Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36025/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th November 2015	**On 11th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

D F
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Respondent

Representation:
For the Appellant: Ms A Fijiwala, Home Office Presenting Officer
For the Respondent: Mr P Bonavero, Instructed by Kilby Jones Solicitors LLP

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Foulkes-Jones promulgated on 1st July 2015 in which she allowed an appeal, on Article 8 grounds, against a decision made by the Secretary of State to refuse an application for leave to remain in the UK on the basis of a family life as a partner under the immigration rules.

2. The appellant is the Secretary of State for the Home Department and the respondent to this appeal is [DF]. However for ease of reference, in the course of this decision I

shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this decision, refer to [DF] as the appellant, and the Secretary of State as the respondent.

Background

3. The appellant, an Albanian national entered the UK 17th September 2013 with entry clearance valid until 11th August 2014. There was an issue before the Judge as to whether the appellant was granted leave to enter as a student or a student visitor but, in any event, on 15th July 2014 she applied for leave to remain in the UK on the basis of her family life as a partner and on Article 8 grounds.

4. The respondent refused the application for leave to remain in the UK under the immigration rules and concluded that there are no exceptional circumstances, which consistent with the right to respect for private and family life contained in Article 8 ECHR, warrant the grant of leave to remain outside the immigration rules.

The decision of First-tier Tribunal Judge Foulkes-Jones

5. First-tier Tribunal Judge Foulkes-Jones heard the evidence of the appellant and her partner, [AP].

6. The findings and conclusions of First-tier Tribunal Judge Foulkes-Jones are set out at section [5] to her decision. Having carefully examined the requirements of the Immigration Rules, the Judge found at paragraph [5(19)] that the appellant has not provided specified evidence from the sources listed in paragraph E-LTRP 3.2 of a specified annual income of at least £18,600 and therefore, the Appellant does not meet E-LTRP 3.1(a)(i). Having reached that conclusion the Judge went on to consider whether the appellant met the requirements of paragraph EX.1.(b). For the reasons that appear at paragraphs [5(22)] to [5(27)], the Judge found:

> "28. On the evidence before me I find that there would be difficulties for [AP] to relocate with the Appellant to Albania but I do not find that there would be very significant difficulties which could not be overcome or would involve very serious hardship on the evidence before me.
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> 29. Having regard to what I say above I dismiss the Appellant's appeal under paragraph EX.l(b) of the Immigration Rules."

7. Having dismissed the appeal under the immigration rules, the Judge went on to consider whether the appeal could succeed on Article 8 grounds. She reminded herself of the five questions identified by Lord Bingham in **Razgar [2004] UKHL 27**. She found that there is family life between the Appellant and [AP] and that the appellant's removal will be an interference by a public authority with the exercise of the applicant's right to respect for her family life. She found that the interference will have consequences of such gravity as to potentially engage the operation of Article 8, and that such interference is in accordance with the law and is necessary for the economic well being of the country and for the maintenance of proper immigration control. The Judge then considered whether the interference is proportionate to the legitimate public end sought to be achieved. She found, for the reasons set out at

paragraphs [32(v)] to [32(xiii)] of her decision, that the Respondent's decision is disproportionate to the need to maintain effective immigration control.

The Grounds of Appeal

8. The respondent claims that First-tier Tribunal Judge Foulkes-Jones erred in law in her approach to Article 8. First, the judge failed to give reasons or adequate reasons on a material matter. The respondent submits that having found that the appellant cannot satisfy the requirements of the immigration rules, and having found, in particular, that there are no "insurmountable obstacles" to the family life between the appellant and her partner continuing outside the UK, the Judge has failed to adequately explain why the appeal succeeds on Article 8 grounds. The respondent relies in particular upon the judgement of Mr Justice Sales in **Nagre –v- SSHD [2013] EWHC 720** in which he stated, at [43]

> "... the gap between the test for leave to remain under EX.1(b) and the result one would arrive at by direct consideration of Article 8 in the precarious family life class of case is likely to be small. In the majority of such cases, if the applicant for leave to remain cannot show that there are insurmountable obstacles to relocation of a spouse or partner to his or her country of origin so as to meet that part of the test laid down in EX.1(b), they will not be able to show that their removal is disproportionate."

9. Second, the Judge misdirected herself in law as to the relevance of the inability to meet the financial requirements set out in the immigration rules. The Judge expressly found that the appellant's sponsor's savings do not meet the evidential requirements in Appendix FMSE. However, at paragraph [5(32)(xi)], the Judge takes into account the income and savings of the sponsor in reaching her decision to allow the appeal on Article 8 grounds. The respondent relies in particular upon the judgement of Richards LJ, in **SS (Congo) & Others [2015] EWCA Civ 387** in which he stated:

> "51. In our judgment, the approach to Article 8 in the light of the Rules in Appendix FM-SE should the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with.
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> 52. This is for two principal reasons. First, the evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources, and the Secretary of State has the same primary function in relation to them, to assess the risk and put in place measures which are judged suitable to contain it within acceptable bounds. Similar weight should be given to her assessment of what the public interest requires in both contexts.
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> 53. Secondly, enforcement of the evidence rules ensures that everyone applying for LTE or LTR is treated equally and fairly in relation to the evidential requirements they must satisfy. As well as keeping the costs of administration within reasonable bounds, application of standard rules is an important means of minimising the risk of arbitrary differences in treatment of cases arising across the wide range of officials, tribunals and courts which administer the system of immigration controls. In this regard, the

> evidence Rules (like the substantive Rules) serve as a safeguard in relation to rights of applicants and family members under Article 14 to equal treatment within the scope of Article 8: compare *AJ (Angola)*, above, at [40], and *Huang* above, at [16] ('There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory;… the need to discourage fraud, deception and deliberate breaches of the law; and so on … ". Good reason would need to be shown why a particular applicant was entitled to more preferential treatment with respect to evidence than other applicants would expect to receive under the Rules. Moreover, in relation to the proper administration of immigration controls, weight should also be given to the Secretary of State's assessment of the evidential requirements needed to ensure prompt and fair application of the substantive Rules: compare *Stec v United Kingdom*, cited at para. [15] above. Again, if an applicant says that they should be given more preferential treatment with respect to evidence than the Rules allow for, and more individualised consideration of their case, good reason should be put forward to justify that."

10. Third, the respondent submits that the Judge misdirected herself as to the relevance of the decision in **Chikwamba**, because the appellant does not meet the substantive requirements of the immigration rules, and thus the appellant has not been refused leave to remain simply on the procedural ground that the appellant should return to Albania and make an application from there. The respondent relies upon the judgement of Mr Justice Nicol in **Thakral –v- SSHD [2015] UKUT 00096 (IAC)**.

11. Permission to appeal was granted on 22nd September 2015 by First-tier Tribunal Judge Andrew. In so doing, she stated:

> "2. It is arguable that the Judge having failed to explain why the matter succeeds under Article 8 outside the Rules given her finding that there are no insurmountable obstacles as a result of which Paragraph EX1 is not met. Further, it is arguable that the Judge should not have taken into account the Appellant's husband's savings, which cannot meet the evidential requirements of the Immigration Rules when coming to her decision in relation to Article 8. However, having carefully considered Paragraph 31(v) of the decision I am satisfied that the Judge did not rely on *Chikwamba v SSHD [2008] UKHL 40*."

12. Although the respondent advances three grounds of appeal, permission to appeal has only been granted in respect of the first two grounds that I have identified at paragraphs 8 and 9 above. Having myself read the decision of the First-tier Tribunal, Judge Andrew was right to refuse permission on the third ground for the reason set out by her.

13. The statutory jurisdiction of the Upper Tribunal is firstly, to decide whether the making of the decision of the First-tier Tribunal involved the making of an error of law: **s12(1) Tribunals, Courts and Enforcement Act 2007**. If the Upper Tribunal finds that there was such an error of law, it may set aside the decision of the First-tier Tribunal, and if it does so, either remit the case to the First-tier Tribunal or re-make the decision. The matter now comes before me to consider whether or not the

decision of the First-tier Tribunal involved the making of a material error of law, and if the decision is set aside, to re-make the decision.

The hearing before me on 9th November 2015

14. On behalf of the respondent, Ms Fijiwala adopted the grounds of appeal. She submits that having decided that the appellant is unable to satisfy the requirements of the immigration rules, the Judge erred in her approach to the assessment of the Article 8 claim. She draws my attention to the decision of the Court of Appeal in **SS (Congo) –v- SSHD [2015] EWCA Civ 387** in which the Court considered the proper approach to applications for leave to enter the UK outside the Immigration Rules on the basis of Article 8. She submits that in a case such as this, where the Judge held that there are no insurmountable obstacles to the family life between the appellant and her partner continuing outside the UK for the purposes of the immigration rules, that finding is highly relevant to the Judges assessment of Article 8 claim because the gap between section EX.1 and the requirements of Article 8 is likely to be small. She draws my attention to the decision of the Court of Appeal in **Agyarko –v- SSHD [2015] EWCA Civ 440**.

15. Miss Fijiwala submits that whilst the Judge has referred to the relevant authorities in her decision, she has not considered the relevant guidance provided by the Court of Appeal. She submits that there is no reason why the appellant should be treated with some preference, when it is clear that she cannot meet the requirements of the immigration rules. She submits that having found that there are no insurmountable obstacles to the family life between the appellant and her partner continuing outside the UK, it is perverse, absent exceptional circumstances, to find that the removal of the appellant is disproportionate to the need to maintain effective immigration control.

16. In reply, Mr Bonavero submits that the decision of the Court of Appeal in **SS (Congo)** is referred to at paragraph [30] of the Judge's decision and reasons, and in reaching her decision the Judge plainly had that decision in mind. He submits that the first ground of appeal advanced is misconceived. He submits that in order for the respondent to succeed in her 'reasons' challenge, she would need to demonstrate that it is impossible to understand the reasons for which the Judge found that the appellant's removal would amount to a disproportionate breach of her Article 8 rights. He draws my attention to the decision of the Court of Appeal in **R (Iran) & Ors –v- SSHD [2005] EWCA Civ 982**. He submits that it is perfectly clear why the Judge reached the decision that she did. It was by reference to a range of factors including the appellant's pregnancy, her previous miscarriage, the financial resources of her partner, and the fact that her child will be a British Citizen.

17. As to the second ground of appeal, Mr Bonavero submits that the approach proffered by the respondent is strange and artificial. He submits that a proportionality exercise necessarily involves looking at all the circumstances in the round. He submits that there were good reasons set out by the Judge for taking account of the financial evidence. He submits that the only reason why the application failed under the

immigration rules was because the appellant's partner had not provided evidence of sufficient savings around May-June 2014. By the time of the hearing in May 2015, there was ample evidence of his very considerable savings. He submits that the Judge was entitled to take account of that financial evidence together with the evidence of the appellant's pregnancy and previous miscarriage, in reaching her decision that the removal of the appellant is disproportionate to the need to maintain effective immigration control.

Discussion

18. Before addressing the two grounds of appeal and the submissions made before me by the parties, it is useful to set out the general approach that has been taken by the courts upon the assessment of Article 8 claims outside the immigration rules since the introduction of Appendix FM and paragraph 276ADE.

19. In **SS (Congo) [2015] EWCA Civ 387** the Court of Appeal considered the proper approach to applications for leave to enter the UK outside the Immigration Rules on the basis of Article 8 following the Court of Appeal's decision in **MM (Lebanon) & Others –v- SSHD [2014] EWCA Civ 985**. Lord Justice Richards set out the basic legal framework as follows;

> "11. Under the 1971 Act, the Secretary of State has a wide residual discretion to grant LTR or LTE outside the Rules, i.e. where an applicant cannot show that they satisfy the conditions in the Rules themselves: see R (Munir) –v- SSHD [2012] UKSC 32; [2012] 1 WLR 2192, at [44]. An applicant who does not satisfy the conditions stipulated in the Rules may nonetheless have a good claim to be entitled to enter the United Kingdom or to be allowed to remain here by reason of their Convention rights, e.g. Article 3 (protection against torture and inhumane treatment) and Article 8. Such a claim arises by virtue of the obligation of the Secretary of State under section 6(1) of the HRA to act in a manner compatible with an individual's Convention rights.
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> …
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> 14. However, the width of the gap between what the Immigration Rules set out by way of entitlement to enter or remain in the United Kingdom and the requirements resulting from application of a relevant Convention right – in these appeals, we are concerned with rights under Article 8 – may be highly relevant in certain contexts. This is because, in the immigration field, the fair balance required to be struck pursuant to Article 8 between individual interests protected by that provision and the general public interest typically involves bringing into account certain public interest considerations in relation to which the Secretary of State has a legitimate role to fulfil by formulating an approach which gives them proper value and weight. The Secretary of State is responsible for the overall operation of the immigration system as a fair system which properly reflects and balances a range of interests, including important aspects of the public interest, and she is accountable to Parliament for what she does.
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> …
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> 17. If the gap between what Article 8 requires and the content of the Immigration Rules is wide, then the part for the Secretary of State's residual discretion to play in satisfying the requirements of Article 8 and section 6(1) of the HRA will be correspondingly greater. In such circumstances, the practical guidance to be derived

from the content of the Rules as to relevant public policy considerations for the purposes of the balance to be struck under Article 8 is also likely to be reduced: to use the expression employed by Aikens LJ in MM (Lebanon) in the Court of Appeal, at [135], the proportionality balancing exercise "will be more at large". If the Secretary of State has not made a conscientious effort to strike a fair balance for the purposes of Article 8 in making the Rules, a court or tribunal will naturally be disinclined to give significant weight to her view regarding the actual balance to be struck when the court or tribunal has to consider that question for itself. On the other hand, where the Secretary of State has sought to fashion the content of the Rules so as to strike what she regards as the appropriate balance under Article 8 and any gap between the Rules and what Article 8 requires is comparatively narrow, the Secretary of State's formulation of the Rules may allow the Court to be more confident that she has brought a focused assessment of considerations of the public interest to bear on the matter. That will in turn allow the Court more readily to give weight to that assessment when making its own decision pursuant to Article 8. An issue arises on this appeal as to whether the Secretary of State has made a conscientious effort to use the new Immigration Rules to strike the fair balance which Article 8 requires and whether there is a substantial gap, or not, between the content of the LTE Rules and the requirements of Article 8."

20. Lord Justice Richards considered the different parts of the immigration rules and the tests of exceptional and compelling reasons. He held:

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

…

31. In other contexts, it cannot simply be assumed that a strict legal test of exceptional circumstances will be applicable when examining the application of Article 8 outside the Immigration Rules (or within the Rules themselves, where particular paragraphs are formulated so as fully to cover the applicability of Article 8, as in paragraphs 399 and 399A as interpreted in MF (Nigeria)). The relevant general balance of public interest considerations and individual interests will vary between different parts of the Rules. It is only if the normal balance of interests relevant to the general area in question is such as to require particularly great weight to be given to the public interest as compared with the individual interests at stake (as in the precarious cases considered in Nagre and the foreign criminal deportation cases considered in MF (Nigeria)) that a strict test of exceptionality will apply.

32. However, even away from those contexts, if the Secretary of State has sought to formulate Immigration Rules to reflect a fair balance of interests under Article 8 in the general run of cases falling within their scope, then, as explained above, the Rules themselves will provide significant evidence about the relevant public interest considerations which should be brought into account when a court or tribunal seeks to strike the proper balance of interests under Article 8 in making its own decision. As

Beatson LJ observed in Haleemudeen –v- SSHD [2014] EWCA Civ 558, at [40], the new Rules in Appendix FM:

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

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

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

21. Lord Justice Richards also set out the proper approach to the notion of a 'complete code' referred to in many cases. He held;

> "44. The proper approach should always be to identify, first, the substantive content of the relevant Immigration Rules, both to see if an applicant for LTR or LTE satisfies the conditions laid down in those Rules (so as to be entitled to LTR or LTE within the Rules) and to assess the force of the public interest given expression in those rules (which will be relevant to the balancing exercise under Article 8, in deciding whether LTR or LTE should be granted outside the substantive provisions set out in the Rules). Secondly, if an applicant does not satisfy the requirements in the substantive part of the Rules, they may seek to maintain a claim for grant of LTR or LTE outside the substantive provisions of the Rules, pursuant to Article 8. If there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules (cf Nagre, para. [30]), then in considering that case the individual interests of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment whether refusal to grant LTR or LTE, as the case may be, is disproportionate and hence unlawful by virtue of section 6(1) of the HRA read with Article 8.
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> 45. Sometimes, the latter stage of the analysis will be covered by the text of the Rules themselves, as in relation to the Rules governing deportation of foreign criminals reviewed in MF (Nigeria). Those Rules laid down substantive conditions which, if satisfied, would lead to the grant of LTR, but also stated that LTR might be granted "in exceptional circumstances" if the substantive conditions were not satisfied in a particular case. Where the Rules take this form, it can be said that they form a "complete code", in the sense that both stages of analysis are covered by the text of the

Rules. But this does not take one very far, since under the "exceptional circumstances" rubric one still has to allow for consideration of any matters bearing on the application of Article 8 for the purposes of the second stage of the analysis: see, e.g., AJ (Angola), above, at [46] and [55]. This is the basic point made by this court at paras. [44]-[46] of its judgment in MF (Nigeria).

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

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

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

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

22. In **Singh & Khalid –v- SSHD [2015] EWCA Civ 74**, (principally a decision about which rules applied) Underhill LJ summarised the position generally as follows:–

> "It is now settled that the right course in any case where an applicant relies on his or her private or family life is to proceed by considering first whether leave should be granted under the relevant provisions of the new Rules and only if the answer is no to go on to consider article 8 in its unvarnished form (the so-called "two-stage approach"): see the line of cases which includes Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC) and R (Nagre) v Secretary of State for the Home Department [2013] EWHC 7200 (Admin) to which I will have to refer more fully below. Thus article 8 claims "outside the Rules" are still possible, though the scope for their operation is reduced."

23. Thus under section 6(1) of the HRA, a grant of leave outside the Rules is appropriate if, notwithstanding that the case is not within the Rules, a person has a good claim to be entitled to remain by virtue of Article 8 or any other Convention right. The decision of Sales J in **Nagre** received the endorsement of the Court of Appeal in both **MM (Lebanon)** and **Singh & Khalid** and represents the law. The authorities establish that there is always a second stage, but where all relevant considerations have been weighed under the immigration rules and there are no compelling circumstances not sufficiently recognised under the rules it will be enough for the decision maker simply to say that. In this kind of case, the issue for the First-tier Tribunal is the lawfulness of the refusal to vary the appellant's leave to remain. The duty involves giving proper weight to the public interest as expressed by the respondent in lawfully made rules and guidance (and now applying also sections 117A-D of the 2002 Act). The failure to qualify under the rules will be tend to suggest that the public interest requires refusal of leave to vary, unless some countervailing factors are present which are not already taken into account under the Rules.

24. Failure under the rules where they are either a "full code" or where the "gap" between the rules and the Article 8 factors is small, will be a strong factor in deciding a freestanding Article 8 claim outside the rules because the claim will already have been addressed to a significant extent when rejecting the claim under the rules. Therefore, the exercise at "stage two" is to identify what factors exist which are relevant to the proportionality assessment which are not fully reflected in the rules which are designed to cover the generality of cases. Where there are factors which are substantial but which could play no, or no sufficient, part in the assessment under the rules, then a full assessment will be required in which they are balanced against all other relevant considerations including the public interest in effective immigration control.

25. In reaching her decision that the removal of the appellant is disproportionate to the need to maintain effective immigration control, the Judge makes the following finding at paragraph [32(vi)];

> "... as indicated at paragraph 33(ii) above the 'Appellant will be separated from [AP] after having miscarried, being pregnant again and looking to him for support."

The Judge had regard to the matters set out in s117 Nationality, Immigration and Asylum Act 2002 and made the following further findings at [32]:

> "(ix) ... Paragraph 117B(2) does not apply to the Appellant as the Respondent does not dispute that the Appellant can speak English. She gave her evidence in English.
>
> (xi) Under the Immigration Rules there was no evidence that cash of £62,500 was available six months prior to the date of application and therefore I could have no regard to the same. Under section 85(4) of the Nationality, Immigration and Asylum Act 2002 on an appeal under section 82(1), 83(2) or 83A(2) against a decision (the Tribunal) may consider evidence about any matter which (it) thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision. I can therefore have regard to evidence of [AP]'s savings after the date of decision with regard to the Appellant's human rights appeal. As at 20th May 2015 [AP] had some £70,000 in his Co-Op account and as at 11th May 2015 in excess of £60,000 in his Nationwide account. Most months from February 2014 he made credits of £2,400 plus into his Nationwide account. He is working as evidenced at page 13 and 14 of the Appellant's bundle. I therefore find that the Appellant will be economically independent.
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> (xii) The Appellant has never been in the United Kingdom unlawfully and therefore paragraph 117B(4) does not apply ...
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> (xiii) In any event the Appellant will be able to return to the United Kingdom after the birth of her British child."

26. The first ground of appeal advanced by the respondent is that the Judge failed "to give reasons or any adequate reasons for findings on material matters". The ground has two separate limbs to it. It is in my judgement, important to distinguish the two. A failure to give reasons would plainly amount to an error or law, but it is plain that the Judge did give reasons at paragraph [32] of her decision and reasons, setting out her reasons for reaching the conclusion that she did.

27. The second limb is that the Judge failed to give adequate reasons for findings on material matters. It is now well established that what is required is that the reasons must give sufficient detail to show the parties and the appellate tribunal, the principles upon which the lower tribunal has acted, and the reasons that led it to its decision, so that they are able to understand why it reached its decision. The reasons need not be elaborate, and need not deal with every argument presented.

28. In **R (Iran) & Ors –v- SSHD [2005] EWCA Civ 982**, the Court of Appeal drew together the threads of the approach to be adopted in cases where it is claimed that there is an error of law in the Tribunal's approach to the evidence. Lord Justice Brooke stated:

> "90. It may now be convenient to draw together the main threads of this long judgment in this way. During the period before its demise when the IAT's powers were restricted to appeals on points of law:
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> 1. Before the IAT could set aside a decision of an adjudicator on the grounds of error of law, it had to be satisfied that the correction of the error would have made a material difference to the outcome, or to the fairness of the proceedings.

This principle applied equally to decisions of adjudicators on proportionality in connection with human rights issues;

2. A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence.

3. A decision should not be set aside for inadequacy of reasons unless the adjudicator failed to identify and record the matters that were critical to his decision on material issues, in such a way that the IAT was unable to understand why he reached that decision.

4. A failure without good reason to apply a relevant country guidance decision might constitute an error of law.

5. At the hearing of an appeal the IAT had to identify an error of law in relation to one or more of the issues raised on the notice of appeal before it could lawfully exercise any of its powers set out in s102(1) of the 2002 Act (other than affirming the adjudicator's decision).

6. Once it had identified an error of law, such that the adjudicator's decision could not stand, the IAT might, if it saw fit, exercise its power to admit up-to-date evidence or it might remit the appeal to the adjudicator with such directions as it thought fit.

7. If the IAT failed to consider an obvious point of Convention jurisprudence which would have availed an applicant, the Court of Appeal might intervene to set aside the IAT's decision on the grounds of error of law even though the point was not raised in the grounds of appeal to the IAT."

29. The respondent submits that having previously found, at paragraph [25] of her decision and reasons, that there are no insurmountable obstacles to family life with her partner continuing outside the UK, the Judge has failed to adequately explain why the appeal succeeds on Article 8 grounds.

30. As I have said, the Judge did give reasons but the question is whether they were adequate reasons for allowing the Article 8 claim, in circumstances where the appeal under the immigration rules was rejected. In addressing that issue, it is necessary to return to the relevant authorities on the assessment of Article 8 claims outside the immigration rules.

31. In **Nagre –v- SSHD [2013] EWHC 720**, Mr Justice Sales considered the gap between paragraph EX.1(b) of the immigration rules and the relevant case law under Article 8. He said:

"41. The approach explained in the Strasbourg case-law indicates that where family life is established when the immigration status of the claimant is precarious, removal will be disproportionate only in exceptional cases; and also that consideration of whether there are insurmountable obstacles to the claimant's resident spouse or partner relocating to the claimant's country of origin to continue their family life there will be a highly material consideration. This is not to say that the question whether there are insurmountable obstacles to relocation will always be decisive. The statement of general approach referred to above refers to a range of factors which may bear upon the question of proportionality. For example, the extent to which there has been delay

by the host state in taking a decision to remove a foreign national may be relevant (a factor discussed in EB (Kosovo)). Therefore, it cannot be said that in every case consideration of the test in Section EX.1 of whether there are insurmountable obstacles to relocation will necessarily exhaust consideration of proportionality, even in the type of precarious family life case with which these proceedings are concerned. I agree with the statement by the Upper Tribunal in Izuazu in the latter part of para. [56], that the Strasbourg case-law does not treat the test of insurmountable obstacles to relocation as a minimum requirement to be established in a precarious family life case before it can be concluded that removal of the claimant is disproportionate; the case-law only treats it as a material factor to be taken into account.

42. Nonetheless, I consider that the Strasbourg guidance does indicate that in a precarious family life case, where it is only in "exceptional" or "the most exceptional" circumstances that removal of the non-national family member will constitute a violation of Article 8, the absence of insurmountable obstacles to relocation of other family members to that member's own country of origin to continue their family life there is likely to indicate that the removal will be proportionate for the purposes of Article 8 . In order to show that, despite the practical possibility of relocation (i.e. the absence of insurmountable obstacles to it), removal in such a case would nonetheless be disproportionate, one would need to identify other non-standard and particular features of the case of a compelling nature to show that removal would be unjustifiably harsh.

43. On this interpretation of the case-law, the gap between the test for leave to remain under EX.1(b) and the result one would arrive at by direct consideration of Article 8 in the precarious family life class of case is likely to be small. In the majority of such cases, if the applicant for leave to remain cannot show that there are insurmountable obstacles to relocation of a spouse or partner to his or her country of origin so as to meet that part of the test laid down in EX.1(b), they will not be able to show that their removal is disproportionate."

32. The relevance of an appellant's inability to meet the evidential requirements and the approach to Article 8 in light of Appendix FM-SE, was considered by the Court of Appeal in **SS (Congo) [2015] EWCA Civ 387**. Their Lordships held:

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

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

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

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

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

33. I am conscious that a decision should not be set aside for inadequacy of reasons unless the Judge failed to identify and record the matters that were critical to her decision, on material issues, in such a way that the Tribunal is unable to understand why she reached that decision. Similarly, judicial restraint should be exercised when the reasons that a Tribunal gives for its decision are being examined, and it should not be assumed too readily that the Tribunal misdirected itself because not every step in its reasoning is set out. I also remind myself that the mere fact that one Tribunal has reached what may seem to another as an unduly generous view of the facts, does not mean that it has made an error of law.

34. Having carefully considered the decision and reasons set out at paragraph [32] of the decision and reasons, in my judgment, the Judge erred in law on the two grounds advanced by the respondent. This is because she did not consider the appellant's Article 8 claim by reference to her earlier finding that there are no insurmountable obstacles to the family life of the appellant and her partner continuing overseas. Paragraph [32] of the Judge's decision and reasons neither expressly nor implicitly, refer to her earlier dismissal of the appeal under the immigration rules. At no stage in her decision to allow the appeal on Article 8 grounds does the Judge ask and address the crucial question of whether there are in this case compelling

circumstances, to justify allowing the appeal on Article 8 grounds where the substantive and evidential requirements of the immigration rules are not met.

35. I accept that it is possible that a case might be found to be exceptional for the purposes of an assessment under Article 8, even where there are no insurmountable obstacles to the family life continuing overseas. However, the fact that there are no insurmountable obstacles to the family life continuing overseas is a material factor to be taken into account and is likely to indicate that the removal will be proportionate for the purposes of Article 8. In order to show that, despite the absence of insurmountable obstacles, removal in such a case would nonetheless be disproportionate, the appellant and the Tribunal must identify other non-standard and particular features of the case, that are of a compelling nature to show that removal would be unjustifiably harsh. As Mr Justice Sales held in **Nagre**, in the majority of such cases, if the applicant for leave to remain cannot show that there are insurmountable obstacles to relocation of a spouse or partner to his or her country of origin so as to meet that part of the test laid down in EX.1(b), they will not be able to show that their removal is disproportionate.

36. In her decision, First-tier Tribunal Judge Foulkes-Jones refers to the fact that the appellant will be separated from [AP] having miscarried, and being pregnant again, looking to him for support. In my judgment, the miscarriage, pregnancy and the appellant's reliance upon the support of [AP] are factors that would be as equally relevant to an assessment of whether there are insurmountable obstacles to family life continuing overseas, as they are to an assessment of proportionality under Article 8. Having found that the appellant has not established that there would be very significant difficulties which could not be overcome or would involve very serious hardship on the evidence before her, the appellant's miscarriage, pregnancy and the support she received from [AP] could not in my judgment, amount to factors that are of a compelling nature to show that removal would be unjustifiably harsh on Article 8 grounds.

37. The Judge went on to consider that the appellant would be economically independent. The Judge sets out, at paragraph [32(xi)] of her decision and reasons, the information that was before her, as to the financial resources of [AP], but which she could not have regard to, in her consideration of the appeal under the immigration rules. Again, the authorities make it plain that compelling circumstances would have to apply, to justify a grant of leave to remain on Article 8 grounds where the evidence rules are not complied with. The appellant is required to demonstrate good reason why she is entitled to more preferential treatment with respect to the evidence, than other applicants would expect to receive under the Rules.

38. In my judgment, the decision of the First-tier Tribunal discloses a material error of law because the First-tier Tribunal failed to take account of a relevant and material consideration. That is, the Tribunal's earlier finding that there are no insurmountable obstacles to the family life of the appellant and her partner, continuing overseas. The decision of the First-tier Tribunal is set aside.

39. Directions were issued to the parties in advance of the hearing before me requiring the parties to prepare for the hearing on the basis that, if the Upper Tribunal decides to set aside the determination of the First-tier Tribunal, any further evidence, including supplementary oral evidence, that the Upper Tribunal may need to consider if it decides to re-make the decision, can be so considered at that hearing. No further evidence was relied upon by the appellant and there was no application made pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

40. For the reasons that I have already set out above, in my judgement, the appellant has failed to establish that despite the finding that there are no insurmountable obstacles to the family life continuing from overseas, removal would, nonetheless be disproportionate. There are in my judgment no other non-standard and particular features of the case, that are of a compelling nature to show that removal would be unjustifiably harsh for the appellant and her partner.

41. The appellant failed to establish that there are insurmountable obstacles to family life continuing abroad, under the test laid down in EX.1(b). The appellant does not challenge that finding. In my judgment, in the absence of any other identifiable features of a compelling nature, the appellant has failed to establish that her removal is disproportionate to the legitimate aim of immigration control. The appeal on Article 8 grounds is therefore dismissed.

Notice of Decision

42. The decision of First-tier Tribunal Judge Foulkes-Jones promulgated on 1st July 2015 discloses an error of law and is set aside. I remake the decision, dismissing the appeal by the appellant under the Immigration Rules and on Article 8 grounds.

~~43. No anonymity direction is made.~~

Signed Date

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT
FEE AWARD

I have allowed the appeal by the SSHD and in remaking the decision, have dismissed the appeal by the appellant and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Mandalia