Upper Tribunal
(Immigration and Asylum Chamber)

SD (British citizen children – entry clearance) Sri Lanka [2020] UKUT 00043(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 October 2019	
	………………………………

Before

THE PRESIDENT, THE HON. MR JUSTICE LANE
UPPER TRIBUNAL JUDGE RIMINGTON
DR H H STOREY, JUDGE OF THE UPPER TRIBUNAL

Between

SD

Appellant

and

ENTRY CLEARANCE OFFICER, COLOMBO

Respondent

Representation:

For the Appellant:	Mr P Lewis, Counsel, instructed by Mylvagananam Manicavasagar
For the Respondent:	Mr T Lindsay, Home Office Presenting Officer

1. *British citizenship is a relevant factor when assessing the best interests of the child.*

2. *British citizenship includes the opportunities for children to live in the UK, receive free education, have full access to healthcare and welfare provision and participate in the life of their local community as they grow up.*

3. *There is no equivalent to s.117B(6) of the Nationality, Immigration and Asylum Act 2002 in any provision of law or policy relating to entry clearance applicants.*

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4. In assessing whether refusal to grant a parent entry clearance to join a partner has unjustifiably harsh consequences, the fact that such a parent has a child living with him or her who has British citizenship is a relevant factor. However, the weight to be accorded to such a factor will depend heavily on the particular circumstances and is not necessarily a powerful factor.

5. When assessing the significance to be attached to a parent's child having British citizenship, it will also be relevant to consider whether that child possesses dual nationality and what rights and benefits attach to that other nationality.

DECISION AND REASONS

1. This is a decision to whose writing each member of the panel has contributed.

2. The appellant is a national of Sri Lanka. In November 2011 she married a British citizen, LD (the sponsor). She is a qualified nurse. They have two children, born in January 2013 and April 2015 respectively. Both are British citizens. In June 2016 she applied for entry clearance as a spouse under Appendix FM of the Immigration Rules. This was refused on 17 January 2017. She applied again on 12 June 2017. She was refused again on 10 September 2017. A review was refused by an Entry Clearance Manager on 15 June 2018. The appellant's appeal was dismissed by Judge Burns of the First-tier Tribunal on 4 September 2018. On 30 July 2019 the Upper Tribunal set aside Judge Burn's decision for material error of law, finding that in assessing the appellant's Article 8 circumstances the judge had failed to have regard to the (British) nationality of the two children. In this case, the two British citizen children reside with the appellant abroad, in Sri Lanka and so the issue of the significance or otherwise of their British citizenship arises in the context of the refusal of the application made by their mother to join her husband and the children's father in the UK.

3. The basis of the respondent's refusal of entry clearance on 10 September 2017 (which is the subject of this appeal) was that she did not meet the eligibility financial requirements under para E-ECP.3.1. to 3.4 of Appendix FM of the Immigration Rules. "[N]umerous discrepancies" between the sponsor's payslips and the transactions in his bank statement and also in pay dates, led the respondent to conclude that his gross income from employment had not been shown to meet the financial requirements. His application was therefore refused under paragraph EC-P.1.1(d) of Appendix FM. The respondent also stated, under the heading "Exceptional circumstances", that "based on the information you have provided we have decided that there are no such exceptional circumstances in your case." Under a further heading, "Refusal under the Partner Rules", the respondent noted that as well as not qualifying under the 5-year partner route, the appellant did not qualify "on the 10-year partner route on the basis of exceptional circumstances under Appendix FM."

4. The appellant's skeleton argument accepted that the appellant did not meet the provisions of Appendix FM, but maintained that in assessing the proportionality of the ECO refusal, that was not a determinative factor. It was submitted that the

refusal decision effectively prevented the appellant's two British citizen children from living in the UK and thus engaged Article 8 in and of itself, even if the children had never lived in the UK. Nationality or citizenship was an important aspect of a person's social identity and can form a component of private life protected by Article 8(1). Whilst the children in this case were not deprived of their British citizenship, the decision robbed them, in practical terms, of the opportunity to exercise their rights as British citizens. If they could not come to the UK they could not exercise their right of abode and all its concomitant rights – "the right to grow up in their country with their own culture and language; their right to attend UK schools and receive NHS treatment; or their right to develop and maintain social relationships in the UK."

5. The skeleton argument stated that "[i]t is no answer to say they could come to the UK at a later date." It was argued that although the domestic law duty under section 55 of the Borders, Citizenship and Immigration Act 2009 does not apply to them, it is clear from *Jeunesse v The Netherlands* (2015) 60 EHRR 789, among other cases, that the Strasbourg jurisprudence on Article 8 applies the best interests of the child test and in this case their best interests weighed strongly in favour of them being able to reside in the UK and exercise their rights as British citizens to grow up in the UK where they will enjoy a higher standard of health care and education to which they are entitled as of right. Accordingly, their status as British citizens should be treated as a "powerful factor" in the assessment of proportionality outside the Rules and accorded "substantial weight".

6. The appellant's skeleton argument also submitted that whilst British citizen children outside the UK are not in all respects in the same position as that of British citizen children in the UK, whose parents had the benefit of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (hereafter the 2002 Act), this provision was still pertinent since it reflected a policy of Parliament that, save in cases involving criminality or poor immigration history, British citizen children should not be forced to choose between living in the UK and living with their parent(s). Further, it was submitted that it would be unjust to put the appellant in a worse position because she applied for entry clearance from abroad, rather than (for example) entering illegally or overstaying and then making an in-country application under s.117B(6).

7. It was also contended that even though the sponsor had ceased working since the last hearing, the appellant had been offered a job as carer at a nursing home in the UK working 40 hours a week, which would create an adequate income to maintain and accommodate herself and the children. Her potential earnings were a factor that could properly be taken into account when assessing Article 8 outside the Rules (in support, the grounds cited the case of *MM v Secretary of State* [2014] EWCA Civ 985, but we note that the same point was advanced in *MM (Lebanon*) [2017] UKSC 10) at [99]-[100]).

8. The respondent's skeleton argument contended that the appellant did not meet the Immigration Rules at the time she applied, and she could not meet the Rules now. There was no reason why she could not reapply once the Rules can be met.

9. It was submitted further that in order to qualify for a grant of entry clearance outside the Rules the appellant must demonstrate the existence of exceptional circumstances that would make it unjustifiably harsh to refuse her entry to the UK. The refusal decision did not give rise to "interference of such severity as to engage Article 8." Alternatively, it was submitted that any interference was limited and proportionate. The respondent accepted that the best interests of the child were "capable in principle of forming a factor relevant to proportionality". In the appellant's case, the question regarding the best interests of the child yielded an "unemphatic" answer since the children had wider family in Sri Lanka and their continuous residence in Sri Lanka would be disrupted by relocation. Further, the ECO refusal would only delay, not permanently deprive, the opportunity for the children to exercise their right to reside in the UK. Nor had it been shown that the children could not, for example, attend school in the UK during term time, continuing to live with their mother in Sri Lanka the rest of the year.

10. The fact that there was no reason why the appellant could not reapply when she could meet the Rules was also relevant to proportionality, since the appellant and sponsor will have been aware at all material times that they may not be able to live together in the UK, unless and until they meet Immigration Rule requirements. The ECO refusal only maintains the *status quo ante* and Article 8 does not protect a preference for domicile and it has not been established that the family could not reasonably choose to live together in Sri Lanka. Also weighing against the appellant's case based on family life was that she had stated in her application that "[d]uring my stay in the UK our children will be looked after by my parents." There was no reason to consider that it is any less reasonable now for the children to remain in Sri Lanka with their mother pending an application that meets the Rules, than it would have been at the date of application for the children to remain in Sri Lanka without their mother. It was argued that the expressed willingness of the appellant to voluntarily leave the children in Sri Lanka for an indeterminate period significantly undermined her arguments that the appealed decision was incompatible with s.55 and Article 8.

11. It was also submitted, as regards the appellant's private life, that the appealed decision does not interfere with the appellant's private life; private life is not engaged in respect of a person outside the Contracting State: *Secretary of State for the Home Department v Abbas* [2017] EWCA Civ 1393 at [18]. The children, it was submitted, are not prevented from living in the UK by the appealed decision or at all.

Submissions at the hearing

12. Mr Lewis asked us to find that the decision under challenge was both an interference with family and private life and a disproportionate interference. Central

to the appellant's case was the fact that British citizenship was not simply an economic right; its right of abode component amounted to, in the words of Lord Mance in *R (Bancoult) v Foreign Secretary (No 2)* [2009] 1 AC 453 at [151], a constitutional or foundational right. Nationality, Mr Lewis said, gives choice and the ability to exercise choice. Its core was the right of abode and the longer the children were away from the UK the harder it would be for them to integrate and to contribute and add to the social fabric.

13. As regards the private life component to the appellant's claim, her case was to be distinguished from that considered by the Court of Appeal in *Abbas*, since in *Abbas* there was no British national children and the application was for a visit visa whereas here the appellant sought entry with a view to settlement. The respondent was required to undertake a best interests of the child assessment and, in the appellant's case, refusal of entry clearance to her entailed denial to her British citizen children of the opportunity to exercise the rights and benefits of that nationality. The children had made known their wish to come to the UK. They were entitled as British citizen children to the higher standards of education and social welfare available in the UK. He reiterated the appellant's submission that the British citizenship of the children did not create an absolute entitlement for the appellant to be granted entry clearance but it provided powerful reasons which could only be outweighed by criminality or a poor immigration history, neither of which pertained here. Ironically, if the appellant had entered illegally she may have stood to benefit from 117B(6). Both parents were of good character.

14. Mr Lewis pointed out that, as regards the appellant's situation under the Immigration Rules, the sponsor was no longer in work due to health problems, including anxiety and depression, but the appellant, although not working in Sri Lanka presently, had an offer of employment as a nurse carer which meant the couple could now meet the financial requirements. The Upper Tribunal was in as good a position as the ECO to reach a view on the current financial circumstances. They had already paid the fee for their application. The sponsor had lived for periods in Sri Lanka and had attempted to find work, the longest being for 2 months on a salary of £450-500 per month. The costs of the children attending an English school was £200 a month. On that salary he would not be able to pay to continue that schooling. The state school was Tamil-speaking. The children had been put into an English school to prepare them for life in the UK. Their parents identified education in the UK as being of primary importance for their children.

15. Mr Lewis reiterated the point that even though s117B(6) of the 2002 Act was not applicable to the appellant, it clearly reflected a public policy to accord particular weight to the nationality of children who were British citizens.

16. Mr Lewis submitted that there were exceptional circumstances in this case: the father and the two children were British citizens; the father was suffering from mental health issues; one of the children had gone to the UK to visit the father but he could not cope on his own. This underlined the importance of the best interests of the children lying in being with both their parents. It was unrealistic due to

economic circumstances to suggest the children could move between the UK and Sri Lanka.

17. Mr Lindsay submitted that it was incorrect to portray the refusal of entry clearance to the appellant as denying the children their right of abode or opportunity to live with their mother and family as a family unit. As regards the financial circumstances of the appellant and sponsor, they had clearly failed to meet the financial requirements. Even accepting that for the purposes of assessing the appellant's Article 8 circumstances outside the Rules it was proper to consider the appellant's potential earnings from a job as a nurse in the UK, there were evidential gaps – for example the job offer to the appellant had not been verified, there was no medical evidence that the sponsor could not work and there were childcare issues if she worked. The Home Office guidance on exceptional circumstances made clear that it was only if there were exceptional circumstances that consideration might be given to disregarding the financial requirements.

18. In relation to the children's best interests, Mr Lindsay accepted that s.55 considerations were capable of being applied, but submitted that it was not uncommon for children to come to the UK when they were older and there was no reason why they could not make visits or indeed attend school in the UK, whilst remaining based in Sri Lanka. In the appellant's case, the best interests of the child assessment cut both ways and it could not simply be assumed that their integration into Sri Lankan society was less important than their potential integration into UK society. It was easy to imagine a situation of a British citizen child in which there might be very exceptional circumstances justifying entry clearance being granted to a parent of a British citizen child, if for example a child needed an organ transplant in the UK and the parent was needed to be with the child throughout that process, but that was not this case.

19. Mr Lindsay asked us to reject the appellant's contention that the appellant's right to respect for private life was engaged. The decision of *Abbas* was clear that in entry clearance cases there was no obligation on a contracting state to protect private life. There was no Strasbourg Court authority to support the view that there was.

20. So far as concerned the appellant's family life claim, it had not been shown that the sponsor could not go and live in Sri Lanka or that the children could not exercise their rights as British citizens by attending school in the UK and returning to Sri Lanka on holidays. The appellant said in her application that it was planned to leave the children in Sri Lanka whilst she came to the UK to find work; it had not been shown there was any material change since then. Further, there was a proportionate option available to the family, namely, to resubmit a fresh application when they could meet the requirements of the Rules.

OUR ASSESSMENT

General

21. Before setting out the legal framework and addressing the main points raised in submissions, it may assist to furnish some context, by noting a number of basic propositions, first about the nationality of children considered from the international law perspective, and second about possession of British citizenship, in particular by children. For the avoidance of doubt, we are concerned throughout this decision with British nationality in the form of British citizenship only, not with any other type of British nationality.[1]

Nationality and children

Nationality

22. In *SSHD v Al-Jedda* [2013] UKSC 62 at [12], Lord Wilson endorsed the well-known aphorism of Warren CJ in *Perez v Brownell*, 356 US 44, 64 (1958) that the right to nationality was "nothing less than the right to have rights". In international law, nationality is defined as the legal relationship or 'legal bond' between the national and his or her state. It is 'the juridical expression of the fact that an individual upon whom it is conferred…is in fact more closely connected with the population of the State conferring nationality than with that of any other State'. (*Nottebohm Case (Liechtenstein v Guatemala)*: Second Phase, ICJ, 6 April 1955, ICJ Reports, p.4,23; General List, No.18). It gives rise to rights and duties on the part of both sides of this relationship.

23. As regards the substantive contents of these rights and duties, there is no definitive statement, although there is broad agreement (we draw here on the summary given by Alice Edwards in *Nationality and Statelessness under International Law*, C.U.P 2014 (eds Alice Edwards and Laura van Waas)) that from the perspective of the national, possessing the nationality of a particular state is generally associated with being granted entitlements to a range of rights, in particular, rights to (re-) admission and to take up residence, consular assistance when abroad, to run for elections, participate in public life and to vote, and the right to economic, social and cultural advancement. Correspondingly, from the perspective of the state, it is generally seen to owe certain duties to its nationals, in particular the right of diplomatic protection and the duty of (re)admission and residence. Nationals may be required to perform specific civic duties, including the obligation to defend the state against enemies (military service) and to pay taxes.

24. The absence of any agreed content to substantive rights and duties attaching to nationality undoubtedly reflects the strong recognition that it is largely for states to determine the precise contents of the rights and benefits they afford to their

[1] Under the British Nationality Act 1981 as amended, there are five other types of British nationals: British Overseas Territories Citizens, British Overseas Citizens, British Subjects, British Nationals (Overseas) and British Protected Persons.

nationals. The UNHCR Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons (Geneva, 2014), which was referred to by the Supreme Court in *Pham (Appellant) v SSHD (Respondent*) [2015] UKSC 19 at [24], notes at paragraph 53:

> "Where States grant a legal status to certain groups of people over whom they consider to have jurisdiction on the basis of a nationality link rather than a form of residence, then a person belonging to this category will be a "national" for the purposes of the 1954 Convention. Generally, at a minimum, such status will be associated with the right of entry, re-entry and residence in the State's territory but there may be situations where, for historical reasons, entry is only permitted to a non-metropolitan territory belonging to a State. The fact that different categories of nationality within a State have different rights associated with them does not prevent their holders from being treated as a "national" for the purposes of Article 1(1). Nor does the fact that in some countries the rights associated with nationality are fewer than those enjoyed by nationals of other States or indeed fall short of those required in terms of international human rights obligations. Although the issue of diminished rights may raise issues regarding the effectiveness of the nationality and violations of international human rights obligations, this is not pertinent to the application of the stateless person definition in the 1954 Convention."

25. The footnote to this passage observes that: "[h]istorically, there does not appear to have been any requirement under international law for nationality to have a specific content in terms of rights of individuals, as opposed to it creating certain inter-State obligations."

26. Consonant with this learning, we know from case law on the 'nationality' element of the definition of 'refugee' in Article 1A(2) of the 1951 Refugee Convention that just because a state denies basic rights and benefits to its nationals – and for example fails in the process to protect them against persecution - does not mean they cease to be its nationals; that underlines how contingent are the actual contents of such rights and duties on what is the situation in the particular state at the relevant time.

27. To summarise the general position in international law, the rights that nationals possess are not rights to a particular quality of enjoyment of those rights. As noted by Edwards (ibid), "[e]ven though the above-mentioned substantive rights are usually associated with the holding of nationality, the lack of access to or enjoyment of these rights does not change the nationality status of the individual under international law, nor ordinarily under municipal law." Edwards notes further that:

> "The only possible exception may be the case where a state denies an individual of the right to re-enter and reside in its territory (considered as the essence of nationality as a matter of public international law), which could be interpreted as a state effectively denying that the individual is its national. However, this could only be determined on the individual case at hand and considering all the relevant facts."

Nationality and children

28. At the same time it is also clear that, by virtue of their minority, children are not in a position to exercise some of the rights and benefits ordinarily associated with nationality for so long as they are children. This is a feature highlighted by a leading expert on children and nationality, Jacqueline Bhaba[2], in her article on "The importance of nationality for children", Institute on Statelessness and Exclusion, 2017:

> "Many of these rights and obligations are not applicable to nationals under 18 years of age: children cannot vote, they cannot stand for public office, they cannot serve on juries, and, as a matter of international law, they cannot be compelled to participate in active combat."

29. However, she goes on to emphasise that "these exclusions do not negate the importance of nationality for children." She then notes the following examples:

> "First, even a very young child, like an adult, will need proof of nationality to qualify for safe and legal border crossing. Second, more age specifically, though primary education is supposed to be free and universally available to all children irrespective of nationality, comparable international mandates do not apply to other, equally critical, educational opportunities, a deficit with consequential implications. Compared to their non-national peers, children who are citizens generally have privileged access to early childhood development and preschool opportunities, as well as to post primary education, college scholarships and other educational facilities. The same enhanced access for citizen children also applies to health care, to social welfare protections and to other critical economic and social rights facilities."

British citizenship and British citizen children

30. The rights and benefits of British citizenship are in large measure a matter of statute. Whether or not a constitutional right (a point on which Lord Hoffman (at [43]) and Lord Mance [at [151] differed in *R (Bancoult) v Foreign Secretary (No 2)*), the right of abode is clearly one of the most important components of British citizenship. However, as Lord Hope observed in *ZH (Tanzania*) at [41], "there is much more to British citizenship than the status it gives to the children in immigration law … [i]t carries with it a host of other benefits and advantages … [which] ought never to be left out of account." In the same case, Lady Hale emphasised at [32] that "the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond."

31. In *R (on the application of Johnson) (Appellant) v SSHD (Respondent*) [2016] UKSC 56, Lady Hale observed at [2] that "[t]here are many benefits to being a British citizen, among them the right to vote, the right to live and to work here without needing permission to do so, and everything that comes along with those rights". In *Rights*

[2] Lady Hale's quotation in *ZH(Tanzania*) at [32] from another of Ms Bhabha's publications is noted below at paragraph 52.

and Responsibilities: developing our constitutional framework, a publication of the Ministry of Justice dated March 2009, it is stated that:

> "Living in the UK, we enjoy a range of entitlements which go beyond the civil and political rights in the European Convention and sit – as part of our well-established welfare state – firmly in the sphere of social and economic rights. Including provisions which point to key aspects of our welfare state, such as the National Health Service and our rights and responsibilities as patients and staff, could help to paint a fuller picture of the rights and responsibilities we share as members of UK society."

32. Insofar as the position of British citizen children is concerned, the Home Office publication of July 2019, *MN1 Registration as a British citizen – A guide about the registration of children under 18*, states at p.5 that:

> "Becoming a British citizen is a significant life event. Apart from allowing a child to apply for a British citizen passport, British citizenship gives them the opportunity to participate more fully in the life of their local community as they grow up."

33. Whilst UK law also accords a number of rights and benefits to persons who are not British citizens (e.g. those who have settled status), they are fewer than those enjoyed by British citizens, As noted by Jay J in *The Project for the Registration of Children As British Citizens & Ors, R (On the Application Of) v Secretary of State for the Home Departmen*t [2019] EWHC 3536 (Admin) at [16]:

> "The advantages of British citizenship cannot be considered in abstract. The position of British citizens falls to be contrasted with those who have limited or indefinite leave to remain (there are also important practical differences between these species of leave), into which categories the majority but not all of the children entitled to be registered will no doubt fall. A person with leave to remain as opposed to the right of abode cannot enter and/or remain in the UK without let or hindrance: by definition, she requires leave, and this permission may require examination by immigration officers at a port of entry or at Lunar House. The status may lapse; it may be cancelled; and individuals holding such leave are liable to be deported on conducive grounds under s.3(5)(a) of the Immigration Act 1971."

British citizenship and Union citizenship

34. Although, at time of writing, we are aware that matters look set to change, *presently* one of the features of British citizenship is that it creates the additional status of citizenship of the European Union under article 9 of the Treaty of the European Union (TEU) and further provision is made by article 20 of the Treaty on the Functioning of the European Union (TFEU):

> "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."

35. By article 20(2), citizens of the Union "shall enjoy the rights and be subject to the duties provided for in the Treaties." The rights identified, non-exhaustively, include

"(a) the right to move and reside freely within the territory of the Member States." This includes the right to move freely around Europe to live, work, study and retire. Citizens of the Union can also vote and stand as a candidate in European Parliament and municipal elections, petition the European Parliament and complain to the European Ombudsman. If a citizen of the Union is travelling outside the EU and his or her country has no diplomatic representation there, they can go to the embassy or consulate of any other EU country and receive assistance and protection. In Case C-165/16, *Lounes*, 14 Nov 2017, the CJEU stated at paragraph 56 that: "the rights conferred on a Union citizen by Article 21(1) TFEU, including the derived rights enjoyed by his family members, are intended, amongst other things, to promote the gradual integration of the Union citizen concerned in the society of the host Member State."

36. The EU dimension brings into train, of course, the *Zambrano* jurisprudence. As was stated by the CJEU in *Ruiz Zambrano v Office national de l'emploi* (Case C-34/09) [2012] QB 265 at paragraph 45:

> "45. Accordingly, the answer to the questions referred is that article 20 TFEU … is to be interpreted as meaning that it precludes a member state from refusing a third country national on 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."

Dual or multiple nationality

37. So far our brief summary relates to nationality and British citizenship considered in the singular. However, the position becomes more complicated if the person concerned has more than one nationality, as it is accepted do the appellant's two children in this case. Again, in broad terms (and focusing for the moment on adults), leading studies identify that there are advantages and disadvantages of dual or multiple nationality.

38. Dual citizens can receive the benefits and privileges offered by each country. For example, in theory they have access to two social service systems, can vote in either country and may be able to run for office in either country, depending on the law. They are also in theory allowed to work in either country without needing a work permit or visa and can attend school in either country on the same footing as other citizen children. They are allowed to carry passports from both countries and enjoy the right of entry to both countries. They will ordinarily have the ability to own property in either country. Dual or multiple nationality also offers the possibility of integration into the culture of two or more countries and the benefit of dual heritage.

39. But there can also be disadvantages of having more than one nationality. As a dual citizen, a person is bound by the laws of both countries. Dual citizens may be

legally obligated to fulfil military obligations in one or both of the countries of nationality. In some countries there are employment security clearance hurdles for persons who have another nationality. There is also the potential for double taxation. Further, there is the potential difficulty for persons seeking to rely on the opportunity to exercise their rights and benefits as a national of one country, that they have available a separate set of rights and benefits flowing from their other nationality. This last feature is one we will have to consider further in the context of this appeal.

40. Again, however, not all of the above rights and obligations have application to children.

41. Whilst our general overview of basic principles pertaining to nationality helps provide context, it also underscores the hazards of seeking to enunciate any general propositions about the advantages of any particular nationality for a person. As we have seen, the actual content and quality of the rights and benefits attaching to nationality will depend heavily on particular circumstances. As Mr Lindsay observed, it is possible to construct hypothetical examples in which an applicant basing their application for entry clearance on having a British citizen child might be decisive. He suggested the example of the parent of a British citizen child living abroad needing an urgent transplant available only in the UK and where it was imperative for the safety and welfare of the child that the applicant parent accompany the child to the UK. Another possible scenario would be if an applicant whose child only has British nationality is in the position of being unable to access education for that child in their country of origin. At least if there are other obstacles facing the child's upbringing in that country, the arguments in favour of a finding that denial of entry clearance to the parent would have unjustifiably harsh consequences. might be compelling.

42. But equally it is possible to construct hypotheses where the child involved may in fact suffer no adverse consequences whatsoever in their country of origin, if for example it has a first-class health system and educational system, both fully accessible to the child and the child is perfectly integrated and happy there – and indeed there may be positive advantages to being brought up in their country of origin. In the absence, therefore, of any policy on the part of the respondent to treat it so, we consider it would go too far to say that at the general level "substantial weight" should be attached to the child involved having British citizenship or that there are "powerful reasons" for granting entry clearance. It will be no satisfaction to Mr Lewis, but our answer to his question about this can only be, we think, "[i]t all depends on the particular circumstances". We shall return to this theme when analysing Article 8 jurisprudence.

Specific legal framework

43. It is not in dispute that the appellant's application for entry clearance as a partner fell to be determined under the Immigration Rules set out in Appendix FM and Appendix FM-SE. Since there was, however, some dispute over whether the refusal

of the application would result in unjustifiably harsh consequences, necessitating an examination of Article 8 factors, outside the rules, it is salient to set out in full GEN.3.1.-GEN.3.3 of the Rules, which were amended from 10 August 2017 for all decisions made on or after that date by HC290:

> **"Exceptional circumstances**
>
> GEN.3.1.(1) Where:
>
> (a) the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1. (in the context of an application for limited leave to remain as a partner), E-ECC.2.1. or E-LTRC.2.1. applies, and is not met from the specified sources referred to in the relevant paragraph; and
>
> (b) it is evident from the information provided by the applicant that there are exceptional circumstances which could render refusal of entry clearance or leave to remain a breach of Article 8 of the European Convention on Human Rights, because such refusal could result in unjustifiably harsh consequences for the applicant, their partner or a relevant child; then
>
> the decision-maker must consider whether such financial requirement is met through taking into account the sources of income, financial support or funds set out in paragraph 21A(2) of Appendix FM-SE (subject to the considerations in sub-paragraphs (3) to (8) of that paragraph).
>
> (2) Where the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1. (in the context of an application for limited leave to remain as a partner), E-ECC.2.1. or E-LTRC.2.1. is met following consideration under sub-paragraph (1) (and provided that the other relevant requirements of the Immigration Rules are also met), the applicant will be granted entry clearance or leave to remain under, as appropriate, paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1. or D-LTRC.1.1. or paragraph 315 or 316B of the Immigration Rules.
>
> GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.
>
> (2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.
>
> (3) Where the exceptional circumstances referred to in sub-paragraph (2) above apply, the applicant will be granted entry clearance or leave to enter or remain under, as appropriate, paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1., D-LTRC.1.1., D-ECPT.1.2., D-LTRPT.1.2., D-ECDR.1.1. or D-ECDR.1.2.

(4) This paragraph does not apply in the context of applications made under section BPILR or DVILR.

GEN.3.3.(1) In considering an application for entry clearance or leave to enter or remain where paragraph GEN.3.1. or GEN.3.2. applies, the decision-maker must take into account, as a primary consideration, the best interests of any relevant child.

(2) In paragraphs GEN.3.1. and GEN.3.2., and this paragraph, "relevant child" means a person who:

(a) is under the age of 18 years at the date of the application; and

(b) it is evident from the information provided by the applicant would be affected by a decision to refuse the application."

Section 55

44. Mr Lindsay accepts that s.55 considerations are "capable in principle of forming a factor relevant to proportionality." In point of fact, it can be seen from GEN.3.1-GEN. 3.3 (cited above), that it is now[3] *part* of the Immigration Rules that "[i]n considering an application for entry clearance or leave to enter or remain where paragraph GEN.3.3.1 or GEN.3.2. applies, the decision-maker *must* take into account, as a primary consideration, the best interests of any relevant child." (emphasis added). GEN.3.3.2 defines 'relevant child' to mean a person who is under 18 at the date of application and "(b) it is evident from the information provided by the applicant would be affected by a decision to refuse the application." Reflecting that these mandatory provisions have been put into practice, we note that the ECO refusal decision in this case states in its third paragraph that "[t]his decision takes into account as a primary consideration the best interests of any relevant child in line with section 55 of the Borders, Citizenship and Immigration Act 2009."

45. GEN. 3.3 (1)(b) and GEN. 3.2(2) clarify that the exceptional circumstances at issue relate to those which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights.

46. Moreover, even before the change to the Rules made in August 2017, it was well-settled that for the purposes of entry clearance decision-making, the best interests of the children were still be taken into account: see, e.g. *SM(Algeria)(Appellant) v Entry Clearance Officer, UK Visa Section* (Respondent) [2018] UKSC 9 at [19]; *MM(Lebanon*) at [109]; *Mundeba* [2013] UKUT 00088 (IAC); *T (s.55 BCIA 2009 – entry clearance*) Jamaica [2011] UKUT 00483(IAC).

Statutory provisions and Section 117B(6)

47. Section 117A-D of the 2002 Act only apply where a *court or tribunal* is considering human rights claims (s117A(1)). Section 117B(6) provides protection for persons in a

[3] Previously the reference in Appendix FM to Article 8 in the context of entry clearance related to grants "outside the Rules).

genuine and subsisting relationship with a qualifying child who is defined in s. 117D(1) to mean a British citizen child or a child who has lived in the UK for a continuous period of seven years or more. From this it is clear that for British citizen children who fall within the geographical scope of s.117B(6) (see next paragraph) there is no residential requirement; they are qualifying children merely by virtue of their nationality (however, even the person who has a subsisting parental relationship with a qualifying child cannot succeed under s.117B(6) unless also able to show that "it would not be reasonable to expect the child to leave the United Kingdom"; the child's British citizenship is not enough on its own).

48. We consider both parties correct to view s.117B(6) as having no application in entry clearance cases, since geographical scope is integral to its wording. That its sole concern is with persons *in* the UK is clear from its reference to a "*removal*" from the UK of persons in a parental relationship with a child and from its reference, as regards the relevant child, to whether "(b) it would not be reasonable to expect the child to *leave the UK* (emphasis added). For that reason we think Mr Lewis goes too far in asking us to regard the underlying policy of Parliament expressed in this subparagraph as being to give substantial weight to the possession of British citizenship irrespective of geographical location. There is no equivalent to s.117B(6) in any provision relating to entry clearance applicants. We cannot assume that is unintentional. That said, as we shall come back to, we consider it consistent with Home Office policy to treat a child's possession of British nationality as a relevant consideration.

The Immigration Rules

49. In relation to *in-country applications*, there are immigration rules that provide eligibility to applicants having a genuine and subsisting relationship with a British citizen child. These broadly complement the protection against removal afforded by s.117B(6) in the context of decisions by courts and tribunals. Paragraph EX.1, which concerns exceptions to certain eligibility requirements for leave to remain as a partner or parent, is predicated, in the same way as is s.117B(6), on it "not being reasonable to expect the [qualifying] child to leave the UK" (EX.1(a) (ii)). Paragraph R-LTRPT.1.1, which concerns requirements for limited leave to remain as a parent, includes a relationship requirement that covers a child who is "a British citizen or settled in the UK" (E-LTRPT.2.2(c), but by E-LTRPT.2.2(b) the child concerned must be "living in the UK".

50. In relation to *entry clearance applications*, Section E-ECPT includes a route for parents of a child who is either a British citizen or settled in the UK (E-ECPT.2.2(c)), but (again) the child must be "living in the UK". The Rules do provide at GEN.1.3(c) that for the purposes of Appendix FM "references to a British citizen in the UK also include a *British citizen* who is coming to the UK with the applicant as their partner *or parent*" (emphasis added) but in the case of a British citizen child with an applicant parent the only applicable rules currently are those set out in GEN. 3.1 – GEN. 3.3. under the heading "Exceptional circumstances". As we have seen, EX.1 does not apply when applicants apply from abroad for entry clearance, even though they have British citizen children in the UK.

51. Although there is no path, therefore, for parents of a British citizen child not living in the UK under the main routes to entry clearance set out in Appendix FM, GEN.3.3.2 does require the decision-maker, in considering whether there are exceptional circumstances giving rise to a breach of Article 8 because such a refusal (including refusal of entry clearance) "would result in unjustifiably harsh consequences for the applicant, their partner, *a relevant child* or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application." (emphasis added). That clearly requires the decision-maker to take into account the impact on any relevant child, although the definition of "relevant child" makes no reference to nationality. We shall come back to this aspect of the Rules later on.

Policy

52. We asked Mr Lindsay to clarify whether or not the respondent had any existing policy instructions or other guidance specifically for Entry Clearance Officers. He stated that the existing guidance was contained in the Home Office Family Policy: Family life (as a partner or parent), private life and exceptional circumstances. He produced Version 3.0, dated 23 September 2019 (we note in passing that since the hearing there is now a Version 4, with the same title, dated 1 November 2019, but in respect of the parts relevant to this case, it is in identical terms). Although stated as being "published for Home Office staff", it expressly states in a subsection headed "Purpose" that:

> "[t]his guidance must be used for all decisions (emphasis added):
>
> > under paragraph 276ADE(1) of Part 7 (private life)
> >
> > under paragraphs 277-280, 289AA and 295AA of Part 8 (family circumstances (family life cases
> >
> > *under Appendix FM including on the basis of exceptional circumstances (family life) in accordance with GEN.3.1 to GEN.33* [which as we have seen encompasses entry clearance applications]
> >
> > outside of the Immigration Rules on the basis of exceptional circumstances (private life)".

53. Correspondingly, this document includes sections specifically relating to entry clearance applications: see e.g. page 31 dealing with "Decision to refuse entry clearance or leave to remain".

54. Mr Lindsay also produced the Immigration Directorate Instruction Family Migration: Appendix FM Section 1.7 Appendix Armed Forces, August 2017. This expressly states in the Introduction that "[f]or the purposes of this guidance "decision-makers" means Entry Clearance Officers and caseworkers."

55. The Family Policy guidance deals, inter alia, with the in-country immigration rules relating to British citizen children and includes at page 50, under the heading

"Is it reasonable for the child to leave the UK?", the statement that: "[t]he starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interests for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK." But it contains no similar provisions relating to British citizen children who are abroad. It does repeat the wording of GEN.3.3. (page 46) and in the section on Exceptional Circumstances (which is expressly stated to apply to entry clearance and leave to remain applications (page 66)), it is noted that its provisions "enable Entry Clearance Officers to conduct full Article 8 considerations under Appendix FM, removing the need to refer those entry clearance cases that potentially raise exceptional circumstances (requiring leave to be granted on Article 8 grounds) to the Referred Casework Unit'" (page 67). In a subsection headed Overview it is stated that:

> "These changes in the Immigration Rules have 2 key implications for Entry Clearance Officers and caseworkers deciding applications under Appendix FM.
>
> First, where an application for entry clearance or limited leave to remain as a partner or child under Appendix FM does not otherwise meet the minimum income requirement applicable under paragraph E-ECP.3.1., E-ECC.2.1., E- LTRP.3.1. or E-LTRC.2.1.:
>
> Then, under paragraphs GEN.3.1. and GEN.3.3. of Appendix FM, you must consider whether refusal of the application could breach ECHR Article 8 because it could result in unjustifiably harsh consequences for the applicant, their partner or a relevant child. In conducting this assessment, you must have regard to all of the information and evidence provided by the applicant. You must take into account, as a primary consideration, the best interests of any relevant child.
>
> Where, under paragraph GEN.3.1. of Appendix FM, you consider that refusal could breach ECHR Article 8 because it could result in unjustifiably harsh consequences for the applicant, their partner or a relevant child, you must give the applicant an opportunity to show whether the minimum income requirement can be met through any other credible and reliable source(s) of income, financial support or funds available to the couple.
>
> If the applicant has not already done so, you must contact the applicant (or their legal representative) in writing giving them 21 days in which to provide information and evidence in writing of any other credible and reliable source(s) of income, financial support or funds available to the couple which enables the minimum income requirement to be met. This can be in addition to, or in place of, the income or funds on which the application relied.
>
> Appendix FM 1.7: financial requirement provides guidance on the application of paragraph 21A of Appendix FM-SE, which sets out objective criteria by which you will assess the genuineness, credibility and reliability of other sources of income, financial support or funds.

Second, where an application for entry clearance or limited leave to remain under Appendix FM does not otherwise meet the requirements of that Appendix or Part 9 of the rules:

Then, under paragraphs GEN.3.2. and GEN.3.3. of Appendix FM, you must consider whether there are exceptional circumstances which would render refusal of the application a breach of ECHR Article 8 because it would result in unjustifiably harsh consequences for the applicant or their family. In conducting this assessment, you must have regard to all of the information and evidence provided by the applicant. You must take into account, as a primary consideration, the best interests of any relevant child."

56. At page 69 a 'relevant child' is stated to mean the same as it does in GEN.3.3.(2), namely, a person who:

"is under the age of 18 years at the date of application

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

Case law

57. The two key cases prayed in aid by Mr Lewis in support of his main arguments were the Supreme Court decisions in *ZH(Tanzania*) [2011] 2 AC 166 and *Zoumbas* [2013] UKSC 34.

58. In *ZH (Tanzania*) Lady Hale, in analysing the relevance of the best interests of the child as a primary consideration, observed at [30] and [32] that:

"30. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality (Article 7) and to preserve her identity, including her nationality (Article 8). In *Wan*, the Federal Court of Australia, pointed out at para 30 that, when considering the possibility of the children accompanying their father to China, the tribunal had not considered any of the following matters, which the Court clearly regarded as important:

"(a) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother's citizenship, 'and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle' (*Vaitaiki v Minister for Immigration and Ethnic Affairs* [1998] FCA 5, (1998) 150 ALR 608, 614);

(b) the resultant social and linguistic <u>disruption</u> of their childhood as well as the loss of their homeland;

(c) the loss of educational opportunities available to the children in Australia; and

(d) their resultant isolation from the normal contacts of children with their mother and their mother's family."

…

32. *Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults*. [Emphasis added] As Jacqueline Bhaba (in 'The "Mere Fortuity of Birth"? Children, Mothers, Borders and the Meaning of Citizenship', in *Migrations and Mobilities: Citizenship, Borders and Gender* (2009), edited by Seyla Benhabib and Judith Resnik, at p 193) has put it:

> 'In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond. Yet children, particularly young children, are often considered parcels that are easily movable across borders with their parents and without particular cost to the children.'"

59. In *Zoumbas*, Lord Hodge, having identified as one of seven legal principles to govern best interests of the child assessment in immigration cases that:

> "(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; …"

stated that:

> "12. Mr Lindsay [a different Mr Lindsay] for Mr Zoumbas also founded on a statement in the judgment of Lord Kerr of Tonaghmore in *ZH (Tanzania)* at para 46 in support of the proposition that what is determined to be in a child's best interests should customarily dictate the outcome of cases and that it will require considerations of substantial moment to permit a different result. In our view, it is important to note that Lord Kerr's formulation spoke of dictating the outcome of cases "such as the present" and that in *ZH (Tanzania)* the court was dealing with children who were British citizens. *In that case the children by virtue of their nationality had significant benefits, including a right of abode and rights to future education and healthcare in this country, which the children in this case, as citizens of the Republic of Congo, do not. The benefits of British citizenship are an important factor in assessing whether it is reasonable to expect a child with such citizenship to live in another country.* Moreover in *H(H)* Lord Kerr explained (at para 145) that what he was seeking to say was that no factor should be given greater weight than the interests of a child. See the third principle above." [Emphasis added]

60. The difficulty for us in seeking to apply the guidance in these two cases is that the Supreme Court was concerned in both cases with children who were in the UK and with issues relating to removal of their parents or the children themselves. Neither dealt with the context of entry clearance and British children living abroad.

61. That said, the unanimous decision of the Supreme Court in *MM(Lebanon)* observed at [80] that the Minimum Income Requirement (MIR):

> "has caused, and will continue to cause significant hardship to many thousands of couples who have good reasons for wanting to make their lives together in this

> country and to their children. Of particular concern is the impact upon the children of these couples, many or even most of whom will be British citizens themselves. These are illustrated in a Report commissioned by the Office of the Children's Commissioner for England, *Family Friendly: The Impact on Children of the Family Migration Rules: A Review of the Financial Requirements* (2015, Middlesex University and the Joint Council for the Welfare of Immigrants)."

62. This report, we observe, drew on empirical survey evidence to identify that separation of families can cause significant behavioural problems for the children involved and that of the 15,000 children estimated to be affected by the MIR the vast majority were British citizens (see 3.6, 3.8). At 4.3 the report stated that among those affected were "[o]ther children [who] are prevented from returning to the UK, their country of nationality, and are effectively exiled abroad in countries with far lower health and education standards."

63. Nevertheless, at [81] the Supreme Court said:

> "But the fact that a rule causes hardship to many, including some who are in no way to blame for the situation in which they now find themselves, does not mean that it is incompatible with the Convention rights or otherwise unlawful at common law."

64. It is, in our view, pertinent that the Supreme Court, despite being aware of the fact that a significant number of the children concerned will be British citizens, did not identify that as a factor of profound or even material significance in the determination of whether Article 8 compels the United Kingdom to admit a third country national who cannot meet the requirements of the immigration rules. This is unsurprising, in the light of the Court's analysis at [40] to [44] of the relevant Strasbourg jurisprudence, which conspicuously has not identified nationality as a necessarily weighty matter in reunification cases. We shall have more to say on this matter at paragraph 63 below.

65. It is clear that in Article 8 jurisprudence nationality is a relevant consideration both in the deportation/removal and the immigration context. Thus, in *ZH (Tanzania*) Lady Hale at [17] made reference to the identification by the Strasbourg Court of relevant factors to be taken into consideration in cases concerned with the expulsion of long-settled non-nationals who had committed criminal offences. She noted that the relevant factors which had first been enunciated in *Boultif v Switzerland* (2001) 33 EHRR 50 (numbers inserted) were:

> "[i] the nature and seriousness of the offence committed by the applicant;
>
> [ii] the length of the applicant's stay in the country from which he or she is to be expelled;
>
> [iii] the time elapsed since the offence was committed and the applicant's conduct during that period;
>
> [iv*] the nationalities of the various persons concerned*;

[v] the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;

[vi] whether the spouse knew about the offence at the time when he or she entered into a family relationship;

[vii] whether there are children of the marriage, and if so, their age; and

[viii] the seriousness of the difficulties which the spouse is likely to encounter in the country to which the appellant is to be expelled." [Emphasis added]

66. She further noted that this list of factors was approved and expanded upon in *Uner v The Netherlands* (2007) 45 EHRR 421.

67. At [180] Lady Hale noted that "[f]actors (i), (iii), and (vi) identified in *Boultif* and *Üner* are not relevant when it comes to ordinary immigration cases, although the equivalent of (vi) for a spouse is whether family life was established knowing of the precariousness of the immigration situation." Notably she did not exclude the relevance of (iv) "the nationalities of the various persons concerned".

68. Alongside the applicable principles set out in *Boultif* and *Uner* and other cases, the Strasbourg Court has identified a number of propositions particular to the context of entry clearance or admission. The applicable principles have been stated by the Court in its *Gül* judgment [*Case of Gül Switzerland*, app.no. 23218] as follows (loc. cit.,§38):

"(a) The extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest.
(b) As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.
(c) Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory."

69. These principles have been reiterated in a number of cases, including *Ahmut v Netherlands* (73/1995/579/665) 26 October 1996 and *Sen v Netherlands*, Application no. 31465/96, 21 December 2001. In *Ahmut v Netherlands*, directly after restating these principles, the Court stated at paragraph 68 that:

"68. Accordingly, as in the *Gül* case, *in order to establish the scope of the State's obligations, the facts of the case must be considered* [emphasis added]."

70. In *Sen v Netherlands* at paragraphs 31-40 the Court took into account the age of the child concerned, her situation in her country of origin and the level of dependence in relation to her parents. It further noted that the present case had certain common points with the situation of the applicants in the case *Ahmut* where no violation of Article 8 had been found based on the facts of the case. It took note of the fact that the third applicant in the case in hand was supported by her aunt and

uncle after her mother's departure to the Netherlands; she lived all her life in Turkey, part of her family was still living there and she had therefore strong links with the linguistic and cultural environment of her country. However, contrary to its judgement in the case of *Ahmut*, the Court assessed that in the present case there was a major obstacle in returning the Sen family to Turkey. The parents were beneficiaries of permits to stay in the Netherlands and had established their life as a couple in the Netherlands, where they had lived legally since many years and where two more children were born. Those two children lived their whole lives in the Netherlands, in the cultural and educational environment of this country. Therefore, they have little or no connection with their country of origin. Under these conditions, the most appropriate way to develop family life was, given the young age of the third applicant, by bringing her to the Netherlands.

71. Taking stock of the relevant Strasbourg jurisprudence on Article 8, we derive that (i) Article 8 cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory; (ii) a relevant factor that must be taken into account is the nationalities of the various persons concerned; and (iii) in order to establish the scope of the State's obligations, the facts of the case must be considered. In relation to (ii), we cannot find any support in this jurisprudence for extending this to include a principle that having a British citizen child furnishes "powerful reasons" for granting admission or entry clearance or that "substantial weight" must be given to a child's nationality. What weight is to be given appears to be left as a matter for each Contracting State's "margin of appreciation". As regards (iii), we would observe that in this regard the Strasbourg jurisprudence reflects our own initial observations on the significance of nationality at the level of abstract principle, in particular that the rights and benefits that attach to nationality will depend heavily on the particular circumstances.

Private life

72. Mr Lewis sought to augment his submissions by arguing that in the context of entry clearance applications the Article 8(1) rights to which the appellant is entitled are not confined to family life but also encompass private life. For him this is an important factor because Strasbourg jurisprudence has recognised the right to nationality as an aspect of a person's private life: see e.g. *R (Johnson) v SSHD* [2016] 3 WLR 1267 and *Genovese v Malta* (2014) 58 EHRR 25. He acknowledged that at first sight this limb of his argument was contrary to Court of Appeal authority (*Abbas v SSHD* [2017] EWCA Civ 1393), but submitted that the appellant's case could be distinguished from *Abbas* in several respects.

73. Whilst we agree with Mr Lewis that *Abbas* case addresses a significantly different factual scenario (a proposed visit to an uncle) and that it does not address the situation of a British citizen child or indeed any child, we are unable to accept that in this decision the Court of Appeal envisaged any exceptions to its broadly expressed statement at the level of "principle" that the right to respect for private life was not engaged in entry clearance cases. At [18] the Lord Chief Justice stated that: "[t]o accept that the private life aspect of article 8 could require a Contracting State to

allow an alien to enter its territory would mark a step change in the reach of article 8 in the immigration context. As a matter of principle it would be wrong to do so."

74. We consider that this decision binds us not to have regard to the appellant's right to respect for private life in the context of an entry clearance application.

75. At the same time, we do not view this as precluding us from having regard to the relevance of nationality, since, as we have seen, that is clearly one of the factors that decision-makers must take into account when considering the proportionality of any interference with the right to respect for family life. Indeed, it would be wholly artificial and simply wrong to hollow out, from the material scope of a person's family life, considerations going to factors such as their nationality and social identity.

<u>The appellant's case</u>

76. The sponsor did not give evidence before us. He gave evidence before Judge Burns and the bundle of documents submitted for that hearing included witness statements from him and the appellant (both undated but *circa* second half of 2018). In her witness statement the appellant said that she had met the sponsor in 2010 when was visiting a friend in hospital in Sri Lanka. In 2011 he came back to Sri Lanka. They married in November 2011 and after their marriage lived together "in our house". She had two children. He went back to the UK in November 2017 to work as an Assistant Sales Manager in a betting company. She was presently living with her parents who were old and fragile. Both her children missed their father very much. The sponsor's witness statement averred, inter alia, that his children attend an International school (the bundle included a number of school fees receipts from the school in question) and he regularly sends money for them to live in Sri Lanka (in the bundle there were various remittance receipts) "but my children want to be with me. I came [back] to live in the UK in order to educate my children." He did not want to go back to Sri Lanka as his interests are only in his children's education and their best interests. In addition to various documents relating to the appellant's qualifications and employment as a nurse, the sponsor's employment history and financial details, the bundle also included a statutory declaration stating that he lived in accommodation which had one double room with sharing facilities of toilet, kitchen and bathroom.

77. In the appellant's bundle produced for the hearing before us, the sponsor (in an undated but clearly recent witness statement) states that he has always worked and always supported his family. In 2017 he had worked for Betfred as an Assistant Sales Manager and had then found another job (in December 2018) as a Slow Sand Filter technician with Thames Water on an annual salary of £22,500 but had unfortunately lost that job following an accident at work that had happened due to the daily pressure and stress he was under. He was hopeful that he would get another job soon but he could not easily describe how stressful has been his separation from his wife and the legal proceedings that have followed. He had gone to Sri Lanka in 2010. He is good with languages and picked up Tamil very quickly. He had met his wife at a hospital where she was working. He had had wanted to bring her to the

UK to really make "our home and family in the UK" and they had made their first application for her visa in December 2011, soon after they had married. This had been refused because "they suggested our marriage was not genuine". He noted that their two children, both attended an English-speaking school for which he paid the fees. Both children are bi-lingual (Tamil and English). The children attend English-speaking events like the British Lankan Festival. He keeps in touch with his children daily through FaceTime. It "breaks my heart every time to see them on FaceTime and let them go". They are excited about moving to the UK. He also describes what happened when his daughter came to the UK for a visit (on an unspecified date), when he found it difficult to cope. He states that to bring his children to the UK without his wife "is not doable. I tried. I need my wife and my children and we will all support one another." He found it very difficult without his family. He has a tenancy for a 2-bedroom flat in anticipation of his family's arrival in the UK. His wife has to bring up the children by herself as she is unable to come to the UK. If they do not come soon they will find it difficult to adjust. He did not want to go back to Sri Lanka as he did not really think it would be in his children's best interests. His wife is a qualified nurse/phlebotomist and also has training as an assistant midwife. She is currently being offered a senior care assistant job at £10 an hour at a care home in Surrey. She had a video interview for this and impressed the prospective employer; but they will only keep the job offer open so long. "I really don't understand what is the point of my kids having British passports if we can't come to the UK". He has been going back and forth to Sri Lanka since 2012 which has cost thousands of pounds.

78. In the same bundle there is an undated but clearly recent witness statement from the appellant. It largely reiterates what she said in her earlier statement. She states that her children are always asking when they will go to the UK and want to be with their dad all the time. She states that the sponsor had gone back to the UK "in order to prepare for us to come to the UK and to start our life afresh in London." He sends money for the children's schooling and everyday expenses. She states that she has a job offer to work as a senior care assistant in a nursing home close to their house in London. The past 8 years has been very difficult and she is finding it difficult to manage with her children without their father's help. She is presently living with her parents who are old and fragile and find it difficult with young children around all the time. She feels their children needs a healthier environment. (The appellant's witness statement also refers to her being in work but Mr Lewis clarified that at the date of hearing she was not working.)

79. The appellant's bundle for this hearing also contains a number of documents relating to the sponsor's history of visits to Sri Lanka, air ticket receipts, his recent work history and his payments of school fees and remittances to his wife, the appellant's educational and work history and her English language qualifications. There is a letter to the appellant dated 16 October 2019 from [a care home in Surrey] offering her permanent employment as a Senior Care Assistant with them for a minimum of 39 hours a week at an hourly rate of £10 per hour. The manager states that the offer will only be kept open for 3 months. Also in the appellant's bundle was a letter from the sponsor's GP dated 7 October 2019 stating that the sponsor suffered

from depression and was on medication to help manage his condition. The fact that his wife and two children live in Sri Lanka was said to be affecting his mental health condition and worsening his depression. The doctor states that if the sponsor is unable to live or reunite with his family, his condition could further deteriorate. Among other documents was an award certificate to the appellant's daughter for being an "All Island Finalist" in the British Lanka Festival for the Performing Arts in verse speaking.

80. We remind ourselves that in respect of the appellant's and sponsor's current circumstances Mr Lewis told us on instructions that the sponsor was no longer in work due to health problems, including anxiety and depression. Nor is the appellant working in Sri Lanka presently, although she has an offer of employment as a nurse carer in the UK.

The Immigration Rules: Appendices FM and FM-SE

81. Dealing firstly with the appellant's situation under the Immigration Rules, we regard it as manifest that she did not meet the Minimum Income Requirements (MIR) of the Immigration Rules either at the date of application or decision. Indeed, so much was conceded by the appellant in the skeleton argument. She had failed to provide requisite documents pursuant to Appendix FM-SE. The only point raised to suggest that this was not so was to reiterate that the sponsor had produced correspondence from the HMRC confirming that he had been paid £19,612 for the financial year April 2016 to April 2017 (we note that there was also a P60 provided relating to that same year), but (as was properly noted by Judge Burns) HMRC correspondence is not included in the relevant evidential requirements in FM-SE. Furthermore, both at the date of application and decision there were discrepancies in the evidence the sponsor had submitted in the form of payslips and bank statements. Judge Burns had also found that there were such discrepancies. In the grounds of appeal before us in this case, there has been no real attempt to explain or dispute these discrepancies. Nevertheless, we do not doubt, and we do not understand Mr Lindsay to doubt, that the sponsor was in employment during the times claimed. But as to the level of his income for the requisite periods, the appellant has clearly failed to discharge the onus of proof on her to show that the sponsor had met the evidential requirements necessary to establish that his gross income exceeded 18,600 either at the date of application or decision or before the First-tier judge. Nor, as we will come to in a moment, can he meet the MIR now

The Immigration Rules: GEN.3.1-GEN.3.3(2)

82. That is not, however, the end of the examination of the appellant's position under the Rules. As noted earlier, she was still entitled to succeed under them if able to show, pursuant to GEN.3.1-GEN.3.3., that there are exceptional circumstances which would render the refusal of entry clearance a breach of Article 8 because such refusal "would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application." Under this rubric, we are satisfied from the information before us that the appellant, the

sponsor, their two children and the sponsor's own family members in the UK would be affected. The only question is whether the effect was such as to result in unjustifiably harsh consequences. In considering this question we have to bear in mind that it is relevant in this context to consider actual or potential income from sources other than the sponsor, in this case the appellant.

Article 8

83. We have already established that we are only concerned, in terms of the scope of Article 8, with the right to respect for family life. It is not in dispute that the appellant enjoys family life with her husband and with her two children. We are not concerned with her right or the children's right to respect for private life.

84. We unhesitatingly reject Mr Lindsay's contention that the appellant has not established an interference with her right to respect for family life. It is well-established that the threshold to establish a mere interference is a relatively low one and Mr Lindsay's own submissions recognised that there were interferences in play, although not ones he considered disproportionate. Article 8 was clearly engaged. The respondent's position on this issue in the refusal decision and before us is untenable. It remains, however, to assess the proportionality of the refusal of entry clearance.

Public interest considerations

85. Turning first to consider the public interest considerations applicable in this case, it is clear that there is a public interest in the maintenance of immigration control which in the context of a partner application for entry clearance has the legitimate aim of furthering the economic well-being of the UK.

86. It is an established part of Article 8 jurisprudence that (to repeat the words used by the Court in *Ahmut v Netherlands*):

> "(a) The extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest.
> (b) As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.
> (c) Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory."

87. In the appellant's case, one specific question that arises with potential impact on the weight we attach to the public interest, concerns Home Office policy. As noted earlier, neither the legislation nor the Rules nor any current Home Office policy expressly identifies the fact that an entry clearance applicant has children with British citizenship as a factor of any particular weight. There is no entry clearance analogue of EX.1 or s.117B(6). The statement in the Family Policy guidance cited earlier, about "not normally" expecting a qualifying child [one subcategory of which

is a British citizen] to leave the UK", is not mirrored at all in their entry clearance context.

88. The most that can be said, drawing on the submissions made by the respondent in *MM (Lebanon*), is that there is an understanding at the level of policy that the MIR can cause hardship and that this rule has a particularly harsh effect on families with British citizen children (see [81)]. By the same token, as we noted above at paragraph 55, Lady Hale spelt out in the next paragraph:

> "But the fact that a rule causes hardship to many, including some who are in no way to blame for the situation in which they now find themselves, does not mean that it is incompatible with the Convention rights or otherwise unlawful at common law."

89. The defects the Supreme Court discerned in the Rules and Home Office guidance at the time were subsequently addressed by the respondent, notably by way of the amendments made within GEN.3.3-3.1 in August 2017.

90. Applicants who have a British citizen child will be able to require the respondent to have regard to that fact, as one of the matters to be considered in undertaking her Article 8 assessment at large. As noted earlier, nationality is one of the factors recognised by the Strasbourg jurisprudence on Article 8 in family life cases as a relevant factor. An entry clearance applicant with a British citizen child is entitled to have that factor considered as relevant in a way that an applicant with a purely foreign national child is not. However, beyond this we are not permitted to go. It is abundantly clear from what we have stated earlier regarding the Article 8 case law, drawing on the principles set out in *Boultif*, *Uner*, *Ahmut v Netherlands* among other case - and our own analysis of nationality and British citizenship - that the degree of weight to be attached to nationality will always depend on the particular circumstances and the individual facts and that it is not regarded as a necessarily weighty matter. There is also the point that a dual national child enjoys the benefits of his or her other nationality. There is nothing in the Strasbourg or domestic jurisprudence that requires the respondent or a tribunal, as a general matter, to ascribe greater significance to the child's European/British citizenship than to the citizenship of the other country. That is unsurprising, since any such requirement risks being seen as a form of Eurocentric arrogance.

<u>The position of the sponsor</u>

91. Given that the appellant stated in her application form in mid-2017 that "[d]uring my stay in the UK our children will be looked after by my parents", we do not consider this a case where there has been an unqualified wish expressed by their parents since their birth for them to live in the UK. However, albeit the evidence is incomplete, we are prepared to accept that as time has gone on, especially in view of the fact that it would appear that the appellant's parents are now old and frail and that the sponsor has psychological problems, both parents are now more intent on the appellant and her children coming to join the sponsor. We are satisfied that one

of the reasons behind the couple placing their children in an English speaking school (and keeping them there) is to prepare them for life in the UK.

<u>The option of the children joining the sponsor in the UK on their own</u>

92. Mr Lindsay has asked us to regard it as a viable option, reducing any possible disproportionality in the decision, for the children to come to the UK to attend school in term time and return to their mother in the holidays. We do not rule out that in some cases that may be a viable option, but on the evidence before us in this case, although somewhat sketchy, we consider such an option to be unrealistic. The sponsor had found it difficult looking after one of the children on his own during a short visit to the UK circa 2016. There are air tickets in the appellant's bundle confirming this trip together with her father and the sponsor in his latest witness statement refers to him being found crying in the middle of the road with his daughter (then 3) during that visit. He states that he was taken to a police station and she was taken into care for 3 weeks whilst he was assessed as to his mental health (during this time he was in Great Yarmouth and she was in London). At the end of that period she came back to live with him, but (he stated) "I still couldn't cope looking after her by myself" and he then took her back to Sri Lanka, selling things to pay for the fares. Given that the letter from his GP states that he still has psychological problems, we do not consider that it would be in the children's best interests for him to be put in the position of being their sole carer, even assuming the appellant, who has always been their primary carer, was happy to be separated from her children in this way.

<u>The option of the sponsor returning to Sri Lanka</u>

93. Mr Lindsay has submitted that it was reasonable to expect the sponsor to move to or go and live in Sri Lanka in order for their family life to take place in that country. Mr Lewis opposes that, submitting that that there would be insurmountable obstacles in the way of the sponsor doing so. He highlights that the sponsor is categorical that he does not want to go back and live in Sri Lanka We find the evidence relating to this issue somewhat mixed. The sponsor had lived there before: between 2011 and November 2017 he appears to have spent a considerable amount of time there. He says he has learnt Tamil. Even though he expressed concerns about being able to find properly remunerated employment there, he did have a job there for two months and he has not raised any other concerns about his own position if residing there. Although the sponsor suffers from depression and psychological problems, both he and his GP describe this as resulting from his separation from his wife and children. Even if being reunited with his family did not relieve or reduce his depression, there was no medical evidence, and it was not suggested by Mr Lewis, that he would be unable to access medical help for this condition in Sri Lanka. Notwithstanding his depression, he had worked and even after his recent accident, he said he was hopeful of finding work soon. On the other hand, it is clear that both the sponsor and the appellant badly want to live together as a family in the UK and that is also the keen wish of their children. If he returns to Sri Lanka to be with them,

even though it is likely he will be able to find employment there, as he did before, it may well be at a level of remuneration lower than that required to meet the MIR.

94. Weighing up the above considerations, we are satisfied that the sponsor returning to live in Sri Lanka would cause difficulties. But we are not satisfied that for him to go and live in Sri Lanka with his family would pose insurmountable obstacles or result in unjustifiably harsh consequences. We remind ourselves what was said in relation to the test of "insurmountable obstacles" in *R (on the application of Agyarko) (Appellant) v Secretary of State for the Home Department (Respondent)* [2017] UKSC. The Supreme Court stated at [45] that:

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

The options of *status quo ante* or the appellant and children being able to live in the UK

95. However, even if we were to proceed on the basis that the only two viable options open to the appellant and her family are the *status quo ante* (i.e. for them to continue to live as they are presently, the wife and children in Sri Lanka and the husband living in the UK) or for them to be able to live together in the UK, we would still not allow this appeal.

The best interests of the children

96. It is well-established that the best interests of the child assessment requires a balanced approach: see e.g. *Zoumbas* at [13].

97. We shall first identify factors in favour of the children's best interests being considered to repose in living in the UK with their parents. As already indicated, we are prepared to accept for the purposes of this appeal that it is now the parents' strong intent that the children should resettle in the UK so they can enjoy the rights and benefits of British citizenship, in particular the access to schooling here, which they consider superior to that the children currently enjoy in Sri Lanka. So far as we know of the children's own wishes, they are of the same mind as their parents, which means that they are likely to view the resettlement as an opportunity rather than as a mere disruption. They want to settle in the UK, which, as children possessing British citizenship, they are entitled to do as a matter of right.

98. As children with British citizenship, it is relevant to assessment of their best interests to take into account that moving to the UK would also enable them to enjoy access to the UK the educational system and if need be to have free access to other

services such as the NHS. Although we have not had country of origin evidence that might enable a full assessment of the comparative advantages and disadvantages of the rights and benefits enjoyed by children with Sri Lankan nationality in Sri Lanka as compared with those enjoyed by children with British citizenship in the UK, we note that Mr Lindsay did not dispute that those enjoyed in the UK would potentially be at a superior level. Being able to live in the UK from a young age will be also likely to enhance their integration into UK society.

99. Leaving to one side here the option of their father moving to Sri Lanka to live with them there, the most obvious impact on the children's best interests currently is that they do not have a father in their life. That is not in their best interests. We noted earlier the report to which the Supreme Court made reference in *MM (Lebanon*) identifying the problems that can be attendant on separated family including adverse behavioural effects on children: see above paragraph 61. Whilst we lack full evidence, we think it highly likely that the children's welfare is diminished by not having their father living with them and that prolonged separation of the family will have negative effects on them. Their best interests are to live with both their parents. We come back to the issue of country of location and likely duration of their separation below.

100. We next consider factors weighing against the children's best interests being assessed as requiring them to live in the UK with their parents. We note first of all that because of their young age, it is reasonable to infer (in the absence of specific evidence as to their own familial and social involvements) that their level of integration into Sri Lankan society is very much a function of their mother's degree of integration in her social and family environment, since a very young child necessarily shares the social and family environment of the circle of people on whom he or she is dependent (as was noted by the Supreme Court in *In the Matter of A (Children) (AP*) [2013] UKSC 60, by reference to *Mercredi v Chaffe* (Case C-497/10 PPU) [2012] Fam 22 at [55] in the context of the Hague Child Abduction Convention*).* On the available evidence, although the appellant speaks good English, she is fully integrated into Sri Lankan society; she has been educated there and studied there and worked there, she has never lived outside it and all her family (bar her husband) are there. The only notable difference in this respect between the children's situation and that of their mother is that they are attending an English-speaking school which means they are receiving an English education, whereas hers was a Sri Lankan education.

101. Obviously the children are receiving primary care from their mother; that distinguishes them from children who, for example, might be orphans or in institutional care.

102. It is not submitted on behalf of the appellant that her children are currently in poor or compelling circumstances. With the help of money sent by the sponsor, they are able to live in Sri Lanka and attend an English-speaking school to advance their education. Separately from the appellant, they have grandparents in Sri Lanka and it was indeed they with whom the appellant previously intended to leave the

children so she could come to the UK and work (it is said, however, that they are now old and fragile). Remaining in contact with their extended family in Sri Lanka, such as their grandparents would be in the best interests of the children. Clearly the children have links of language, culture and residence with Sri Lanka. The sponsor described them as bilingual. At most their linguistic links with Sri Lanka might be somewhat diminished (because they are being schooled in English). Given their young age, we doubt that they have any close ties with friends of unusual significance; certainly none of this type have been put forward as part of the evidence. They have no known health issues.

103. Reverting to the issue of the relevance of the children's nationality, whilst they are British citizens, they are also nationals of Sri Lanka. As noted earlier, dual nationals ordinarily stand to enjoy the rights and benefits of both countries of nationality, even though for children not all such rights and benefits have application. Here (again) we have incomplete evidence, but it has not been submitted that the children do not enjoy the rights and benefits that go with Sri Lankan nationality; the appellant's submissions have only argued that such rights and benefits are inferior. Given however, that it has not been submitted that the children are in poor or compelling circumstances, we consider the evidence to show that whilst refusal to their mother of entry clearance does deny them the opportunity to exercise almost all the rights and benefits of their British citizenship, it does not mean that they lack the ability to enjoy the rights and benefits of Sri Lankan nationality. They are thus in a different position (at least at the abstract level) from a child living in an overseas country who has no nationality other than British.

104. Whilst the effect of the refusal decision on the appellant's children is to deprive them of the opportunity to enjoy the rights and benefits of British citizenship that flow from residence in the UK, we take into account that such deprivation is time-bound, since once they turn 18 they will be entitled to move to and reside in the UK as they choose.

105. Weighing up all relevant considerations, we consider that the children's best interests are for them to live with both their parents and it has not been shown that it would significantly impair their welfare/best interests if their father went to live with them in Sri Lanka

The appellant's position under the Rules

106. Considering first of all the position of the appellant under Appendix FM and FM-SE, it is clear that she cannot satisfy the financial requirements of the Rules.

107. As already noted, by virtue of GEN.3.1-GEN.3.3 there may be exceptional circumstances which could render refusal of entry clearance a breach of Article 8 because it could result in unjustifiably harsh consequences. This is the broadly the same question that arises under assessment of Article 8 at large, to which we now turn.

The wider proportionality assessment

108. Turning to the wider proportionality assessment, we have already noted the basic principles to be applied in Article 8 jurisprudence as set out in *Boultif*, *Uner* and *Ahmut v Netherlands*: see above paragraphs 65-71.

109. We have already considered the best interests of the children at paragraphs 96-105. Whilst we concluded that their best interests lie in living with both their parents, we have not found their current circumstances to be such that they lack the ability to enjoy the rights and benefits of Sri Lankan nationality and we have noted that they are receiving good education in an English-speaking school. It may well be, comparatively speaking, that such rights and benefits are inferior to those they would likely be able to enjoy in the UK but it is not the case they are living in poor circumstances. The principal detriment to their best interests currently is that they have no father in their lives, apart from contact via FaceTime.

110. The sponsor's reluctance to go to live in Sri Lanka, whilst understandable, is nevertheless problematic in terms of Article 8: see paragraphs 91-94. On the facts, it amounts to an attempt to compel the United Kingdom to give effect to his and the appellant's choice of residence, despite the fact they cannot meet the requirements of the Rules. The sponsor's employment prospects in Sri Lanka may not be as good as in the United Kingdom; but we are not satisfied that he has shown he would be permanently unable to secure employment there in any reasonable capacity.

111. We lack full information, but it would appear that the appellant and the sponsor have been seeking to obtain entry clearance from as early as 2011-2012. Whatever the earlier reasons for them being refused, we know from the decision under appeal that they have narrowed down essentially to two: that she does not meet the MIR and because refusing her entry clearance would not result in unjustifiably harsh consequences contrary to Article 8. On the other hand (as noted earlier), on the available evidence, although she speaks good English, she is fully integrated into Sri Lankan society; she has been educated there and studied there and worked there, she has never lived outside it and all her family (bar her husband) are there. Further, although it would appear the couple have been trying to obtain entry clearance for some time, we also know that in June 2017 it was the appellant's intention to leave the children in Sri Lanka with her parents. In any event, the appellant has been employed in Sri Lanka as a nurse and is reasonably likely to find similar employment again when she chooses and the evidence does not show that the overall position of the family, if reunited in Sri Lanka, would be such as to preclude the respondent from pointing to that as a legally acceptable option. We so find, both as to whether there would be insurmountable obstacles to the sponsor returning and more generally, in assessing proportionality as required by *Agyarko.*

112. We have taken account of Mr Lewis's submission that the job offer to the appellant from a care home in the United Kingdom means that we should adopt the course described by Lady Hale at [99] of *MM* and judge for ourselves the reliability of that alternative source of finance.

113. The starting point for doing so is articulated in GEN 3.1 (1) of Appendix FM. This describes the circumstances in which the decision-maker must consider whether the financial requirement in paragraph E-ECP. 3.1- that is not met from the specified sources in the relevant paragraph - may be met "through taking into account the sources of income, financial support or funds set out in paragraph 21A(2) of Appendix FM-SE (subject to the considerations in sub-paragraphs (3) to (8) of that paragraph)". The circumstances in question are where "it is evident from the information provided by the applicant that there are exceptional circumstances which could render refusal of entry clearance … a breach of Article 8 … because such refusal could result in unjustifiably harsh consequences for the applicant, their partner or a relevant child" (GEN 3.1 (1)(b)).

114. Paragraph 21A(2) of Appendix FM-SE specifies the following as a source of income:

> "(b) credible prospective earnings from the sustainable employment … of the applicant or their partner".

115. For the reasons we have given, on the evidence before us we have found that the appellant has not been able to show that there are such exceptional circumstances, which could render refusal of entry clearance unjustifiably harsh for the appellant, the sponsor or the children. Whilst the sponsor has had mental health difficulties, the evidence does not show that they are such that he would be unable to secure employment in Sri Lanka; or to look after the children there, if the appellant were again to go out to work.

116. In any event, even if it were necessary to examine the evidence of the job offer to the appellant, that evidence falls short of what is contemplated by paragraph 21A(8)(b) of Appendix FM-SE. The written offer of employment has not been "witnessed or otherwise independently verified"; nor is there a "signed or draft contract of employment".

117. If the evidence were to change, so as to bring the case within GEN 3.1(1), then the appellant may decide to make a fresh application based on the job offer (or some other offer), addressing the matters set out in paragraph 21A(8). Alternatively, the sponsor may, of course, secure employment that meets the substantive requirements of the rules.

118. In the context of arguing that s.117B(6) of the 2002 Act (and EX.1 of the Rules) should be seen as reflecting a broader legislative policy to attach substantial weight to the British citizenship of children, Mr Lewis pointed to the seeming anomaly that if the appellant had sought to enter the UK illegally or unlawfully she would have then been able to benefit from s.117B(6). That would appear to overstate the case, since in *KO (Nigeria*) [2018] UKSC 53 the Supreme Court, whilst ruling that the issue of whether it would be reasonable for a child to leave the UK did not involve an assessment of the public interest, concluded nevertheless that "the record of the parents may become indirectly material…" ([18]) and that "reasonableness had to be considered in the real world in which the children find themselves" ([19]. It cannot

be assumed, therefore, that had the appellant come to the UK and acted outside the law that in light of that record she would automatically have been able to benefit from s.117B(6). In any event, as explained earlier, the current state of the legislation is that no analogous provision is made in law or policy for the parent of a British citizen child where both live abroad.

Zambrano

119. Although we have identified above that British citizenship *presently* confers an additional right of Union citizenship and that in the *Zambrano* line of cases applicants have sought to derive a right of residence from a child who is a national of the Member State concerned, we conclude that this is not an issue arising in this case. The appellant has made no application under the EEA Regulations and no *Zambrano* point has been advanced before us.

120. Even if we were wrong in considering there is no live *Zambrano* issue before us, we do not consider it would avail the appellant for several reasons.

121. First, even though article 20 TFEU would appear to cover the right of admission as one aspect of the right of residence, the Court's concern in *Zambrano* and related cases has been solely with the issue of deprivation of the genuine enjoyment of the substance of the rights attaching to the substance of European Union citizens of children residing in a Member State. The threshold set is a high one, namely whether, (paragraph 44) because of the denial of that right, such children "*would have to leave the territory of the European Union* in order to accompany their parents." The Court did not address what equivalent threshold would apply in an admission case, nor so far as we are aware has it in any *Zambrano*-type case since. What if any would be the threshold regarded as appropriate in an admission/entry clearance context is at this stage moot.

122. Second, if there was considered to be some equivalent threshold to be applied in admission/entry clearance cases, it is important to note that the threshold applied in-country does not protect against inferior socio-economic benefits. As the Supreme Court emphasised in *HC, R (on the application of) v Secretary of State for Work and Pensions* [2017] UKSC 73 at [9], "[t]here was no issue as to the nature of financial support (if any) required, nor as to the extent of any right to benefits otherwise available to nationals." Lord Carnwath (Lords Clarke, Wilson, Sumption agreeing) cited the CJEU ruling in *Dereci v Bundesministerium für Inneres* (Case C-256/11) [2012] 1 CMLR 45 at paragraph 68:

> "68. Consequently, the mere fact that it might appear desirable to a national of a member state, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a member state to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted."

123. At [47] of *HC*, Lady Hale likewise observed that: "[t]he situation of *Zambrano* carers and their children does not fall within the European Union legislation on access to social security and other welfare benefits. All that *Zambrano* requires is that the children are not effectively deprived of their rights as European citizens by the situation in which they find themselves."

124. Third, we do not read the *Zambrano* jurisprudence to warrant an automatic approach. In *Chavez-Vilchez and Others v Raad van Bestuur van de Sociale Verbekeringsbank and Others* (10 May 2017) (Case C-133/15) (Grand Chamber), [2017] 3 WLR 1326, [2017] 3 CMLR 35 the CJEU ruled at paragraphs 70 and 71 that:

> "70. In this case, in order to assess the risk that a particular child, who is a Union citizen, might be compelled to leave the territory of the European Union and thereby be deprived of the genuine enjoyment of the substance of the rights conferred on him by Article 20 TFEU if the child's third-country national parent were to be refused a right of residence in the Member State concerned, it is important to determine, in each case at issue in the main proceedings, which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent. As part of that assessment, the competent authorities must take account of the right to respect for family life, as stated in Article 7 of the Charter of Fundamental Rights of the European Union, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of that charter.
>
> 71. For the purposes of such an assessment, the fact that the other parent, a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national. In reaching such a conclusion, account must be taken, in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium."

125. The role of the *Zambrano* principle in relation to children who have citizenship of the Union was considered by the Supreme Court in *Patel (Appellant) v Secretary of State for the Home Department (Respondent) Secretary of State for the Home Department (Respondent) v Shah (Appellant)* [2019] UKSC 59. Their decision confirms that the "compelled to leave" threshold is a high one. In the appellant's case, even assuming an equivalency of threshold in entry clearance cases, that threshold would plainly not be met given the situation of the two British citizen children in the appellant's case. Her children have strong emotional ties to her as their primary carer and it has not been shown that it would significantly impair their welfare/best interests if their father went to live with them in Sri Lanka.

126. Nor in the wider proportionality assessment have we been satisfied that either the *status quo ante* or the option open to the sponsor of living in Sri Lanka gives rise to a breach of Article 8.

127. We are mindful when reaching the above conclusion that in *MA and SM (Zambrano: EU children outside EU*) Iran [2013] UKUT 380 the Upper Tribunal held that:

> *"(1) In EU law terms there is no reason why the decision in Zambrano could not in principle be relied upon by the parent, or other primary carer, of a minor EU national living outside the EU as long as it is the intention of the parent, or primary carer, to accompany the EU national child to his/her country of nationality, in the instant appeals that being the United Kingdom. To conclude otherwise would deny access, without justification, to a whole class of EU citizens to rights they are entitled to by virtue of their citizenship."*

128. However, we do not understand by so holding that the panel was suggesting that there was an automatic basis established by *Zambrano* for parents of British citizen children living abroad to be admitted under EU law. To the contrary, the first appellant in the above case was an Iranian national living in Turkey with AP, her British citizen child. Although the panel in this case considered her case did fall within the ambit of the *Zambrano* principle, it was allowed because it was the current intention that the child abroad would travel to and reside in the United Kingdom "even if his mother is not granted leave to do so." (para 53) and also, because of the "exceptional nature of the situation in which the child would find himself if his parent was denied entry into the UK" (para 51). The second appeal, which also featured one of two British citizen children living abroad, was not allowed.

129. To conclude:

> The decision of the First-tier Tribunal judge has already been set aside for material error of law.
>
> The decision we re-make is to dismiss the appellant's appeal.

Signed

Date: 21 January 2020

Judge of the Upper Tribunal