be entirely reasonable to expect the other family members to leave with the person deported." [16]

20. Having outlined the applicable principles derived from United Kingdom and European case law, Lady Hale continued in the section entitled '*Applying these principles*' said:

> "Applying, therefore, the approach in *Wan* to the assessment of proportionality under article 8(2), together with the factors identified in Strasbourg, what is encompassed in the "best interests of the child"? As the UNHCR says, it broadly means the well-being of the child. Specifically, as Lord Bingham indicated in *EB (Kosovo),* it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence from the other country; where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away." [29]

21. However, this passage must be seen in the context of what Lady Hale stated in a passage that follows the extract we have cited from [29]:

"We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her." [33]

22. The assessment of whether it is 'reasonable to expect the child to live in another country' was articulated by Lady Hale in the context of a consideration of the best interests of the child, as paragraph 29 makes clear. This is not surprising given the over-arching issue in the case which concerned the weight to be given to the best interests of children who are affected by the decision to remove or deport one or both of their parents from this country [1]. However, as paragraph 33 makes clear the best interests of the children and the concomitant reasonableness of expecting the child to live in another country was not determinative and had to be assessed amongst all the other considerations, albeit the best interests of the children was a primary consideration.

23. The restricted meaning attached to the reasonableness of expecting the child to live in another country (restrictive in the sense that it was equated with the best interests of the children) does not mean that this phrase must always be construed as short-hand for the best interests of the children. All will depend on the context. Lady Hale was not attempting to offer a statutory interpretation. As Mr Blundell powerfully submits, Parliament could have used express words to that effect; it could have referred expressly to the best interests of the child but did not do so. If Parliament had intended a child's best interests to be the sole consideration under s. 117B(6)(b), it needed only to have referred to the 2009 Act, as it did in s. 71 of the Immigration Act 2014:

"71. **Duty regarding the welfare of children**
For the avoidance of doubt, this Act does not limit any duty imposed on the Secretary of State or any other person by s. 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children)."

24. In *EV (Philippines) & Ors v SSHD* [2014] EWCA Civ 874 (26 June 2014), Christopher Clarke LJ clearly used the expression 'whether it was reasonable to expect the children to live in another country' as encompassing a much broader meaning that one restricted to a consideration of the best interests of the children:

"43. In the present case the FTT judge treated the best interests of the children as a primary consideration and concluded that their best interests lay in remaining with their parents and continuing their education here. He then considered

whether the need to maintain immigration control outweighed that consideration.

44. In carrying out this assessment he took into account the fact (a) that the parents would be employable in the Philippines; (b) that the family would not be homeless; (c) that there was an extended family to which they would have access; (d) that the family had only been in the UK for a limited time – 3 years 9 months at the date of the FTT decision at which time the children were 11,10 and 8; (e) that the children would not be without education in the Philippines. The fact that it would not be as good and that secondary education was not free was not determinative. In addition there was no question of any interference with the appellants' family life. Further, the family could have had no assurance of a guaranteed permanent settlement. The judge took account of the fact that EV had been underpaid by her employers and the chronology provided by the Appellants [13] which reveals the delays attributable to the Respondent.

45. His overall conclusion was that the need to maintain immigration control did outweigh the best interests of the children. *In effect he found that it was reasonable to expect the children to live in another country.* The Appellants submit that the judge did not analyse the weight to be given in this case to the need for immigration control. But, as it seems to me, in setting out and examining the factors relating to the Appellants, he was performing that exercise."

25. The enumeration of the factors set out in paragraph 44 of the judgment in *EV (Philippines)* clearly involved the holistic approach we would expect to find in a classical application of the proportionality balance. The factors identified undoubtedly went beyond a restricted consideration of the best interests of the children. It resulted in the Court of Appeal concluding that the Judge had not erred in his determination, [46].

26. At the conclusion of a hearing in which Article 8 is engaged and due respect is given to an individual's private and family life, a decision must be proportionate. In such a case, there is no room for another test save one of proportionality. Anything that requires one factor to determine the decision must inevitably skew the balance, perhaps fatally. However, the public interest in the balance to be conducted on proportionality requires the Tribunal to consider a complex set of factors involving a wide spectrum of considerations, economic, social and community building engaging in concepts of justice, fairness, and integration whilst at the same time avoiding discrimination. It is understandable that the concept of the public interest may be more readily assessed by specific consideration being given to identified factors. That is not, however, loading the balance in such a way that it cannot find its own equilibrium. The public interest factors identified in the statute can never artificially result in a different outcome to a proportionality assessment.

27. Parliament is uniquely able to identify the public interest; more so than in a statement of policy by a Minister. Hence, it is a sensible measure for Parliament to identify a number of factors which *must* be taken into account; to which regard

*must* be had. However the list is never exclusive and, as section 117B makes clear the specified factors are to be taken into account *in particular*, signifying that there may well be other factors which fall to be considered. Furthermore, the structure avoids being over prescriptive thereby permitting the balance to swing freely without any artificial check that prevents the decision becoming disproportionate and violating Article 8.

28. There is a danger that clearly operates in the appellants' interpretation of s. 117B(6) that, provided the individual is not liable to deportation, in all cases where he has a normal parental relationship with a qualifying minor child, his removal would be unlawful by reason of that one factor alone, namely the reasonableness of expecting the child to leave the United Kingdom. Hence, all other factors are excluded from consideration. Whilst the reasonableness of removing a child is a highly significant factor, indeed, a primary consideration, the focus restricted to this issue alone to the exclusion of all others *unbalances* the assessment of proportionality. In the context of this appeal, the outcome, as Mr Blundell accepts is stark. An appeal which we have found fails by the application of the conventional proportionality exercise succeeds if the surrounding circumstances are disregarded.

29. Mr Toal relied heavily upon what was said by Lady Hale at paragraph 29 of *ZH (Tanzania) v Secretary of State for the Home Department* as defining what is meant in s 117B(6) by the expression *'it would not be reasonable to expect the child to leave the United Kingdom'* and in particular the exact equation between the best interests of the child and Lord Bingham's opinion in *EB (Kosovo),* that the answer involved asking whether it was reasonable to expect the child to live in another country.

30. Accordingly, Mr Toal submits that s.117B (6) contains what we will call dual eligibility requirements namely that the qualifying child's parent must not be liable to deportation and there must be a genuine and subsisting relationship. If the eligibility requirements are satisfied, the only consideration is whether it would not be reasonable to expect the child to leave the United Kingdom. This is directed exclusively to a consideration of the child's interests.

31. The consideration, Mr Toal argues, is driven exclusively towards the child's circumstances. Thus in paragraph 20 of his submission, Mr Toal asserts that the question whether it is reasonable to expect a child to live in another country is to be determined solely by reference to the effect on the child of having to leave the United Kingdom and live in another country:

> "It does not invite a global consideration of all of the factors weighing for and against the expulsion of the child and his or her parents and an assessment in that context of what is reasonable."

32. In pursuing this argument, he relied upon the decision of the Tribunal in *MK (best interests of child) India* [2011] UKUT 00475 (IAC), in relation to the timing of

the consideration of the best interests of the child as a first or primary stage of the evaluation. He relied upon this passage:

> "There is a risk of the best interests of the child consideration wrongly taking into account extraneous factors such as the parents' poor immigration history." [19]

33. In this way Mr Toal elided the reasonableness of expecting a child to leave the country with the best interests of the child. However, the best interests of the child will inevitably be limited to a consideration of factors relating to the child. The reasonableness of expecting the child to leave has no such connotation. It may well be that the best interests of the child are to remain in the United Kingdom, to benefit from the welfare system including the provision of benefits as well as the provision of health care and education, perhaps at a better level than that possible in the country of destination. Were the reasonableness of the child's removal to relate solely to what is best for him, the consideration would exclude, for example, the fact that his parents have no right to remain in the United Kingdom (or, indeed, that the child has no substantive right to remain here) or that one of them has committed offences whilst in the United Kingdom. Similarly, Mr Toal relies upon the decision in the Court of Appeal in *JW (China) v Secretary of State for the Home Department* [2013] EWCA Civ 1526 in which, in paragraph 27, it is said that the judge correctly reminded himself that "the public interest in the maintenance of effective immigration control must not form part of the best interests of the child consideration."

34. Mr Toal seeks to justify the exclusion of factors other than considerations weighing in favour of the private right because, he argues, the public interest is expressly provided for by reference to "the case of a person who is not liable to deportation". In other words, the public interest has been expressly taken into account but is limited to the class of persons liable to deportation. There would be, he argues, an intrinsic illogicality were the public interest to be given consideration in two separate places: the first, by reference to whether the person is liable to deportation; the second, by reference to a test of reasonableness which he describes as a '*vague and general reference to reasonableness as a global, catch-all substituted for 'proportionate''.* Accordingly, he submits, on the true construction of subparagraph (6), Parliament has expressly limited the public interest to a consideration of whether the person is liable to deportation in cases of a child in a normal relationship with a parent.

35. These considerations require a careful examination of Part 5A which begins by noting ss. 117A to D apply to a 'court or tribunal' when considering an individual's private and family life under Article 8. It does not apply to the Secretary of State when making the decision. Subsection (2) provides that when considering the public interest, the court or tribunal must have regard to the factors in s. 117B and where applicable, s117C. The overarching purpose of these provisions is to ensure that the interference with the person's right to respect for family and private life is appropriately justified as required by Article 8 (2).

36. It is clear that it is an obligation to give consideration to the statutory factors.

37. The same broad meaning of "*having regard to*" a series of factors is repeated, in somewhat different terms, in s. 117C as it relates to the additional criteria involving foreign criminals. According to subsection s.117C (7) considerations are to be "*taken into account where a court or tribunal is considering a decision to deport foreign criminal*". The factors are '*considerations*' which must mean they are all to be taken into account or that the court or tribunal must have regard to them. That is a far cry from making any of these considerations determinative of the issue of removal.

38. The considerations set out in s.117B form the context in which subsection (6) is to be considered. Subsection (1) refers to the maintenance of effective immigration control being in the public interest. Such a broad consideration does not easily admit a definitive or determinative answer. Similarly, in subsection (2), the economic well-being of the country is directly linked to the ability of the person seeking to enter or remain to speak English. The consideration is expressly reasoned by reference to an English speaker being less of a burden on taxpayers and better able to integrate into society. In subsection (3) the economic well-being of the country is directly linked to the ability of the person seeking to enter or remain in the United Kingdom being financially independent.

39. Subsections (4) and (5) perform a related but distinct function. Whilst, by implication, subsections (1) to (3) are concerned with assessing positive considerations, subsections (4) and (5) are concerned with ensuring little weight is attached to a private and family life developed when the person is in the United Kingdom unlawfully or during a period when that person's immigration status is precarious.

40. All of the considerations so far identified in section 117B are directed at identifying a relative amount of weight to be attached to relevant (one might say, obvious) factors whilst never asserting that the factors are determinative. It is in the context of this consideration that we are bound to approach subsection (6). In such a case the existence of a genuine and subsisting parental relationship with a qualifying child provides that the public interest does not require that person's removal. However, it is conditional upon it and not being reasonable to expect the child to leave the United Kingdom.

41. If Mr Toal is correct in his submissions, the function served by subsection (6) is distinctively different from the functions identified in subsections (1) to (5). It is true, of course, that it does not provide carte blanche to every parent because such a parent has to establish a genuine and subsisting parental relationship with his qualifying child and to fall into that class of persons "not liable to deportation". These considerations refer to the eligibility of those seeking to rely upon subsection (6). Once the eligibility criteria are satisfied, according to Mr

Toal's submission, the individual cannot then be removed, because the public interest, as a matter of statute, does not require it. In these circumstances the public interest question ceases to be a matter to which regard should be had or taken into account but becomes a determinative factor. It may not be relevant that the effect of this provision is extraordinarily wide and will be satisfied, in most cases, by establishing a genuine and subsisting parental relationship with a qualifying child. It does not matter if the category is broad; nor does it matter that it runs counter to any earlier identification of the public interest; nor does it matter if it introduces a radical departure provided this is what Parliament has expressly intended. Mr Toal submits that the words are clear and that Parliament's intention is rendered plain by their use in subsection (6). It follows that the best interests of the qualifying children preclude the removal of their parents.

42. The language of sections 117A to 117D does not readily admit the startling result for which Mr Toal contends. Nor, in our judgment, is such an interpretation necessary, where there is an obvious alternative meaning to the phrase "*it would not be reasonable to expect the child to leave the United Kingdom*". If the court or tribunal when reaching its decision is able to consider the reasonableness of removal in its broadest terms and in the context of proportionality as a whole, the ultimate decision will be both reasonable and proportionate. Alternatively, if the court or tribunal is restricted to its consideration of reasonableness so that it relates solely to the child's best interests, the *overall* decision is capable of being neither reasonable nor proportionate. Indeed, by artificially, as it were, loading the balance by excluding the public interest in removal to a single consideration (whether the person is liable to deportation), there can be no genuine exercise of proportionality, the essence of which is to permit the balance to find its own equilibrium.

43. Mr Toal's approach sits uneasily with what the courts have said about the holistic nature of proportionality. Thus, in *VW (Uganda)*, Sedley LJ said:

> "…while it is of course possible that the facts of any one case may disclose an insurmountable obstacle to removal, the enquiry into proportionality is not a search for such an obstacle and does not end with its elimination. It is a balanced judgment of what can reasonably be expected in the light of all the material facts."

44. Mr Toal argues that this passage must be read in context and, in particular, the context created by what Sedley Lord Justice described as the last word in *EB (Kosovo)* - which Lord Bingham said [12]:

> "…it will rarely be proportionate to uphold an order for removal of a spouse was if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the remove spouse to the country of removal, or if the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in

general no alternative to making a careful and informed evaluation of the facts of the particular case."

45. Neither of these cases provided any support for Mr Toal's submission that in deciding whether a removal is proportionate, the court or tribunal must exclude material that is relevant to that issue. Indeed, both decisions pay close attention to the importance of making a balanced judgment on all of the material facts and suggesting, if not establishing, that an exclusionary approach will inevitably be incompatible with an holistic evaluative exercise.

46. Further, Mr Toal's justification for the exclusion of factors other than considerations weighing in favour of the child does not fit into the scheme of Part 5A that the s. 117B considerations will need to be addressed *in all cases,* see the express terms of s. 117A (2)(a): *('in all cases, to the considerations listed in section 117B')*. If the conditions for the application of s. 117B (6) are met, there is no room for the consideration of any others factors; the task is complete. By implication, Mr Toal's submission inserts into s. 117A (2)(a) the additional words '*save where s.117B(6) applies*', the s. 117B considerations will need to be addressed in all cases. That cannot be right.

***Absurdity***

47. Mr Blundell submitted that the interpretation advanced by the appellants amounted to an absurdity given that the application of s.117 was expressly confined to the court or tribunal. The Secretary of State is not bound by its terms. He, therefore, argues that the Secretary of State is entitled to reach a decision which is contrary to the provisions of s.117B(6). Such a decision would be lawful. Furthermore, it would fall within the Secretary of State's broad area of unfettered discretion. However, provided the appellant appealed against the Secretary of State's decision, the Tribunal would be bound, as a matter of law, to allow the appellants appeal, notwithstanding the lawfulness of the respondent's decision.

48. We feel this disregards the essential purpose of Part 5A which is that it is specifically directed towards the Courts and Tribunals in order to express Parliament's expression of the public interest. The need to do so arises only in the context of an appeal. The Secretary of State may reasonably expect that her own decision makers will have regard to the public interest without the need for the imposition of a mandatory code. Officials within the Home Office do not require statutory compulsion since this may be provided by other means. On the other hand, the developing case law has demonstrated the significance of making express provision for applying criteria as part of the Article 8 assessment. A distinction exists between criteria identified in the Immigration Rules, the emanation of the Secretary of State's policy on immigration matters albeit approved by Parliament and the greater significance of criteria in statutory form expressing the will of Parliament itself. There is nothing absurd in drafting criteria which, theoretically, the decision maker in the Home Office may have no

mandatory duty to apply but, for all practical purposes, is likely to do so. Whilst the 'absurdity' identified by Mr Blundell is at its most extreme form in the case of s. 117B (6), the 'absurdity' applies equally to the other mandatory criteria which impose a duty upon the Court or Tribunal to pay regard to matters which the Secretary of State is not so bound. In the result, the respondent's argument on this point does not assist us in considering the meaning of subsection (6), notwithstanding the obvious anomaly arising from a mandatory requirement that binds the appellate jurisdiction but not the original decision maker.

***The contextual scene***

49. The appellants rely upon documents that were before Parliament during the passage of the bill leading to the 2014 Act. These are the *Immigration Bill: European Convention on Human Rights: Memorandum by the Home Office* (October 2013) ("the ECHR Memorandum") and a letter of 12 November 2013 to the Chair of the Joint Committee on Human Rights, sent by Mark Harper MP, Minister for Immigration.

50. There is no dispute the documents are admissible, even where there is no ambiguity, albeit limited to showing the contextual scene in which the 2014 Act is set as demonstrating the aims of the government in promoting the 2014 Act. In this regard the respondent relies upon *Bennion on Statutory Interpretation* (6th ed.), section 219, pp. 591 – 593. However, the respondent contends both documents support the Secretary of State's submissions as to how the relevant provisions should be construed. Mark Harper MP stated:

> "It takes into account the children duty and includes subsection (6), which sets out that the public interest does not require the removal of a person who has a qualifying child where it would not be reasonable to expect the child to leave the UK. This provision is a proper reflection of the best interests of children in the UK – both British and foreign – which the law requires to be a primary consideration in immigration decisions. The law is also clear that those best interests can be outweighed by countervailing factors, including in controlling immigration and protecting the public. Clause 14 strikes the right overall balance on these issues."

51. This expressly refers to the best interests of the child as a primary consideration but not determinative and capable of being outweighed by countervailing factors. They reflect the *status quo* and do not suggest the introduction of a novel category of individuals entitled to remain solely on the basis of a genuine and subsisting parental relationship with a qualifying child. We are satisfied this would amount to a departure from the law as it stood prior to 28 July 2014 and is not justified by the inclusion of subsection (6) into s.117B.

52. For all of the above reasons, we are not satisfied that the introduction of Part 5A has the effect contended for by the appellants. Our consideration of

proportionality is, in the result, not determined by the changes introduced by Part 5A.

53. Ultimately, for the reasons we have already given and now having taken into account ss. 117A-D of the 2002 Act, we consider that the children's removal is proportionate, notwithstanding the changes introduced. It goes without saying that we consider this is reasonable.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
12 March 2015