Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: IA/40044/2014**

THE IMMIGRATION ACTS

Heard at: Field House
On 8 December 2015

Decision and Reasons promulgated
On 22 December 2015

Before

Upper Tribunal Judge Gill

Between

The Secretary of State for the Home Department Appellant

And

Khalida Sultana Farzana Respondent
(Anonymity Order Not Made)

Representation

For the appellant: Ms A Fijiwala, Senior Home Office Presenting Officer.
For the respondent: Ms E King, of Counsel, instructed by Rahman & Company Solicitors.

Decision and Directions

1. The Secretary of State has been granted permission to appeal the decision of Judge of the First-tier Tribunal Adio who, in a decision promulgated on 18 June 2015 following a hearing on 1 June 2015, allowed the appeal of Khalida Sultana Farzana (hereafter the "claimant"), a national of Pakistan born on 18 October 1959, against a decision of the respondent of 15 September 2014 to refuse her application of 7 August 2014 (made on form FLR(M)) for variation of her leave as the spouse of Amir Hussain (the "sponsor"). At the same time, the Secretary of State decided to remove the claimant by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006. As the claimant had no leave as a consequence of the decision of 15 September 2014, she had a right of appeal under s.82(d) (as it then existed) of the Nationality, Immigration and Asylum Act 2002.

2. It was accepted before the judge that the claimant did not meet the requirements of Appendix FM or para 276ADE of the Statement of Changes in the Immigration Rules HC 395 (as amended) (hereafter referred to individually as a "Rule" and collectively the "Rules"). This means that it was accepted that she did not meet the requirements of EX.1. It further follows that it was accepted that the claimant could not meet the requirement to show that there were no insurmountable obstacles to family life being enjoyed between her and the sponsor in Pakistan as required by EX.1 (b). She could not meet EX.1 (a) because her children in the UK were over 18 years of age.

3. Before the judge, reliance was placed solely on the claimant's Article 8 claim outside the Rules. He allowed the appeal on Article 8 grounds outside the Rules.

Factual background

4. The claimant arrived in the UK on 20 June 2012 with entry clearance valid from 17 May 2012 until 17 August 2014 as the sponsor's spouse. They were married in Pakistan on 18 October 1977 when the claimant was 18 years old and the sponsor 23 years old. The sponsor arrived in the UK on 22 May 1992 and obtained indefinite leave to remain on the basis of long residence. He is now a British citizen.

5. The claimant and the sponsor have six children. Three reside in Pakistan and three in the UK. They are all now over 18 years of age. The two younger children are a son (Faheem Abbas) and a daughter (Zara Iram) who arrived in the UK with the claimant, on 20 June 2012, aged (respectively) 18 years 3 months and 16 years 9 months. They were granted indefinite leave to enter the UK.

Reasons for refusal of the application

6. The Secretary of State refused the application under para 284(ix) of the Rules on the ground that the claimant was required to provide an original English language test certificate in speaking and listening from an approved English language test provider but had failed to do so. It is relevant to note that para 284(ix) makes provision for exceptions to the requirement to provide an English language test certificate. The version of para 284(ix) that applied at the date of the claimant's application provided as follows:

> Requirements for an extension of stay as the spouse or civil partner of a person present and settled in the United Kingdom
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> 284. The requirements for an extension of stay as the spouse or civil partner of a person present and settled in the United Kingdom are that:
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> …
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> (ix)(a) the applicant provides an original English language test certificate in speaking and listening from an English language test provider approved by the Secretary of State for these purposes, which clearly shows the applicant's name and the qualification obtained (which must meet or exceed level A1 of the Common European Framework of Reference) unless:
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> (i) the applicant is aged 65 or over at the time he makes his application; or
> (ii) the applicant has a physical or mental condition that would prevent him from meeting the requirement; or;
> (iii) there are exceptional compassionate circumstances that would prevent the applicant from meeting the requirement; or
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> (ix)(b) the applicant is a national of one of the following countries: Antigua and Barbuda; Australia; the Bahamas; Barbados; Belize; Canada; Dominica; Grenada; Guyana;

Jamaica; New Zealand; St Kitts and Nevis; St Lucia; St Vincent and the Grenadines; Trinidad and Tobago; United States of America; or

(ix)(c) the applicant has obtained an academic qualification (not a professional or vocational qualification), which is deemed by UK NARIC to meet the recognised standard of a Bachelor's or Master's degree or PhD in the UK, from an educational establishment in one of the following countries: Antigua and Barbuda; Australia; The Bahamas; Barbados; Belize; Dominica; Grenada; Guyana; Ireland; Jamaica; New Zealand; St Kitts and Nevis; St Lucia; St Vincent and The Grenadines; Trinidad and Tobago; the UK; the USA; and provides the specified documents; or

(ix)(d) the applicant has obtained an academic qualification (not a professional or vocational qualification) which is deemed by UK NARIC to meet the recognised standard of a Bachelor's or Master's degree or PhD in the UK, and

(1) provides the specified evidence to show he has the qualification, and
(2) UK NARIC has confirmed that the qualification was taught or researched in English, or

(ix)(e) has obtained an academic qualification (not a professional or vocational qualification) which is deemed by UK NARIC to meet the recognised standard of a Bachelor's or Master's degree or PhD in the UK, and provides the specified evidence to show:

(1) he has the qualification, and
(2) that the qualification was taught or researched in English.

7. The Secretary of State went on to consider Appendix FM, EX.1.(a), EX.1(b) and para 276ADE of the Rules which it is not necessary for me to summarise since these aspects of the decision were not challenged before the judge. The Secretary of State then considered the Article 8 claim outside the Immigration Rules.

8. The requirement for an English language test certificate to be provided was introduced by HC194 which came into effect on 9 July 2012. HC 194 was ordered by the House of Commons to be printed on 13 June 2012. Notice of the impending requirement was first given through a document issued by the Home Office entitled: "*Statement of Intent: family Migration*" dated June 2012 but which was announced on about 11-13 June 2012.

The judge's decision:

9. The judge heard oral evidence from the claimant, the sponsor and her two younger children. The evidence is summarised at paras 4-7 of his decision. It was said, inter alia, that the claimant discovered that she had to satisfy an English language test requirement in 2013, that she has tried to learn English, attending a college and studying for 2-3 months but she failed the test.

10. In reliance upon the judgment of Lord Neuberger in **Odelola v SSHD** [2009] UKHL 25, Ms King (who appeared before the judge) submitted that the claimant had a "*vested interest*" at the time that HC194 came into force, namely her right to enjoy family life with her family in the UK. The Secretary of State had moved the goalpost after she was granted entry by introducing the English language requirement, giving rise to unfairness.

11. The skeleton argument before the judge also argued that the requirement to demonstrate proficiency in the English language was bound to have a disproportionate impact on women in particular, and specifically women from developing countries who are typically disadvantaged in terms of access to

education. It was argued that the claimant had had little formal education and that it would be disproportionately harder for her to quickly learn a new language than it would for a man who would be likely to have had access to more education and opportunities outside the home to be exposed to learning new skills.

12. The judge's reasons for allowing the appeal outside the Rules on the basis of Article 8 may be summarised as follows: The judge found that the claimant enjoyed family life with the sponsor and her children. This persuaded him to consider the Article 8 claim outside the Rules. The judge found that the amendment to the Rules by HC 194 by which, under para 284(ix), applicants were required to comply with an English language test requirement created an element of unfairness in the claimant's case because she had already been enjoying family life with her husband before the rule change. Her family life was not established whilst she was in the UK unlawfully. She had been married for a number of years and had lived in the UK for three years with permission, which went in her favour. She has lived without her husband and has only had the opportunity to live with him again after a lengthy period. Her children were unlikely to return to Pakistan with her. As the claimant's education ceased at the age of 10 years, it was much harder for her to learn English. The sponsor had said that he was willing to return to Pakistan when he retires from work in four years' time and it was unreasonable to expect him to return to Pakistan before then.

13. The judge's reasoning is set out at paras 12-15 which read:

> 12. Each appeal is to be decided on its own facts. The burden of proof is on [the claimant] and the standard of proof is on a balance of probability. I have taken into account the oral and documentary evidence before me and the circumstances at the date of the hearing. I have considered the case of [the claimant] under Article 8 of the Human Rights Convention. I accept that there is family life between [the claimant] and her husband and children. They all live together in the same household as a family unit. [The claimant]'s two children even though they are over 18 came together with her when she arrived in the country in 2012 and have since been living together as a family and the fact that they *[sic]* just over 18 does not of itself end the family life between them. I note that in the reasons for refusal letter the Respondent did not consider the fact that there are other circumstances concerning [the claimant's] case such as her lack of education since the age of 10 and the fact that her husband is four years away from retirement and has not been able to enjoy residing with his wife for a long period of time. These are factors which have made me consider the matter more outside the Rules.
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> 13. Applying the case of **Razgar [2004] UKHL 27** I find that the Respondent's decision interferes with the family life of [the claimant] and her husband to live together. I accept that the Respondent's decision is in accordance with the law for the maintenance of immigration control. With regards to the point made by Ms King about the discrimination made against [the claimant] as someone who is a woman and who did not have enough access to education I do not accept this issue. The Secretary of State is in a position to change the law. I take into account the public interest and in this particular case making English a requirement is to ensure integration into society as well as reduce the public cost as stated by Mr Ali. The obligation is to be assessed at the date of decision and that is the decision made in the case of **Odelola**. I now go on to look at the issue of proportionality. In doing so I have taken into account paragraph 117B of the Immigration Act 2014. The Act notes that it is in the public interest and in particular in the interests of the economic wellbeing of the country that persons who seek to remain in the UK are able to speak English because if they speak English they are a less burden on the taxpayer and are able to integrate into society.
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> 14. On the other hand I note that [the claimant] has been in a relationship with her husband a qualifying partner and this was not established at a time when she was in the UK unlawfully. She has been married to her husband for a number of years. She was granted leave to enter the UK in 2012 and she has lived in the UK for three years with permission. It is therefore a factor in her favour. [The claimant] also has family life with her children who accommodate her in the United Kingdom. In this particular case I find

> that the Respondent's decision is disproportionate to the sever *[sic]* [the claimant]'s family life. She met the Rules under which family life was permitted to develop from June 2012 and although there has been a change in the Rules if she was to return to Pakistan she would be living without her husband who she has only had the opportunity to live with again after a lengthy period of time. The children are unlikely to go back with her as they have indefinite leave to remain. There is an element of unfairness in her case in that she had already been enjoying family life with her husband before the Rule change. To that extent I accept Ms King's legal argument of there being a vested interest before the change of the law took place.
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> 15. The circumstances of [the claimant] are such that she did not have an education in English and stopped her education at the age of 10. This has meant that it is much harder for her to learn English than it is for many other people. There has therefore been a disadvantage with regard to her access to education. There are other ways in which the Secretary of State is able to deal with this issue. [The claimant] does not qualify for indefinite leave to remain in the United Kingdom however she can still enjoy family life with her husband with discretionary leave in the United Kingdom. In all the circumstances of this case I find that it will be disproportionate applying the case of **Odelola** and the respected family life that exists between [the claimant] and her husband to remove her from the UK. The Sponsor made it clear that he is willing to go back to Pakistan but it is not reasonable for him to do so until he retires and he has got four more years to complete his working life in the UK. I therefore find that at this period of time it is disproportionate to remove [the claimant] from the United Kingdom and that the Respondent's decision amounts to a breach of her right to respect for family life under Article 8 of the Human Rights Convention.

(my emphasis)

The Secretary of State's grounds:

14. There are two grounds. Ground 1 is that the judge had erred by misdirecting himself or giving inadequate reasons. The judge had failed to provide adequate reasons as to why the fact that the sponsor was four years away from retirement affected the family life/private life claim of the claimant. The question of whether the claimant has the required English language test certificate has been dealt with under the Rules. The judge had relied upon the length of time the claimant and her husband were separated, something which has already been covered under the Rules because an application for leave as a partner will always be underpinned by a desire to be united with a partner to avoid absence.

15. Ground 2 is that the judge erred in finding that the claimant had a "vested right" prior to the Rules being amended to include the requirement for an English language test certificate. It is contended that the claimant was only granted leave to remain when she entered the UK in June 2012 and therefore she only ever had an expectation of further leave, never a legal right to it. The grounds contend that the judge had misdirected himself as to the judgment in **Odelola v SSHD [2009] UKHL 25,** in that, it was expressly stated in **Odelola** that no vested right existed. Furthermore, whilst the claimant in **Odelola** would have succeeded in her application on the basis of the rules that were in force at the time of her application, the claimant had made her application for leave at a time when the Rules had already changed.

The claimant's response

16. On behalf of the claimant, Ms King filed a response under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In relation to ground 1, reliance is placed on the judgment in **R (Ganesabalan) v SSHD** [2014] EWHC 2712 (Admin) to the effect that there is no prior threshold for consideration of an Article 8 claim outside the Rules. Accordingly, the judge did not err in considering the Article 8 claim outside the Rules.

17. In relation to ground 2, it is contended that the judge did not err in relying upon **Odelola** to find that the claimant had a vested right and that there was an element of unfairness in this case by virtue of the Rule change. Reliance is placed on the judgment of the Supreme Court in **R (Quila) v SSHD** [2011] UKSC 45 in which it was held that the choice as to where to carry out family life was an element of the enjoyment of family life as described by Article 8(1). It is therefore contended that the claimant had a right to remain in the UK to enjoy her family life that existed *supra* to any right that could be granted to her under the Rules.

18. It is submitted in the claimant's response that this distinguished the claimant's facts from the facts of the applicant in **Odelola**. Whilst it was held in **Odelola** that there was no vested right in that case, the Supreme Court did recognise that a change in the Rules was capable of amounting to an interference with a vested right. In this respect, reliance is placed on paras 53-54 of the judgment of Lord Neuberger in **Odelola**. It was contended on the claimant's behalf that, but for the introduction of the English language requirement, the claimant would have continued to satisfy the requirements of the Rules on which she was admitted to the UK, thus enabling her to enjoy family life in the UK. It was properly open to the judge to find that the claimant had a vested right and there was an element of unfairness in this case which tipped the balance in favour of allowing her appeal.

19. In the alternative, it is said that, even if the judge had erred in finding that the claimant had a vested right and that there was an element of unfairness in the claimant's case, the error was not material as it is clear that he would have allowed the appeal in any event, given the factors he had taken into account.

Oral submissions

20. At the hearing on 8 December 2015, I heard submissions from the parties on the question whether the judge had materially erred in law. At the commencement of the hearing, I showed to the parties the Statement of Intent dated June 2012 referred to at para 8 above and a document downloaded from the website of a law firm from which it is clear that the date on which the Home Office announced its intention to change the Rules was 11 June 2012.

21. Ms King had an opportunity to consider the Statement of Intent. She accepted that page 56 of the Statement of Intent referred to the requirement for an applicant to establish that he or she has English speaking and listening skills at level A1 or above.

22. I also asked the parties to address me on the question whether the judge had erred by failing to consider whether there were compelling circumstances for the grant of leave outside the Rules, pursuant to the judgment of the Court of Appeal in **SS (Congo) v SSHD** [2015] EWCA Civ 387, judgment in which was delivered on 23 April 2015, i.e. before the hearing of the appeal before the judge.

23. Ms Fijiwala submitted (in summary) that the judge had misdirected himself in finding that the claimant had a vested right. Lord Neuberger found that the applicant in **Odelola** did not have a vested right notwithstanding that she satisfied the requirements of the Rules at the date that she submitted her application for leave. Lord Neuberger said that the most that could be said that was she had suffered disappointment. In the instant case, the Statement of Intent was published before the claimant's arrival in the UK and the Rules were changed 2 ½ weeks after her arrival. There was therefore no unfairness at all.

24. Ms Fijiwala also relied upon the judgment of the Supreme Court in **R (Ali and Bibi) v SSHD** [2015] UKSC 68 that the English language requirement pursued legitimate aims. There were exceptions to the requirement, none of which applied to the claimant. The claimant is not someone who had experienced difficulties in accessing training because she has attended a training course in the UK and she had been in the UK for 2 years prior to her application. Although at para 91 of the judgment, the Supreme Court considered that those who had entered the UK prior to the Rule change were in a weaker position than they were following the amendment that imposed the English language requirement, the courts should give the Secretary of State a wide margin of discretion. The Supreme Court concluded that, bearing in mind the wide discretion, the relevant English language requirement struck a fair balance and there was no unjustified interference with the applicants' Article 8 rights.

25. Whilst Judge Adio in the instant case had noted that Parliament considered that it was necessary for applicants to communicate in English, this should have been a significant factor against the claimant. The judge could only have allowed the appeal outside the Rules if there were compassionate circumstances. She submitted that there was no reasonably arguable case outside the Rules pursuant to **SS (Congo)** and that, even if it had been necessary to consider the Article 8 claim outside the Rules, the judge should have placed significant weight on the claimant's failure to meet the English language requirement.

26. The judge had taken into account the fact that the sponsor was only four years away from retirement. However, it was a matter of choice if the sponsor remained in the UK until his retirement. The couple had been separated for a number of years. They could continue to enjoy their family life in that way until he retired, if he chooses.

27. Ms King relied upon the Rule 24 response. In relation to ground 1, she submitted that the circumstances that the judge found existed amounted to compassionate circumstances. She submitted that the words in para 13 of the judge's decision that are underlined at my para 13 above showed that the judge was mindful of the fact that the claimant did not satisfy the English language requirement.

28. Pursuant to **Ganesabalan**, there was no prior threshold for consideration of an Article 8 claim outside the Rules. The judge had identified some particular features of the case that merited consideration outside the Rules. It was not just that she had not passed the test but that the reason why she had failed to do so was because of her lack of education.

29. **Ali and Bibi** was concerned with entry clearance applications. In **Ali and Bibi**, the Supreme Court considered that physical barriers to accessing training if a person is in a remote part of the world may amount to exceptional circumstances in an individual case. There is no good reason to draw a distinction between a physical barrier and an inability to satisfy the Rule on the part of someone who has attempted to satisfy the requirement but suffers a disadvantage on account of lack of education. Every case is fact-specific. It was for the judge to consider the reason why the relevant Rule was not satisfied and weigh that in the balancing exercise outside the Rules.

30. Ms King submitted that the term "vested right" was simply a fancy way of saying that there was an element of unfairness. She submitted that the judge did not misunderstand **Odelola** when he said that the claimant had a vested right. **Odelola** can be distinguished because the application in **Odelola** was an application for leave to remain as a postgraduate doctor and therefore the applicant in **Odelola** did not

have any greater right to be in the UK outside the Rule that had been amended and which she could not satisfy, whereas the claimant has a right to family life which continues under Article 8(1). Thus, whereas the amendment of the relevant Rule in **Odelola** removed the right of the claimant to be in the UK, the amendment of the relevant rule in the claimant's case could not take away her right to enjoy family life.

31. Ms King submitted that the judge was entitled to find that there was an element of unfairness in the instant case and to take that into account in the balancing exercise. It is clear from para 13 of his decision that he took into account the public interest.

32. Ms King submitted that, although it may be that the Statement of Intent was published before the claimant's arrival, this was after she had been granted entry clearance. Her right to enjoy her family life in the UK came into existence then. She began enjoying her family life in the UK before the Rules were amended on 9 July 2012. Although she may have been on notice that there was an intention to amend the Rules, she had already started to enjoy her family life in the UK.

33. I reserved my decision.

Assessment

34. I shall deal first with ground 2. In **Odelola,** all five of the judges of the Supreme Court agreed that the applicant's appeal was to be dismissed. Lord Hope did not give any substantive reasons, his Lordship's judgment being confined to the repayment of the application fee paid by the claimant in that case. Lord Scott agreed with the reasons given by Lord Brown dismissing the appeal. Reasoned judgments were given by Lord Hoffman, Lord Brown and Lord Neuberger.

35. Lord Brown summarised the reasoning of the Court of Appeal at para 29, to the effect that the presumption against retrospectivity applies only in the case of vested rights and that an argument that the presumption applies in the case of the Rules is to beg the very question at issue. At para 31, Lord Brown said that the whole debate was bedevilled by a failure to recognise the difficulties inherent in the presumption itself.

36. Lord Brown said at para 35 that the Rules are statements of administrative policy: an indication of who at any particular time the Secretary of State will exercise her discretion with regard to the grant of leave to enter or remain. Drawing a distinction between legislation that confers "*money or other certain benefit*" on the one hand and a mere statement of policy as to how presently it is proposed to exercise an administrative discretion when eventually it comes to be exercised, Lord Brown held that a policy may be changed at any time (para 37). At para 39, Lord Brown concluded that the changes in the Rules, unless they specify to the contrary, take effect whenever they say they take effect with regard to all leave applications, those pending no less than those yet to be made.

37. The issue of vested rights did not feature in the reasoning of Lord Brown whereas Lord Hoffman specifically said that, whilst there was no conceptual reason why the Rules should not create rights which subsequent Rules should not, in the absence of express language, be construed as removing, they should not be so construed (paras 6 and 7). Thus, it is clear that Lord Hoffman considered that, when one looks at the functions of the Rules, they should not be construed as removing vested rights (para 7).

38. Ms Fijiwala referred to the judgment of Lord Neuberger as the dissenting judgment. Strictly speaking, it is not correct to do so, since all the judges were agreed about the outcome.

39. Whilst it is correct (as Ms King pointed out) that Lord Neuberger said at para 52 that the common law presumption against retrospectivity can apply to amendments to the Rules, his Lordship nevertheless went on to say (at para 59) that there was in fact no vested right or a legitimate expectation, saying: *"… the immigration rules would have been expected to be amended from time to time, as needs and perception change…";* that applicants in the position of the claimant in that case would suffer disappointment but it could not be put higher than that; and that, whilst unfairness was a factor that could be invoked, it did not have great force.

40. In my judgement, the discussion at para 48 onwards of the judgment of Lord Neuberger was merely part of his Lordship's process of reasoning to reach the conclusion that the presumption against retrospectivity does not apply to the Rules precisely because there is in fact no vested right or legitimate expectation. It is inconceivable that his Lordship intended the question whether a rule has retrospective effect to turn on the individual facts of a case, on whether the individual in a particular case has a vested right. I reject the suggestion that this was how the judgment of Lord Neuberger should be understood as it would mean that the question whether a rule has retrospective effect would vary from case to case.

41. Thus, in finding that the claimant had a vested right in reliance upon **Odelola**, the judge misunderstood the judgment of Lord Neuberger. It is plain in my judgement, that Lord Neuberger rejected the notion that the concept of vested rights decides the question whether a change in a Rule has retrospective effect. I am therefore satisfied that the judge misdirected himself in law and therefore fell into legal error.

42. Ms King sought to distinguish the claimant's case from the case of the applicant in **Odelola** in that, whilst the amendment to the relevant rule in the **Odelola** case removed the right of the applicant in that case to remain in the UK, the claimant continued to have her right to enjoy her family life and, in reliance upon **Quila**, her right to enjoy her family life in the UK. However, this simply ignores the fact that, prior to the amendment to the Rules, the Rules did not make any provision for applications for leave on the basis of Article 8. Such applications were considered outside the Rules. The claimant did not have a vested right to have her Article 8 family life claim considered and dealt with under the Rules. The amendment to para 284 of the Rules did not take away her right to apply for and have her Article 8 family life claim considered under the Rules for the simple reason that Article 8 family life claims were not considered under the Rules prior to 9 July 2012. Insofar as the Rules provided for leave to remain as a spouse, the general rule, that the Secretary of State is entitled to amend the rules, applies. Thus, I reject Ms King's attempt to distinguish the claimant's case from that of the applicant in **Odelola**.

43. In any event, even if I am wrong in what I have said paras 40-41 above the judge also erred in finding that there was an element of unfairness in this case. Lord Neuberger made it plain in the **Odelola** case that unfairness was not a factor that carried great force (para 59). This notwithstanding the fact that the applicant in **Odelola** satisfied the relevant rule at the time her application was made. Ms King relied upon the fact that entry clearance was granted to the claimant prior to the publication of the Statement of Intent and that, by the time HC 194 came into force on 9 July 2012, the claimant had already commenced enjoying her family life in the UK. In my judgment, this is a hopeless argument as it is in effect a submission that

anyone who had established family life in the UK prior to 9 July 2012 was entitled to be exempt from any amendments to the requirements under the Rules for leave as a spouse. In my judgment, this submission could not properly have been made, quite apart from the fact that the submission ignores the fact that, prior to 9 July 2012, applications for leave on the basis of the right to family life under Article 8 were not dealt with under the Rules.

44. Furthermore, the concept of unfairness underpinned the unsuccessful arguments that were advanced before the Supreme Court in **Odelola** and yet the appeal in **Odelola** failed, the Supreme Court holding unanimously that the Secretary of State is entitled to amend the Rules and that any such amendments apply from the date on which they are said to take effect unless there are transitional provisions.

45. Thus, the judge erred in finding that there was an element of unfairness in the instant case. In any event, he failed to recognise that the claimant had had two years in the UK to access English language courses and obtain the relevant qualification.

46. I am therefore satisfied that the error identified in paras 40-41 above and the error identified in paras 43-45 were *each* material for two reasons. Firstly, it is plain that the judge gave significant weight to what he perceived to be the claimant's vested right and what he perceived to be unfair in this case, whereas it is clear from Lord Neuberger's judgment in **Odelola** at para 59 that, whilst unfairness could be invoked, it does not have great force.

47. Secondly, and in any event, the judge's failure to consider whether there were compelling circumstances for the grant of leave outside the Rules rendered each error material. The search for compelling circumstances is necessary because this approach gives due weight to the strength of the public interest and the fact that the claimant did not qualify under any of the exceptions listed in para 284, including those provided for at para 284(ix)(a)(ii) and (iii) and, further, that she did not meet the requirements of Appendix FM and EX.1. In other words, the judge failed to consider the Article 8 claim outside the Rules "*through the lens of the Rules*" to borrow the phrase used by Sales LJ in **SSHD v AJ (Angola) and AJ (Gambia)** [2014] EWCA Civ 1636 at para 39.

48. The fact that the judge failed to consider the claimant's Article 8 claim outside the Rules through the lens of the Rules is demonstrated by the following:

    i. The fact that he took into account the fact that the sponsor was only four years away from retirement without mentioning at all that it had been accepted that there were no insurmountable obstacles to family life between her and her husband continuing in Pakistan.

    ii. The fact that he took into account that the claimant's children are unlikely to return to Pakistan with her as they have indefinite leave to remain without considering whether it is reasonable to expect them to do so if they wished to enjoy family life with her.

    iii. The fact that he considered the claimant's lack of education (para 12 of his decision) without noting that she did not satisfy any of the exceptions in para 284(ix) of the Rules.

49. Ms King relied upon the fact that the judge said at para 13 of his decision that he had taken the public interest. However, whilst it is clear from para 13 that the judge said

that he had taken into account the fact that the English language requirement was imposed to ensure integration and reduce the public cost, there is nothing to show that he had taken into account the fact that para 284(ix)(a) made provision for exceptions which the claimant did not satisfy and that she did not meet the requirements of Appendix FM and EX.1.

50. I do not accept Ms King's submission that the judge's errors were not material on the ground that it is clear that he would have allowed the appeal in any event, for the reasons I have given above. In any event, once the judge's flawed reasoning as to what he perceived to be the claimant's vested right and the unfairness he perceived is stripped from the reasons he gave, it is plain that he further erred in law by giving inadequate reasons for allowing the appeal. It is at this point that ground 1 of the Secretary of State's grounds to the effect that the judge gave inadequate reasons becomes relevant. In this regard, it is relevant to note that he failed to explain why the fact that the sponsor was 4 years away from retirement was relevant to his finding that the decision was a disproportionate breach of the claimant's right to family life. In taking into account that the claimant was enjoying family life after being separated from the sponsor for some years, he failed to explain why that prevailed over the fact that it was accepted that there were no insurmountable obstacles to family life being enjoyed in Pakistan.

51. I do not consider that the judgment in **Ali and Bibi** assists the claimant in any way. One of the arguments before the Supreme Court in **Ali and Bibi** was that the English language requirement had a disproportionate impact on women and those who lacked education. However, the discrimination ground failed before the Supreme Court in the challenge to the legality of the English language requirement, Lady Hale saying that the discrimination argument added nothing to the Article 8 ground.

52. Ms King submitted that there is no good reason to draw a distinction between a physical barrier and an inability to satisfy the Rule on the part of someone who has attempted to satisfy the requirement but suffers a disadvantage on account of lack of education. However, this submission simply ignores the fact that disadvantages on account of lack of education was an argument that was advanced before the Supreme Court in **Ali and Bibi**.

53. For all of the above reasons, I set aside the decision of Judge Adio to allow the appeal outside the Rules on the basis of Article 8. His decision to dismiss the appeal under the Rules stands. His summary of the evidence he heard, at paras 4-7 of his decision, shall stand as a record of the evidence given to the First-tier Tribunal.

54. In the majority of cases, the Upper Tribunal when setting aside the decision will be able to re-make the relevant decision itself. However, the Practice Statement for the Immigration and Asylum Chamber of the Upper Tribunal at para 7.2 recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

> "(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

55. In my judgment this case falls within para 7.(b). In addition, given that the claimant won her appeal before the First-tier Tribunal and having regard to the Court of Appeal's judgment in JD (Congo) & Others [2012] EWCA Civ 327, I am of the view that a remittal to the First-tier Tribunal is the right course of action.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision to allow the appeal under Article 8 is set aside. The decision to dismiss the appeal under the Immigration Rules stands. This case is remitted to the First-tier Tribunal for a hearing of the Article 8 claim outside the Immigration Rules by a judge other than Judge of the First-tier Tribunal Adio.

Signed Date: 17 December 2015
Upper Tribunal Judge Gill