Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of FBL) v Secretary of State for the Home Department IJR [2015] UKUT 00328 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Heard at Cardiff Civil Justice Centre
On 10 April 2015

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Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE QUEEN (ON THE APPLICATION OF FBL)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Applicant: Mr C Jowett instructed by Albany Solicitors
For the Respondent: Ms M Bayoumi instructed by Government Legal Department

ANONYMITY ORDER

I was invited by both parties to make an anonymity order to protect the identity of the applicant's children. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269 as amended) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the applicant, his partner or children. For the avoidance of doubt, this order also applies to both the applicant and

to the respondent. A failure to comply with this order could lead to contempt of court proceedings.

JUDGMENT

(HANDED DOWN ON FRIDAY 29 MAY 2015)

Judge Grubb:

Introduction

1. The applicant, who was born on 11 January 1983, is a national of the People's Republic of China (China). He arrived in the United Kingdom on 6 January 2007 and claimed asylum. That application was refused by the Secretary of State on 16 February 2007. There was no appeal. Thereafter, the applicant ceased contact with the Home Office until 20 June 2012.

2. Sometime in December 2008 the applicant began a relationship with a Chinese national, "QC". The applicant and QC have two children who were born respectively on 20 January 2010 ("AXL") and 10 April 2011 ("AYL") in the United Kingdom.

3. The applicant's partner, QC, came to the UK on 11 May 2009 using a false passport. On 13 November 2009, she claimed asylum and that application was refused by the Secretary of State on 21 December 2009. Thereafter, QC appealed and her appeal was dismissed by an Immigration Judge on 16 February 2010. She did not appeal that decision. On 24 November 2011, further submissions were lodged on her behalf and on 17 January 2013 those submissions were rejected. However, on 22 January 2013, a decision was made by the Secretary of State applying the "exceptional circumstances" criteria in para 353B of the Immigration Rules to grant QC and her two children, AXL and AYL, discretionary leave until 22 July 2015.

4. The applicant made contact with the Home Office on 20 June 2012 and on 10 April 2013 he made further submissions to the respondent relying upon his private and family life in the UK, namely his relationship with his partner and two children.

5. On 18 February 2014 the applicant's legal representatives sent a 'chasing' letter to the respondent. On 25 February 2014, the respondent replied indicating they would review the applicant's case within 12 months. On 26 February 2014, the applicant's MP wrote to the respondent who responded on 28 February 2014 indicating that the aim was to review the applicant's case by December 2014.

6. On 7 July 2014, the respondent refused the applicant's claim for leave under the Immigration Rules (Statement of Changes in Immigration Rules, HC 395 as amended) and under Art 8 of the ECHR. In addition, the Secretary of State concluded that the applicant's claim to remain in the UK did not amount to a 'fresh claim' under para 353. (The detailed reasons

are dated 8 July 2014 but I will throughout refer to the decision as the "7 July 2014" decision.)

7. On 31 July 2014, the applicant's solicitor sent a pre-action protocol letter (PAP) to the respondent. On 16 August 2014, the Secretary of State responded to the PAP letter maintaining her decision to refuse leave to the applicant and that his claim was not a 'fresh claim'.

8. On 30 September 2014, the applicant filed these proceedings challenging the respondent's decisions of 7 July 2014 and 16 August 2014. In summary, two Grounds were relied upon:

> (1) the respondent's decision to refuse leave under Art 8 was unlawful as the respondent had applied a test of 'exceptionality'; had failed to have regard to the 'best interests' of the children and had failed properly to consider all the circumstances; and
>
> (2) the decision that the submissions did not amount to a 'fresh claim' was irrational and the respondent had failed to apply 'anxious scrutiny' in reaching her conclusion.

9. On 8 December 2014, HHJ Lambert (sitting as a Judge of the Upper Tribunal) granted permission to bring these proceedings.

The Applicant's Further Submissions

10. In their letter of 10 April 2013, the applicant's legal representatives set out further submissions which formed the basis upon which the applicant should be granted leave under Art 8 of the ECHR. In that letter, reliance is placed upon the relationship between the applicant and QC and also that they have two children, AXL and AYL who were born in the UK. The applicant relies on the fact that QC and the two children have discretionary leave which is valid until July 2015 and that the applicant plays an "active role" in the children's day to day lives. Accompanying the application were the passports of the applicant's partner and children; the birth certificates of the two children, and a number of other supporting documents such as photographs of the applicant with his partner and children.

11. The representative's letter puts the applicant's claim as follows:

> "We respectfully advise you as to a significant change to our client's circumstances in the UK. Our client has been in a serious, and long standing relationship with [QC] since December 2008 and they have two children together, [AXL] and [AYL]. [QC] and their children currently hold Limited Leave to Remain for 30 months. Our client, partner and children are currently unable to legally live together permanently due to our client's lack of immigration status but hope to do so in the future. Despite this, he is able to reside with his partner and children at times and has been formally included in their pending housing application.

> Our client plays an active role in the day to day life of his children and is central in the upbringing of both children. Our client and [QC] share responsibility for all decision making concerning the future of the child".

Then, the letter set out some points and relevant case law relating to the existence of "family life".

12. The letter continues:

> "Furthermore, with reference to s55 we believe that it would be in the children's best interests to remain in the UK where their mother is based. If our client is forced to leave the UK, then this will lead to the separation of the family unit, as [QC's] current status does not allow her to pursue an Entry Clearance application for our client to lawfully return to the UK on the basis of his family and exercise his family life".

13. The letter then concludes as follows:

> "It is considered that the above representations and supporting evidence clearly demonstrate our client maintains a strong private and family life in the UK and that the removal of our client from the UK in light of the above would lead to a disproportionate breach of his Article 8 ECHR right to family life. We submit that a grant of Limited Leave to Remain in line with [QC] and their children would be appropriate in respect of the above.
>
> We wish to remind you of the very low burden of proof required when considering what amounts to a "realistic prospect of success" as this does not mean *will* succeed, but *may* succeed before an Immigration Judge".

14. On 7 July 2014, the respondent made the decision which is principally challenged in these proceedings.

The Challenged Decisions

15. The Secretary of State considered the applicant's claim to remain in the UK based upon his family and private life under the Immigration Rules and Art 8 of the ECHR in her decision letter of 7 July 2014. Although they have been subject to some subsequent amendment, I set out below the Rules as they were in force at the date of decision.

16. Having noted that the applicant relied upon the fact that he had a partner in the UK and two children aged 3 and 4, all of whom were Chinese nationals, the Secretary of State first considered the applicant's claim under the "partner" Rule, namely R-LTRP of Appendix FM. In order to succeed under R-LTRP, R-LTRP1.1(c)(ii) required that:

> "(ii) the applicant meets all the requirements of Section E-LTRP: Eligibility for leave to remain as a partner; ...".

17. Alternatively, by virtue of R-LTRP1.1(d)(ii) and (iii):

> "(ii) the applicant must meet the requirements of paragraph E-LTRP1.2–1.12 and E-LTRP2.1; and

(iii) paragraph EX.1 applies".

18. EX.1 provided, so far as relevant to the applicant's claim as a "partner" that:

> "This paragraph applies if ...
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK".

19. One of the "eligibility" requirements in E-LTRP1.2 stated as follows:

> "the applicant's partner must be –
>
> (a) a British Citizen in the UK;
>
> (b) present and settled in the UK; or
>
> (c) in the UK with refugee leave or as a person with humanitarian protection".

20. In her decision, the Secretary of State concluded that the applicant could not meet the "eligibility" requirement in E-LTRP1.2 as his partner was not a British citizen, was not settled in the UK and was not in the UK with leave as a refugee or on the basis of humanitarian protection. The applicant's partner only had limited leave to remain.

21. In addition, the respondent concluded that the applicant could not meet the requirements of EX.1 for the same reason and also because:

> "You have not demonstrated any reasons why there would be insurmountable obstacles to your relationship continuing in your country of origin. It is considered that all four members of your family unit are Chinese nationals and would face no difficulty in continuing your present family life in your country of origin. Your partner has been granted discretionary leave to expire in July 2015. As such your partner is free to return to China with you at any time".

22. The respondent then considered the applicant's claim as a "parent" under the Rules. As regards that claim, R-LTRPT1.1(c)(ii) required the applicant to meet all the "eligibility" requirements for leave in E-LTRPT. Alternatively, R-LTRPT1.1(d)(ii) and (iii) stated that:

> "(ii) the applicant meets the requirements of paragraphs E-LTRPT2.2–2.4 and E-LTRPT3.1; and
>
> (iii) paragraph EX.1 applies".

23. E-LTRPT2.2 required, in addition to the child being under the age of 18 at the date of application and having not formed an independent family unit or leading an independent life and to be living in the UK, that the child should be:

> "(c) a British Citizen or settled in the UK; or

(d) has lived in the UK continuously for at least seven years immediately preceding the date of application and paragraph EX.1 applies".

24. So far as relevant to a claim as a "parent", EX.1 provided that:

> "This paragraph applies if
>
> (a) (i) the applicant has a genuine and subsisting parental relationship with a child who -
>
> (aa) is under the age of 18 years ...;
>
> (bb) is in the UK;
>
> (cc) is a British Citizen or has lived in the UK continuously for at least the seven years immediately preceding the date of application; and
>
> (ii) it would not be reasonable to expect the child to leave the UK; ...".

25. In her decision, the respondent focused upon EX.1 and concluded that the applicant could not meet its requirements for the following reasons:

> "Regard has been given to EX.1 of Appendix FM of the Immigration Rules.
>
> You state that your children were born in the United Kingdom in 2010 and 2011 respectively, both of whom are nationals of China. Your children have not spent 7 years in the United Kingdom and you have not presented any exceptional circumstances as to why they would be unable to return with you to your country of origin.
>
> You therefore fail to fulfil EX.1 (a) (aa) and (cc) of Appendix FM of the Immigration Rules.
>
> As you have not demonstrated any reasons as to why your children cannot return with you to enjoy your family life in China, you have failed to fulfil EX.1 (a) (ii) of Appendix FM and it is considered that it would be in the best interests of your children to return with you to your country of origin where you can enjoy family life as a family unit".

26. In relation to the applicant's private life, the respondent considered paragraph 276ADE of the Rules which, so far as relevant, provided as follows:

> "The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> ...
>
> (iii) has lived continuously in the UK for at least twenty years (discounting any period of imprisonment); or
>
> ...
>
> (vi) is aged 18 years or above, has lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but has no ties

(including social, cultural or family), with the country to which he would have to go if required to leave the UK".

27. In her decision, the respondent concluded that the applicant could not meet either the requirement in para 276ADE(iii) or in para 276ADE (vi) for the following reasons:

> "You claim to have entered the United Kingdom in January 2007. You have failed to demonstrate that you have accrued 20 years residence in the United Kingdom as required by Rule 276 ADE (iii). You have spent the majority of your life in China and have raised no reasons as to why you would not be able to continue to live in China as you have done so before.
>
> You have failed to demonstrate that you have no social, cultural or family ties in your country of origin for the reasons given above and therefore fail to fulfil Rule 276 ADE (vi)".

28. Consequently, the respondent concluded that the applicant had no claim under the Rules.

29. The respondent then turned in her decision letter to consider whether the applicant could succeed outside the Rules under Art 8. In doing so she also considered the "best interests" of the applicant's two children. The decision letter is in the following terms:

> "I have also considered whether the particular circumstances set out in your application constitute exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights, might warrant consideration by the Secretary of State of a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules. I have decided that they do not, having first considered the best interests of your two children.
>
> Article 3 of the UNCRC requires that the best interests of the child are a primary consideration in all actions concerning the child. Section 55 of the statutory guidance in the 2009 Act creates a duty to safeguard and promote the welfare of children.
>
> In weighing up the factors in favour and against a grant of leave it is pertinent to look at the judgement given on 01 February 2011 in the case of ZH (Tanzania) v Secretary of State for the Home Department.
>
> At paragraph 33 Lady Hale said:
>
> > "… . *The best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created*".
>
> While it is accepted that you are father to dependent children born in the United Kingdom and that you maintain an active role in their upbringing, it is not considered that this alone amounts to circumstances which may be considered exceptional so as to warrant a grant of leave. It is not considered that remaining in the United Kingdom is necessarily in the best interests of the

children or that you would face any difficulty in returning and re-integrating into your country of origin alongside your partner and children.

Your application for leave to remain in the United Kingdom is therefore refused.

Consideration of SSHD v Razgar

Your claim has been considered using the five stage test outlined in the case of SSHD v Razgar [2004] UKHL 27:

(1) Below is a consideration of whether you have established family and/or private life in the United Kingdom:

You have submitted certified copies of birth certificates for your two dependent children, born in the United Kingdom. It is accepted that you have established a family life in the United Kingdom with your children and partner, all of whom are Chinese nationals. You additionally cite your length of residence in the United Kingdom in excess of six years. It is accepted that you may have established connections to the county over this time amounting to a private life in the UK.

(2) If (or assuming that) family or private life exists, consideration is given below to whether refusal or removal will interfere with that family and/or private life:

It is considered that your removal would interfere with any family or private life you have developed in the country.

(3) If there is any interference it must be in accordance with the law. Interference with family life, that is, the decision to refuse/remove, will be in accordance with the law where:

- It is in accordance with domestic law as set out in primary and secondary legislation, the Immigration Rules, or published policies and procedures; and

- The relevant law is accessible (published) and precise.

It is considered that any interference with your family life would be in accordance with the law.

(4) Below is a consideration of why any interference is in pursuit of a permissible aim as set out in Article 8(2);

It is considered that any interference would be in pursuit of the permissible aim of maintaining effective immigration control.

(5) Below is a consideration of why any interference is proportionate to the permissible aim;

You have accumulated 7 years of residence in the United Kingdom however you have absconded from immigration authorities for the majority of this residence. You claim to have been in a relationship with your partner since 2008 but made the decision not to present yourself to immigration authorities until 2012 and not to make any attempt to regularize your stay until 2013 following your partner's grant of discretionary leave. While you have established a family life in the United Kingdom, it is considered that you are a fit and healthy male and have spent the majority of your life in your country of origin. Your

partner and children are all Chinese nationals. You have presented no reason why you cannot return to China as a family. You established said family life in full knowledge of the fact that your immigration status was especially precarious given your decision to abscond.

Your children are aged three and four and cannot be claimed to have established exceptionally significant cultural ties to the United Kingdom in this time.

In light of the above it is considered that your removal would be entirely proportional to the pursuit of the permissible aim of maintaining effective immigration controls.

For the reasons considered above it is concluded that your rights under Article 8 of the ECHR would not be breached upon your removal from the United Kingdom".

30. Then, having referred to the applicant's previous submissions, the respondent concluded that his claim did not amount to a 'fresh claim' under para 353 of the Immigration Rules in the following terms:

> "Further more it has been decided that your submissions do not amount to a fresh claim. The new submissions taken together with the previous considered material do not create a realistic prospect of success, namely that an immigration judge applying anxious scrutiny would decide that the claimant ought to be granted asylum, Humanitarian Protection or Discretionary Leave for the reasons above and in light of WM(DRC) v SSHD and SSHD v AR (Afghanistan) [2006] EWCA Civ 1495".

31. Finally, the respondent considered para 353B of the Immigration Rules and concluded that it did not apply so as to make the applicant's removal inappropriate. Para 353B provides as follows:

> "Where further submissions have been made and the decision maker has established whether or not they amount to a fresh claim under para 353 of these Rules, or in cases with no outstanding further submissions whose appeal rights have been exhausted and which are subject to a review, the decision maker will also have regard to the migrant's:
>
> (i) character, conduct and associations including any criminal record and the nature of any offence of which the migrant concerned has been convicted;
>
> (ii) compliance with any conditions attached to any previous grant of leave to enter or remain and compliance with any conditions of temporary admission or immigration bail where applicable;
>
> (iii) length of time spent in the United Kingdom spent for reasons beyond the migrant's control after the human rights or asylum claim has been submitted or refused;
>
> in deciding whether there are exceptional circumstances which mean that removal from the United Kingdom is no longer appropriate".

32. The respondent considered the relevant factors and concluded that the applicant's circumstances were not "exceptional" for the following reasons:

"*Character, conduct and associations*

Security checks have returned no evidence of criminality on your part, however the absence of criminality is not considered a suitable justification for a grant of leave. There are concerns with regards to your character arising from your failure to comply with immigration authorities upon arrival, discussed below.

Compliance

The majority of your residence in the United Kingdom has been accrued with no basis of stay. You have absconded from immigration authorities for some five years having failed entirely to comply with the asylum process upon arrival. You failed to attend interview and to submit your statement of evidence. You claim to have remained in the United Kingdom and to have established a relationship with your partner since 2008, but have offered no explanation as to why you chose not to present yourself to authorities until 2012. Taken in the round, your compliance history is considered to weigh heavily against you.

Length of time in the UK

You have resided in the United Kingdom for more than seven years, however as noted above the majority of this time was accrued due to your decision to abscond from the Home Office. Your stay has been further prolonged by an additional year awaiting the outcome of your further submissions, however when considered in balance with your total length of residence, it is concluded that your previous non-compliance outweighs any consideration which may have been given to delay on the part of the Home Office beyond your control. Your length of time in the UK accordingly carries little weight when considered in the round.

Conclusion

All of the above factors considered in the round fail to present any justification for a grant of leave to remain in the United Kingdom. You have raised no circumstances exceptional enough to overrule the fact that you have accrued the majority of your time in the United Kingdom illegally".

33. Following the applicant's PAP letter, the respondent replied in her letter of 16 August 2014 as follows:

"You claim that SSHD has fettered her discretion by failing to give adequate consideration to your client's circumstances. You claim SSHD completely fails to consider the application in accordance with Article 8 ECHR and established jurisprudence. You further claim this error of law makes the decision unlawful and submit that it cannot stand.

You request a review of the decision or alternatively you request that your client is given a right of appeal.

It is considered that your client's further submissions were considered in accordance with the law, guidance and policies that were in place at the time of the decision. In your client's case, the caseworker has weighed up factors to indicate whether removal is appropriate, incorporating all present policies and legal requirements or conversely, whether a grant of leave is appropriate.

> The SSHD submits that the approach outlined by the Master of the Rolls in MF (Nigeria) and Sales J in Nagre is consistent with the approach of considering whether a case meets the requirements of the Rules and then considering whether the case discloses any exceptional circumstances such as to mean that refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate under Article 8. Article 8 is not an absolute right. When considering the impact of removal SSHD must balance the Applicant's rights to a private and family life in the United Kingdom, against the maintenance of effective immigration control. The case law has established that:
>
> > "[t]he existence or non-existence of family life for the purposes of Article 8 is essentially a question of fact depending on the real existence in practice of close personal ties".
>
> If the existence of an Article 8 right is established, the case law states that contracting states are permitted to interfere with the enjoyment of that right provided that certain conditions are satisfied. Any assessment of an Article 8 claim must therefore be viewed in light of the United Kingdom's right to control the entry of foreign nationals into its territory and the necessity of fair and consistent immigration control.
>
> The result of the consideration and the reason for the refusal of your client's case were explained in detail in the decision letter. It is submitted that the decision gives complete and full consideration of your client's circumstances, including that of his partner and children.
>
> It is considered there is no evidence that the appropriate policies and guidance in place at the time of the consideration of your client's case were not applied correctly. Consequently, the decision to refuse your client's further submissions is maintained".

The Grounds

34. The applicant's challenge is focused primarily upon the respondent's decision letter of 7 July 2014. The detailed grounds and skeleton argument prepared by Mr Jowett raise two grounds.

35. Ground 1 concerns the respondent's decision under Art 8. First, it is argued that the respondent unlawfully applied an "exceptionality" test. Secondly, it is argued that the respondent failed properly to consider the "best interests" of the applicant's two children as required by s.55 of the Borders, Citizenship and Immigration Act 2009 "BCI Act 2009"). Thirdly, it is argued that the respondent failed properly to take into account all relevant factors in assessing proportionality including the immigration status of the applicant's partner and children, the best interests of the children and the delay in reaching a decision on the applicant's claim. In addition, it is argued that the respondent had failed to properly consider whether there were "exceptional circumstances" under para 353B, in particular by failing to have regard to the best interests of the children.

36. Ground 2 challenges the respondent's decision that the applicant's claim does not amount to a 'fresh claim' under para 353 of the Immigration Rules. It is argued that the respondent's decision was irrational in concluding that the applicant's claim had no realistic prospect of success

before a judge hearing an appeal and that in reaching that conclusion the respondent has failed to apply the required "anxious scrutiny".

Discussion

37. It is well recognised that Statement in Changes in Immigration Rules HC 194 introduced new provisions into the Immigration Rules with effect from 9 July 2012, in para 398, 399 and 399A in relation to criminal deportation cases and in paras 276ADE and Appendix FM in other cases that deal with claims under Art 8 based upon an individual's private or family life in the UK. Those Rules provide a more focused analysis of factors considered to be relevant in applying Article 8. In R (Nagre) v SSHD [2013] EWHC 720 (Admin), Sales J (as he then was) stated at [29] that:

> "... the new Rules do provide better explicit coverage of the factors identified in case-law as relevant to analysis of claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision-makers applying the new Rules. It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new Rules to require the grant of such leave".

(See also Haleemudeen v SSHD [2014] EWCA Civ 558 at [40] *per* Beatson LJ – "the Secretary of State's policy…is more particularised in the new Rules than it had previously been".)

38. The decision-maker should adopt a two-stage process. First, can the individual succeed under the Rules? Secondly, if not, can he or she succeed outside the Rules under Art 8? The two-stage approach has been approved by the Court of Appeal in a number of cases including MF (Nigeria) v SSHD [2013] EWCA Civ 1192 (in the context of deportation where the Rules are a "complete code") and Singh and Khalid v SSHD [2015] EWCA Civ 72 (in the non-deportation context).

39. There is no "threshold requirement" or "intermediary test" of arguability before a decision maker must consider the second stage, namely whether the individual, despite not meeting the requirements of the Rules, has a good claim under Art 8 (see MM (Lebanon) v SSHD [2014] EWCA Civ 985). However, the extent of any consideration outside the Rules will depend upon whether all the issues have been adequately addressed under the Rules. As Underhill LJ (with whom Lewison and Arden LJJ agreed on this point) noted in the Court of Appeal in Singh and Khalid (at [64]):

> "there is no need to conduct a full separate examination of Art 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules."

40. In Nagre, Sales J said at [30]:

> "... if, after the process of applying the new Rules and finding that the claim for leave to remain under them falls, the relevant official or Tribunal judge considers it is clear that the consideration under the Rules has fully addressed

> any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately under the Rules".

41. The approach in Nagre has most recently been approved by the Court of Appeal in SSHD v SS (Congo) and Others [2015] EWCA Civ 387 and R (Agyarko and Others) v SSHD [2015] EWCA Civ 440.

42. As Sales J noted (above) a claim outside the Rules required consideration of whether there are "compelling circumstances" so as to outweigh the public interest reflected in the fact that the applicant could not meet the requirements of the Immigration Rules. That latter public interest is now, so far as a court or tribunal is concerned, statutorily enshrined in s.117B(1) of the Nationality, Immigration and Asylum Act 2002.

43. In Huang v SSHD [2010] UKHL 11 the House of Lords recognised that, as a general proposition, a claim for leave outside the Immigration Rules under Art 8 should not only be granted in "exceptional cases". There is no "test of exceptionality" in assessing proportionality under Art 8. Nevertheless the case law acknowledges that in carrying out the balancing exercise under Art 8, where an individual cannot meet the requirements of the Immigration Rules, the public interest will, generally, only be outweighed by the individual circumstances if there are "exceptional" or "compelling" circumstances. That approach has, in a number of cases, been 'glossed' so as to require an individual to establish that the immigration decision would have unjustifiably harsh consequences in order for the public interest to be outweighed (see, e.g. Nagre at [42] and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)).

44. In SSHD v SS (Congo) and Others, decided after the hearing in this case, the Court of Appeal adopted a more nuanced approach to the consideration of Art 8 outside the Rules. The court considered that a test of "exceptionality" ("the most exceptional") or "very compelling reasons" was applicable in two special contexts, namely where the individual family relationship had been established in circumstances of known "precariousness" and the deportation of foreign criminals. In other cases, involving entry clearance or a claim for leave to remain, an applicant must show that "compelling circumstances" exist. At [40]–[42] Richards LJ, delivering the judgment of the Court (Richards, Underhill and Sales LJJ), stated:

> "40 .... In our view, the appropriate general formulation [in a claim outside the Rules] is that such cases will arise where an applicant for LTE [leave to enter] can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave.
>
> 41. This formulation is aligned to that proposed in *Nagre* at [29] in relation to the general position in respect of the new Rules for LTR [leave to remain], which was adopted by this court in *Haleemudeen* at [44]. It is a fairly demanding test, reflecting the reasonable relationship between the Rules themselves and the proper outcome of the application of Article 8

> in the usual run of cases. But, contrary to the submission of Mr Payne, it is not as demanding as the exceptionality or "very exceptional circumstances" test applicable in the special contexts explained in *MF (Nigeria)* (precariousness of family relationship and deportation of foreigners convicted of serious crimes).
>
> 42. In our view, it is a formulation which has the benefit of simplicity. It avoids the need for any excessively fine-grained approach at the level of decision-making by officials and tribunals. It should thus help to avoid confusion when cases arise, as they sometimes do, where an application for LTE is made in parallel with an application for LTR ...".

45. I, of course, did not have the benefit of submissions in relation to SS (Congo) and Others as the decision was reported after the hearing. Given that the relationship between the applicant and QC began in December 2008 when neither had leave to remain in the UK, there is an argument that their situation falls within the "precarious" family life situation recognised by the Court of Appeal in SS (Congo) and Others as requiring the application of a strict "exceptionality" test in order to outweigh the public interest. It may be, however, that that approach is restricted to cases where, unlike this case, no children are involved (see [29]). For that reason, and out of deference to the fact that I had not heard submissions on SS (Congo) and Others, together with my conclusion that the applicant cannot succeed on the basis put by Mr Jowett in his submissions, it is not necessary to consider further the application of the distinction made by the Court of Appeal to the facts of this case. If the applicant cannot succeed on the basis of Mr Jowett's submissions, *a fortiori* he could not succeed on the more onerous test ("exceptionality") and approach identified in SS(Congo) and Others.

Ground 1: *"exceptionality" test*

46. With that in mind, I turn to the first issue raised by Mr Jowett in Ground 1, namely that the respondent wrongly applied a test of exceptionality in refusing the applicant leave outside the Rules under Art 8.

47. In support of his submissions Mr Jowett did not criticise the Secretary of State's use of the phrase "exceptional circumstances". However, he submitted that she had unlawfully applied a substantive test of "exceptionality" when she had stated that the children's circumstances were not "considered exceptional so as to warrant a grant of leave". Likewise, he relied upon the respondent's statement that the children, aged 3 and 4, could not be said to have established "exceptionally significant cultural ties" to the UK. Mr Jowett submitted that the respondent had, contrary to Huang, wrongly applied a test of "exceptionality" both in assessing the children's best interests and in determining the proportionality issue under Art 8. He submitted that at no point had the Secretary of State properly considered whether the consequences to the applicant and his family were "unjustifiably harsh" such that the refusal would not be proportionate.

48. I do not accept Mr Jowett's submissions on this point. In my judgment, the respondent did not unlawfully apply an exceptionality test.

49. First, and I will return to this point as a recurring theme in relation to the points raised by Mr Jowett in his submissions, the respondent's decision letter must be fairly read as a whole. Whilst the decision letter may not be a model of structural clarity, it is clear that the respondent when first considering the applicant's claim outside the Rules considered whether there were "exceptional circumstances" to justify the grant of leave. As I understood Mr Jowett's submissions he did not take issue with that formulation. He was, in my judgment, right not to do so. It is a formulation accepted by the courts as consistent with the respondent's lawful consideration of whether the public interest is outweighed by an individual's circumstances when they are unable to meet the requirements of the Rules (see, e.g., Nagre at [14]). In my judgment, reading the respondent's decision letter as a whole there is no reason to think that the respondent's reference to "exceptional" or "exceptionally" in the instances highlighted by Mr Jowett were other than a shorthand for considering whether there were "exceptional circumstances" as properly understood as being required to outweigh the public interest.

50. Secondly, it is clear that the respondent applied the well-known five-stage test in R (Razgar) v SSHD [2004] UKHL 27 and, in particular, considered the issue of proportionality when stating: "below is a consideration of why any interference is proportionate to the permissible aim". Likewise, the respondent's reference to the applicant's removal being "entirely proportional" is also clearly a reference to the central issue under Art 8.2 of proportionality.

51. Thirdly, Mr Jowett's reliance upon the absence of a self-direction by the respondent in terms of whether the consequences to the applicant and his family would be "unjustifiably harsh" does not establish that the decision was unlawful. Reading the decision letter as a whole, it is plain that the Secretary of State looked to factors relevant to the applicant and his family to weigh against the public interest. Leaving aside Mr Jowett's submission, to which I will return below, that the respondent did not carry out that assessment lawfully, there can be no doubt that she did actually carry out an assessment. There is no reason to conclude that the respondent failed to do so.

52. In any event, in her letter of 16 August 2014, which is also challenged in these proceedings, the respondent specifically stated that the applicant's case did not disclose:

> "any exceptional circumstances such as to mean that refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate under Article 8".

53. Although that letter post-dated the first decision, it is itself challenged in these proceedings, and plainly identifies in my judgment that the respondent was well aware of the need to assess the applicant's circumstances against an appropriate yard-stick sufficient to outweigh the public interest.

54. The respondent's letter also goes on to state that the decision was in accordance with the "appropriate policies and guidance" relevant to the applicant's claim. In some detail, Mr Jowett placed some reliance upon the respondent applying an irrelevant part of her guidance (IDI, "Family Members under the Immigration Rules", Section FM 1.0, Partner and ECHR Article 8 Guidance" (October 2013) by reference to section 3.2.7c rather than 3.2.8. The former, he submitted, was relevant to whether there were "insurmountable obstacles" relevant to a consideration under the Rules whilst the latter was directly concerned with "exceptional circumstances" outside the Rules under Art 8. Whilst Mr Jowett's submission is correct to the extent that section 3.2.7c is not the relevant part of the guidance concerned with Art 8, the point takes Mr Jowett nowhere. The Secretary of State made no reference to section 3.2.7c in either of her decision letters. The reference to it is found in the "detailed grounds of defence" (at para 45) drafted by Ms Bayoumi. As I understood Ms Bayoumi in her submissions, she accepted that she had wrongly referred to section 3.2.7c in the respondent's grounds. Nothing in either decision letter, in my judgment, demonstrates that the respondent unlawfully applied an irrelevant part of her policy or that she did not have in mind the relevant "exceptional circumstances" guidance in section 3.2.8 which the Administrative Court in Nagre (at [14]) acknowledged lawfully set out the approach to "exceptional circumstances" to justify a grant of leave outside of the Rules on the basis that there would be "unjustifiably harsh consequences". As the Court of Appeal recently accepted in SS (Congo) and Others (at [49]), the "exceptional circumstances" guidance in the respondent's IDIs is given:

> "a wide meaning in the context of the instructions, covering *any* case in which on proper analysis under Article 8 at the second stage it would be disproportionate to refuse leave".

55. In rejecting Mr Jowett's submissions, I note that similar arguments were put to, and rejected by, the Upper Tribunal in R (Chen) v SSHD [2015] UKUT 00189 (IAC). At [30], UTJ Gill rejected a submission made in that case that the respondent had unlawfully applied an "exceptionality test". The judge said this:

> "30. ....
>
> i) The mere fact that the word "exceptional" is used does not mean that the test of exceptionality is being applied contrary to the guidance of the House of Lords in Huang v Secretary of State for the Home Department [2007] UKHL 11. In MF (Nigeria), the Court of Appeal accepted (at paras 40 and 41) the submission advanced on behalf of the Secretary of State that the phrase "*it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors*" in para 398, which applies in deportation cases, served the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paras 398 and 399 or 399A. At para 42 of MF (Nigeria), the Master of the Rolls said, in effect, that the use of the phrase "exceptional circumstances" does not necessarily mean that a test of

exceptionality is being applied. The explanation given at para 42 of MF (Nigeria) was as follows:

> "...it is only in "exceptional" or "the most exceptional circumstances" that removal of the non-national family member will constitute a violation of article 8. In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal. In our view, it is no coincidence that the phrase "exceptional circumstances" is used in the new rules in the context of weighing the competing factors for and against deportation of foreign criminals".

ii) Although MF (Nigeria) was a deportation case, there is no reason to think that the use of the word "*exceptional*" or the phrase "*exceptional circumstances*" outside the IRs in non-deportation cases means that the test of exceptionality is being applied contrary to Huang, especially given that:

a) Strasbourg case-law indicates that, where family life is established when the immigration status of the claimant is precarious, removal will be disproportionate only in "*exceptional cases*" (Nagre at (41)); and

b) the guidance applied by the case-workers in assessing Article 8 claims outside the IRs defines "exceptional" as follows (Nagre at para 14):

> ""Exceptional" does not mean "unusual" or "unique". Whilst all cases are to some extent unique, those unique factors do not generally render them exceptional. For example, a case is not exceptional just because the criteria set out in EX.1 of Appendix FM have been missed by a small margin. Instead, "exceptional" means circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. That is likely to be the case only very rarely".

At para 14 of Nagre, Sales J accepted that the definition of "*exceptional circumstances*" which is given in the guidance equates such circumstances with there being unjustifiable hardship involved in removal such that it would be disproportionate – i.e. would involve a breach of Article 8.

31. Yet, I regularly encounter objections by applicants to the use of the word "*exceptional*" or the phrase "*exceptional circumstances*" by decision-makers in assessing Article 8 claims outside the IRs on the ground that it shows that the respondent has unlawfully applied the test of exceptionality contrary to Huang. The mere use of these phrases is not enough to show that the test of exceptionality is being used contrary to Huang. An applicant must point to a defective process of reasoning that shows that the test of exceptionality was in fact applied.

> 32. In the instant case, the decision-maker plainly considered the question of proportionality. This is evident not only from the fact that the words "*proportionate*" and "*disproportionate*" were used a total of three times in the second decision letter in the assessment of the Article 8 claim outside the IRs and once in the "Summary" at the end but also from the reasoning (see the words in bold in the quote at my para 8 above) which shows that the decision-maker looked for factors to weigh against the state's interests".

I entirely agree with that reasoning which is in line with my own expressed above. The respondent plainly considered the issue of proportionality and, subject to Mr Jowett's submission below, considered the individual circumstances of the members of the family. For these reasons, I reject Mr Jowett's submission that the respondent unlawfully applied a test of "exceptionality".

Ground 1: *the children's 'best interests'*

56. Mr Jowett submitted that the respondent's consideration of the children's best interests was unlawful. He put this point in two ways.

57. First, looking at the decision letter, Mr Jowett submitted that the respondent had failed to reach a conclusion on whether removal was in their best interests. He relied upon the respondent's words in the decision letter when dealing with s.55 of the 2009 Act that:

> "it is not considered that remaining in the United Kingdom is necessarily in the best interests of the children ...".

58. Mr Jowett submitted that the respondent's failure to reach a finding on the children's "best interests" remained equivocal even though when considering the applicant's claim as a parent under the Rules the respondent had stated that:

> "it would be in the best interests of your children to return with you to your country of origin where you can enjoy family life as a unit".

He submitted that that passage did not form part of the respondent's reasoning when she subsequently considered Art 8.

59. In my judgment, Mr Jowett's approach demands that one part of the respondent's decision letter should be read in isolation from another, rather than reading the letter as a whole. That, in my judgment, is a wholly impermissible approach. Whilst, as I have already commented, the letter may not be the model of structural clarity, it is plain that the respondent was well aware of her obligation under s.55 of the 2009 Act (to which she makes specific reference) to "first consider [the best interests of your two children]". The respondent also made reference to, and cited from the judgment of Lady Hale in, ZH (Tanzania) v SSHD [2011] UKSC 4. That is done under the rubric of "exceptional circumstances" and a consideration of Art 8, albeit prior to the section applying the five-stage Razgar test. It is clear from the respondent's statement, albeit when considering the "parent" Rules, that she concluded it:

> "would be in the best interests of your children to return with you to your country of origin where you can enjoy family life as a family unit".

60. The part relied upon by Mr Jowett must be read in the context of the letter as a whole. Read in that way, despite the apparently equivocal nature of the subsequent wording ("not considered that remaining in the UK is necessarily in the best interests of the children"), I am satisfied that the respondent approached the applicant's claim on the basis that it would be in the children's best interests to return to China with the applicant and their mother. Consequently, I reject that aspect of Ground 1 relied upon by Mr Jowett.

61. Secondly, Mr Jowett submitted that the respondent had failed to take into account all relevant matters in assessing the children's best interests. He relied on a number of matters.

62. He drew attention to the fact that the children had never lived other than in the UK and that both they and their mother had discretionary leave until July 2015, which they would be entitled to apply to extend. It is simply untenable to suggest that the respondent did not take into account that the applicant's children had lived in the UK since they were born. Again, the decision letter must fairly be read as a whole and in considering the applicant's claim as a "parent", the respondent notes that: "your children were born in the United Kingdom in 2010 and 2011". There has never been any suggestion that they have left the UK. Equally, the respondent made reference to the fact, albeit when considering the applicant's claim under the "partner" Rule, to the fact that his partner: "has been granted discretionary leave to expire in July 2015". It simply defies common sense to conclude that the respondent was also not fully aware that the applicant's children, aged 4 and 3, had leave in line with their mother. In addition, the respondent was no doubt factually aware, as it was patently obvious, that both the applicant's partner and his children could apply to extend their discretionary leave in the future.

63. Mr Jowett submitted that the respondent's decision was, in effect, contrary to the one taken by the Secretary of State in granting the applicant's partner and children discretionary leave in 2013. There was no inconsistency necessarily in the respondent's conclusion that the children's "best interests" lay with their mother and father if the applicant returned to China and the decision taken in 2013, having regard to their interests, that they and their mother should be granted discretionary leave. The record of that grant is at pages 45-47 of the trial bundle. It is clear that the decision was taken under para 353B of the Immigration Rules on the basis of "exceptional circumstances". Amongst the factors considered was the fact that the applicant's partner had been living in the UK for at least three years and that the children had lived their entire lives in the UK. But, somewhat curiously, it is also noted:

> "it is not believed the family have any extended family in the UK, although the children's father/father's status is not known".

64. That would appear to record that, in making her application for leave, the applicant's partner did not identify the applicant as their father or indicate his status. The grant of leave was, therefore, on the basis that the applicant's partner was a single woman looking after two young children in the UK. At the hearing, I asked Mr Jowett whether he could assist me in relation to this matter but he indicated that he had no instructions. The applicant's claim has always been that he and QC formed their relationship in 2008 and it has been continuous thereafter including at the time that QC made her successful application for discretionary leave. Given the premise upon which that leave was granted to both the applicant's partner and children, there is nothing necessarily inconsistent in the respondent, now being aware of the full facts, concluding that the children's best interests lie with the family unit of the applicant and his partner if he returns to China.

65. Mr Jowett submitted that the respondent had been wrong to take into account the issue of whether the children's parents could reintegrate into China which was irrelevant to their best interests, and also in taking into account that they had not established "exceptionally significant cultural ties" to the UK. I do not accept that submission. It was relevant to consider whether their parents could reintegrate into life in China. The circumstances of the parents in China potentially impacted upon the children and their interests. Apart from the time that both parents had been in the UK, there was no evidence concerning any difficulty they might have in reintegrating. Also, the children were 4 and 3 years old respectively, it was entirely reasonable for the respondent to conclude that their focus was likely to be, in effect, on their family (parents) rather than externally as they developed social ties with others through, for example, school (see, e.g., E-A (Article 8 – best interests of child) Nigeria [2011] UKUT 00315 (IAC)). Whether looking for "exceptional" or any ties with the UK, the evidence was simply not there to suggest they existed.

66. Ms Bayoumi drew my attention to the Upper Tribunal's decision in JO and Others (Section 55 duty) Nigeria [2014] UKUT 00517 (IAC) which she submitted demonstrates that a decision maker applying s.55 was entitled to reach a conclusion on a child's best interests by considering the material in the application for leave or submission made to the Secretary of State. Whilst the Tribunal was primarily concerned with the "tools available to the court or Tribunal", the point made by Ms Bayoumi is, in my judgment, as a generality, equally true of the Secretary of State. There may be circumstances, however, where the Secretary of State's duty under s.55 requires further enquiry. Mr Jowett did not submit that the respondent was required to make further enquiry so as to consider material not contained within the application or submissions. Ms Bayoumi submitted that the plain fact in this case was that there was little material before the respondent relevant to the children's best interests. In particular, the applicant had not provided the Secretary of State with any material concerning the impact upon the children of leaving the UK and returning to China with their parents. That, in my view, is entirely correct. All that the Secretary of State knew was, in essence, that the applicant

and his partner had two children who had been born and lived in the UK and were aged 4 and 3. They were Chinese nationals and had been brought up by a couple who were themselves Chinese nationals. This was not a case where the children had lived, e.g., at least seven years in the UK and had established social ties through education, etc. It was entirely reasonable for the Secretary of State to consider the children's position on return to China despite the fact that they and their mother had discretionary leave to remain in the UK. That did not mean that they could not return to China. Neither the applicant nor the applicant's partner were entitled to international protection. Whilst the applicant's partner and children could remain in the UK, if they did so despite the applicant being removed, that would be a personal choice of the applicant and the applicant's partner. There were no obstacles, let alone "insurmountable" obstacles, to the family as a unit returning to China. Given the ages of the two children and the total absence of any evidence of any deleterious impact upon them of returning to China with their parents, in my judgment, the Secretary of State was properly entitled to conclude rationally that it was in their "best interests" to do so.

Ground 1: '*proportionality'*

67. I turn now to Mr Jowett's submissions which challenge the respondent's assessment of "proportionality" under Art 8.

68. Mr Jowett submitted that the respondent had failed to give proper consideration to the children's best interests in assessing proportionality. That submission, in my judgment, added nothing to the points raised by Mr Jowett and with which I have already dealt. The respondent properly directed herself in accordance with s.55 and ZH (Tanzania) and was entitled as a matter of law to come to the conclusion that the children's best interests lay with their parents in China if the applicant was removed. It was, as I have already pointed out, entirely reasonable for the respondent to conclude that, despite the applicant's partner and children having discretionary leave, for them to accompany the applicant to China where, given the paucity of evidence, it had not been established that the family as a whole would be unable to reintegrate into China.

69. Secondly, Mr Jowett submitted that the respondent's decision was wholly inconsistent with that of the grant of discretionary leave for the applicant's partner and their children and failed to take into account that they were entitled to apply for further leave in the future. As I have already pointed out, the grant of discretionary leave to the applicant's partner and children was based upon her being a lone mother with two children. Here, the respondent was considering a family unit including two parents whom it was reasonable to expect could return as a whole to China if the applicant was removed. Those are different circumstances from those considered by the respondent when granting the applicant's partner and children leave in 2013. However, of course, in assessing the applicant's claim, his immigration history was unique to him including that he had absconded between 2007 and 2012 which the respondent was entitled to take into account in assessing proportionality.

70. Further, the respondent's decision was not unbalanced. In my judgment, the respondent did not unlawfully focus on factors militating against a grant of leave to the applicant. The respondent took into account the positive factors in favour of the applicant which in large measure amounted to little more than a period of residence of seven years in the UK and the fact that he had a partner and two young children in the UK, the latter being his dependants and in respect of whom he played "an active role in their upbringing" on a day-to-day basis. The respondent clearly took into account the applicant's parental role.

71. Thirdly, Mr Jowett submitted that the respondent had failed to take into account that the respondent had delayed in considering the applicant's further submissions sent on 10 April 2013 until 7 July 2014. Mr Jowett submitted that this delay of over a year was a very substantial proportion of the children's lives and the respondent had failed to take that into account.

72. Ms Bayoumi accepted that the respondent's decision had taken over a year but she submitted that this was not the type of delay envisaged by the House of Lords in EB (Kosovo) v SSHD [2008] UKHL 41 which would weigh in favour of a grant of leave. I accept that submission. Lord Bingham of Cornhill dealt with the relevance of delay at [13]–[16] of EB (Kosovo). He considered that delay might be relevant in three ways. First, it might assist to demonstrate that an applicant had during the period of delay developed closer personal and social ties and had established deeper roots in the community. To that extent, an applicant's claim under Art 8 would necessarily be strengthened. Secondly, delay might be relevant if it was of sufficient length to remove or displace an individual's "precarious situation" if an expectation arose that the authorities did not intend to remove the applicant. Thirdly, delay could be relevant in reducing the weight to otherwise be accorded to the requirements of firm and fair immigration control if the delay was shown to result from a dysfunctional system which yielded "unpredictable, inconsistent and unfair outcomes".

73. Mr Jowett submitted that any sense of impermanence in the applicant's relationship with his partner and with his children faded and the expectation grew that the respondent did not intend to reject the application. Mr Jowett pointed out that the applicant's representatives had sent a chasing letter on 18 February 2014 and there had been contact between the applicant's MP and the respondent resulting in a response by the respondent on 28 March 2014. Mr Jowett quite rightly did not rely upon the third basis upon which delay could be relevant set out in Lord Bingham's judgment that it demonstrated a "dysfunctional system". There is no evidence in this case which could conceivably engage that aspect of Lord Bingham's reasoning.

74. As regards the other two aspects of delay identified by Lord Bingham, the respondent plainly had in mind that over the course of the period April 2013 to July 2014 that the applicant's children had become that much older. They remained, however, young children aged 4 and 3. There was

no evidence that they had developed any particular social or cultural ties in the UK outside of their family unit. Likewise, the delay of just over a year could not, in my judgment, amount to such a significant factor, in all the circumstances of the applicant's case, so as to create an "expectation" that he was to be granted leave to remain. The applicant had been in the UK since 2007 and had never had leave to remain. He had absconded between 2008 and 2012 and I am wholly unpersuaded that the "delay" in determining his application for leave was, or is, a significant factor in assessing the proportionality of the respondent's decision.

75. Despite the detailed forensic dissection undertaken by Mr Jowett in his written and oral submissions of the respondent's decision, I am wholly unpersuaded that the decision to refuse leave under Art 8 read fairly and as a whole was unlawful. The reality is that the applicant's circumstances in large measure, if not as a whole, fell within the rubric of, and were dealt with by, the Immigration Rules themselves. It is not suggested that the applicant met the requirements of any of the Rules. The applicant's claim under Art 8 was, in my judgment, weak. In my judgment the respondent properly reached her decision to refuse the applicant leave outside the Rules under Art 8. For the reasons I have given, that decision was not irrational or otherwise unlawful.

Ground 1: *paragraph 353B*

76. The final point raised by Mr Jowett under Ground 1 concerned the respondent's decision in her letter of 7 July 2014 that para 353B dealing with "exceptional circumstances" did not lead to the conclusion that the applicant's removal was no longer appropriate.

77. In his oral submissions, Mr Jowett was content to rely upon paras 37-39 of his skeleton argument. Those brief paragraphs argue that the respondent failed properly, or at all, to consider the children's "best interests" and reliance is placed upon the points raised in relation to Art 8 of the ECHR.

78. I have set out above the respondent's decision in relation to para 353B. The respondent considered the applicant's circumstances under the headings "Character, conduct and associations", "Compliance" and "Length of time in the UK". The respondent then concluded that there are "no exceptional circumstances" sufficient to overrule the fact that the applicant has spent the majority of his time in the UK illegally.

79. Para 353B was considered by the Court of Appeal in Qongwane and Others v SSHD [2014] EWCA Civ 957. In his leading judgment, Sir Stanley Burnton noted at [24] that:

> "the discretion is a safety valve, pursuant to which the Secretary of State may refrain from removing but only in such circumstances, which will necessarily be rare".

80. Then at [32] Sir Stanley Burnton observed that:

> "In any event the factors referred to in that paragraph are likely to have been considered in the rejection of the Article 8 claim. It will be unnecessary for the decision maker to refer to those factors again, other than the statement that there are no exceptional circumstances justifying a decision that removal is not appropriate".

81. The truncated course approved by Sir Stanley Burnton was not followed by the Secretary of State in her decision letter. Instead, the Secretary of State considered in full the applicant's circumstances under the rubric set out in para 353B(i)-(iii). In truth, there was nothing raised by the applicant relevant to para 353B which had already not been considered by the Secretary of State in considering whether there were "exceptional circumstances" to justify the grant of leave outside the Rules under Art 8. There was, in my judgment, nothing which could invoke the "safety valve" of para 353B. Certainly, the children's best interests could not - even if the respondent had not taken those into account, and I simply do not accept that reading the letter as a whole that was the case - amount to "exceptional circumstances" given the respondent's entirely justifiable conclusion that their best interests were served as remaining as a family unit with their parents if the applicant was removed. It may well be that the brevity of Mr Jowett's submissions on this point reflect the reality that any challenge to the respondent's decision restricted to para 353B is without hope of success.

Ground 2

82. That leaves Ground 2 which challenges the respondent's conclusion that the applicant's claim was not a 'fresh claim' under para 353 of the Rules. Para 353 provides as follows:

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
>
> This paragraph does not apply to claims made overseas".

83. The relevant law was not a matter of dispute before me. It is set out in a number of decisions of the Court of Appeal, in particular WM (DRC) v SSHD [2006] EWCA Civ 1495 and R (YH) v SSHD [2010] EWCA Civ 116.

84. Further submissions will amount to a 'fresh claim' if:

a. their content has not yet been considered; and

b. taken together with the previously considered material, they create a realistic prospect of success before an Immigration Judge on appeal.

85. A decision is challengeable only on public law grounds. First, the Secretary of State must ask herself the correct question, namely whether the claim had a "realistic prospect of success" on appeal. That test is a "modest" one requiring only more than a 'fanciful' prospect of success. Secondly, in reaching a decision the Secretary of State must apply "anxious scrutiny" taking into account all the relevant material and demonstrating that she has done so. Thirdly, the court's role is one of "review" and the legality of the decision is based upon public law principles, in particular whether the Secretary of State could rationally come to the conclusion that she did.

86. In this case, there is no dispute that the applicant's further submissions had not previously been considered. The challenge here is to the respondent's decision at the second stage, namely that the claim had no realistic prospect of success before an Immigration Judge.

87. Mr Jowett, in his written and oral submissions, did not argue that the respondent had failed to apply the correct "realistic prospect of success" test. At the hearing, I raised in argument whether the respondent had, in fact, done so by asking the question whether there was "a realistic prospect of success" that a judge applying anxious scrutiny "would decide" in the applicant's favour. On reflection, I am satisfied that the phrase "would decide" in the applicant's favour does not demonstrate that the respondent applied too high a standard. The crucial phrase, identifying the correct test, used by the respondent, was whether there was a "realistic prospect of success". The use of the phrase "would decide" is no more than a reflection that the respondent was considering a hypothetical future judge and his or her decision. The phrase "realistic prospect of success" correctly identified that the Secretary of State need only conclude that an appeal "might" succeed. That is the "modest" test which para 353 requires the Secretary of State to address.

88. Mr Jowett submitted that the brief reasons given by the respondent in her decision letter demonstrated that she had not applied "anxious scrutiny" in reaching her decision and further this was not a claim where the Secretary of State was entitled to conclude that there was "only one right answer to a proportionality assessment". Mr Jowett also relied upon each of his submissions challenging the respondent's decision to refuse leave outside the Rules. I will not repeat those submissions here other than to state that I have rejected them above and for those reasons they cannot establish that the respondent's decision under para 353 was unlawful.

89. Although the respondent's reasoning is brief in respect of para 353, it is in my judgment adequate in law. It has to be read in the context of the decision letter as a whole which rejects the applicant's claim under Art 8. In reaching her conclusion under para 353, just as Mr Jowett sought to import his challenge to the substantive decision under Art 8 in his

submission about para 353, so the Secretary of State should properly be considered to have had in mind her reasoning in relation to the substantive decision under Art 8. That decision entails a proper consideration of all the factors relevant to the applicant's Art 8 claim. As I have already indicated, that claim was weak. In my judgment, given the paucity of evidence and all the circumstances of the applicant and his family, his claim had no realistic prospect of success before an Immigration Judge on appeal. More importantly, I am wholly unpersuaded that the respondent's decision that the claim had no realistic prospect of success was irrational or otherwise unlawful on public law principles. The brief reasons must be taken in the context of the decision's detailed reasons as a whole and, read as a whole, I am satisfied that the respondent did give "anxious scrutiny" by considering all the relevant factors in reaching her decision under para 353.

90. For these reasons, I reject Ground 2 relied upon by the applicant.

Decision

91. For all the above reasons, the respondent's decisions of 7 July 2014 and 12 August 2014 affirming the earlier decision were lawful. The claim is, accordingly, dismissed.

Signed

A Grubb
Judge of the Upper Tribunal