Hilary Term
[2017] UKSC 11
On appeal from: [2015] EWCA Civ 440

JUDGMENT

R (on the application of Agyarko) (Appellant) *v* Secretary of State for the Home Department (Respondent)
R (on the application of Ikuga) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lady Hale, Deputy President
Lord Kerr
Lord Wilson
Lord Reed
Lord Carnwath
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

22 February 2017

Heard on 6 and 7 April 2016

Appellants	*Respondent*
Parminder Saini	Lisa Giovannetti QC Neil Sheldon
(Instructed by Nag Law Solicitors Ltd and MTG Solicitors)	(Instructed by The Government Legal Department)

LORD REED: (with whom Lady Hale, Lord Kerr, Lord Wilson, Lord Carnwath, Lord Hughes and Lord Hodge agree)

1. These appeals are concerned with applications made by foreign nationals, residing unlawfully in the UK, for leave to remain here as the partners of British citizens with whom they have formed relationships during the period of their unlawful residence. The appellants rely primarily on the duty imposed on the Secretary of State by the Human Rights Act 1998 to act compatibly with the right to respect for family life guaranteed by article 8 of the ECHR. In each case, the Secretary of State concluded that the appellant did not qualify for leave to remain under the applicable provisions of Appendix FM to the Immigration Rules ("the Rules"), and that, applying the Immigration Directorate Instructions, "Family Members Under the Immigration Rules, Section FM 1.0, Partner & ECHR Article 8 Guidance" ("the Instructions"), there were no exceptional circumstances warranting the grant of leave to remain outside the Rules.

2. The appeals focus primarily on (1) paragraph EX.1(b) of Appendix FM, which imposes on applicants for leave to remain as a partner, where the applicant is in the UK in breach of immigration laws, a requirement that there are "insurmountable obstacles" to family life with that partner continuing outside the UK; and (2) a requirement in the Instructions that there must be "exceptional circumstances" for leave to remain to be granted in such cases outside the Rules. They also raise an issue under EU law, relating to the effect of the judgment of the Court of Justice in *Ruiz Zambrano v Office national de l'emploi* (Case C-34/09) [2012] QB 265, as well as some other issues under domestic law.

Rules and Instructions

3. It may be helpful to begin by explaining the nature and status of the Rules and the Instructions. Decision-making in relation to immigration, as in relation to other areas of government, is not exhaustively regulated by legislation. It involves the exercise of discretion and the making of evaluative judgments. In such a situation, it is usual, and legitimate, for the Secretary of State to adopt administrative policies in order to guide decision-making, and to issue instructions to officials. Unusually, in the context of immigration Parliament has enacted legislation under which it exercises oversight of these aspects of administrative decision-making. Section 3(2) of the Immigration Act 1971 requires the Secretary of State to lay before Parliament "statements of the rules, or any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to

have leave to enter". The Rules are subject to Parliamentary approval, and are published as House of Commons papers. Their legal significance was reflected, at the time of the proceedings with which these appeals are concerned, in the fact that an appeal could be brought against an immigration decision on the ground that it was not in accordance with the Rules: Nationality, Immigration and Asylum Act 2002, section 84(1)(a). Section 86(3) of the 2002 Act also included the Rules in the law to which the tribunal must have regard when determining an appeal.

4. The Secretary of State also has a discretionary power under the 1971 Act to grant leave to enter or remain in the UK even where leave would not be given under the Rules: *R (Munir) v Secretary of State for the Home Department* [2012] UKSC 32; [2012] 1 WLR 2192, para 44. The manner in which that discretion is exercised may be the subject of a policy, which may be expressed in guidance to the Secretary of State's officials. The discretion may also be converted into an obligation where the duty of the Secretary of State to act compatibility with Convention rights is applicable.

Giving effect to Convention rights

5. In the exercise of her functions under the 1971 Act, including the making of rules and the giving of instructions, the Secretary of State has always been under a duty to comply with requirements imposed by the common law: notably, to act consistently with the intentions of Parliament, and to exercise her powers in accordance with the law and in a rational manner. The Human Rights Act additionally imposed on the Secretary of State a statutory duty not to act incompatibly with Convention rights, including the right guaranteed by article 8. The same duty is also imposed on tribunals and courts considering an appeal against the decision of the Secretary of State, but their role does not absolve the Secretary of State of her own duty to act compatibly with Convention rights. Unlike the ECHR itself, which imposes a duty under international law on the United Kingdom as a contracting party, and is therefore not concerned with failures to comply with Convention rights by one organ of the state which are fully corrected by another, the Act imposes a duty on every public authority, subject to specified exceptions. The fact that an act of a public authority may be subject to review by the courts, and therefore does not in itself inevitably result in a breach of the Convention, does not mean that the act cannot be incompatible with Convention rights. Such a reading of the Act would deprive it of most of its content, since virtually all acts of public authorities are susceptible to appeal or review before the courts. It would therefore be inconsistent with the intention of Parliament.

6. How the Secretary of State ensures that her acts in the exercise of her functions under the 1971 Act are compatible with Convention rights is, in principle, a matter for her. The Secretary of State's initial response to the entry into force of

the material provisions of the Human Rights Act in October 2000 was to insert into the Rules a direction to officials to carry out their duties in compliance with the provisions of that Act (rule 2). As the Home Office noted in 2012, however, "there was no change to the family life part of the Rules to reflect any consideration of proportionality under article 8, and there has been no attempt since to align the rules with developing article 8 case law" (*Statement of Intent: Family Migration,* Home Office, June 2012). The Rules frequently offered no more than broad guidance as to how discretion was to be exercised in different typical situations. In that situation, it was primarily through the exercise of her residual discretion to deal with cases outside the Rules that the Secretary of State sought to comply with article 8.

7. That is no longer true. Over time, increasing emphasis has been placed on certainty rather than discretion, on predictability rather than flexibility, on detail rather than broad guidance, and on ease and economy of administration. The increased numbers of applications, the increasing complexity of the system, and the increasing use of modern technology for its administration, have necessitated increasingly detailed Rules and instructions. In some areas, the apparent aim is for the decision-making process to involve as little discretion or judgment as can be achieved consistently with the duty to respect Convention rights. The present context appears to be an example, as explained below.

8. The position was different at the time when the House of Lords decided the leading case of *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167. At that time, the Rules did not reflect an assessment of the proportionality of decision-making in relation to article 8. In that context, Lord Bingham of Cornhill said at para 6 that the rule under which the appellant failed to qualify for leave to remain was unobjectionable, but that her failure to qualify under the Rules was the point at which to begin, not end, consideration of her claim under article 8.

9. The Rules with which this appeal is concerned form part of the Secretary of State's response to *Huang*. They were included in the Statement of Changes in Immigration Rules published in June 2012 (HC 194), and laid before Parliament pursuant to section 3(2) of the 1971 Act. The new rules set out in that Statement were the subject of debates in both Houses of Parliament, as well as being examined by the Secondary Legislation Scrutiny Committee of the House of Lords. They came into force on 9 July 2012. Their rationale was explained in the Home Office documents which accompanied the Statement of Changes, comprising the *Statement of Intent: Family Migration*, and the Statement by the Home Office, *Grounds of Compatibility with Article 8 of the European Convention on Human Rights.*

10. The *Statement of Intent* announced that the changes to the Rules would "comprehensively reform the approach taken towards ECHR article 8 in

immigration cases" (para 10). They would achieve this by themselves reflecting an assessment of all the factors relevant to the application of article 8:

> "The new rules will reflect fully the factors which can weigh for or against an article 8 claim. They will set proportionate requirements that reflect, as a matter of public policy, the Government's and Parliament's view of how individual rights to respect for private or family life should be qualified in the public interest to safeguard the economic well-being of the UK by controlling immigration and to protect the public from foreign criminals. This will mean that failure to meet the requirements of the rules will normally mean failure to establish an article 8 claim to enter or remain in the UK, and no grant of leave on that basis." (para 7)

In consequence, if an applicant failed to meet the requirements of the new Rules, "it should only be in genuinely exceptional circumstances that refusing them leave and removing them from the UK would breach article 8" (para 11).

11. One particular respect in which the new rules were to reflect an article 8 assessment concerned "family life established when the parties knew one or both of them lacked a valid basis of stay in the UK". The fact that family life established in those circumstances "carries less weight under Strasbourg case law ... is reflected in the new Immigration Rules" (para 32).

12. The *Statement of Intent* also explained that the new rules were intended to result in a change of approach on the part of the courts. In the past, it was said, the lack of a clear public policy framework had effectively left the courts to develop public policy (para 30). They could not give due weight to the Government's and Parliament's view, because they did not know what it was (para 37). The new Rules were intended to fill this public policy vacuum by setting out the Secretary of State's position on proportionality and to meet the democratic deficit by seeking Parliament's agreement to her policy (para 38).

13. The Statement on *Grounds of Compatibility with Article 8 of the European Convention on Human Rights* was intended to address issues arising under article 8 in relation to the new rules. It explained that the current rules did not provide a "comprehensive" framework for considering family life, and that "currently family life applications are first considered under the Rules and, if the application does not meet the requirements of the Rules, the decision-maker then considers whether the decision is compatible with A8 [and, if not,] ... leave is granted outside the Rules"

(para 3). It acknowledged that this two-stage approach had one advantageous consequence:

> "A policy of keeping proportionality decisions outside of the Rules can be helpful in forming the basis of an argument that the Rules can never be incompatible with the ECHR." (para 16)

The Statement also noted, however, the serious disadvantages which had flowed from that approach. The approach adopted in *Huang*, in requiring the compatibility of individual decisions with article 8 to be considered on a case-by-case basis, rather than assessing the compatibility of the Rules themselves with article 8, "has led to unpredictability and inconsistency which are anathema to good administration" (para 11). The conclusion drawn was that "it would be better if proportionality were determined according to provisions in the Rules" (para 18). The thinking behind the new rules, therefore, was that "if the Rules are proportionate, a decision taken in accordance with the Rules will, other than in exceptional cases, be compatible with A8" (para 20). As a result, "the role of the courts should shift from reviewing the proportionality of individual administrative decisions to reviewing the proportionality of the Rules" (para 22).

Appendix FM

14. Appendix FM, "Family Members", begins with a general statement which explains that it sets out the requirements to be met by those seeking to enter or remain in the UK on the basis of their family life with a person who is a British citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection (para GEN.1.1). It is said to reflect how, under article 8, the balance will be struck between the right to respect for private and family life and the legitimate aims listed in article 8(2). The Appendix nevertheless contemplates that the Rules will not cover all the circumstances in which a person may have a valid claim to enter or remain in the UK as a result of his or her article 8 rights. Paragraphs GEN.1.10 and GEN.1.11 both make provision for situations "where an applicant does not meet the requirements of this Appendix as a partner or parent but the decision-maker grants entry clearance or leave to enter or remain outside the Rules on article 8 grounds".

15. Section R-LTRP sets out the requirements for limited leave to remain as a partner. Certain requirements apply in all cases: for example, that the applicant meets suitability requirements relating to such matters as his or her criminal record. Other requirements depend on the applicant's circumstances. In particular, under paragraph R-LTRP.1.1(d), the applicant must not be in the UK on temporary admission or temporary release, or in breach of immigration laws (disregarding an

overstay of 28 days or less), unless paragraph EX.1 applies. That paragraph applies if either of two conditions is satisfied. The first applies to persons applying for leave to remain as parents, and is not relevant to the present appeals. The second applies to persons, such as the appellants, who apply for leave to remain as partners:

> "(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."

16. At the time when the present cases were considered, the Rules did not define the expression "insurmountable obstacles". A definition was however introduced with effect from 28 July 2014, when paragraph EX.2 was inserted into Appendix FM by the *Statement of Changes in Immigration Rules* (HC 532, 2014):

> "For the purposes of paragraph EX.1(b) 'insurmountable obstacles' means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

Paragraph EX.2 applies only to applications decided on or after 28 July 2014.

The Instructions

17. The Instructions, in the version effective from 9 July 2012 which was in force when these cases were before the Secretary of State and the courts below, state that "failure to meet the requirements of the Rules will normally mean failure to establish an article 8 claim" (para 1.1). There is a statement, in relation to applications for leave to enter or remain as a partner on the basis of family life, that "if the applicant does not meet the requirements of the Rules, the application should be refused" (para 3). That statement is, however, implicitly qualified by later provisions. In relation to the eligibility requirements relating to immigration status, the Instructions state that, for leave to remain, the applicant must not have overstayed by more than 28 days, unless paragraph EX.1 applies (para 3.2.4). Provision is made for exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying.

18. In relation to assessing whether there are "insurmountable obstacles", as required by paragraph EX.1(b), the Instructions direct the decision maker to consider the seriousness of the difficulties which the applicant and his or her partner would face in continuing their family life outside the UK, and "whether they entail something that could not (or could not reasonably be expected to) be overcome, even with a degree of hardship for one or more of the individuals concerned" (para 3.2.7c). Relevant factors are said to include the ability of the parties to enter and stay lawfully in the country concerned; cultural and religious barriers; and the impact of a mental or physical disability. In relation to the second of these, the Instructions reiterate that the barrier must be one which either cannot be overcome or which it is unreasonable to expect a person to overcome.

19. The Instructions state that although refusal of an application will normally be appropriate where the applicant does not meet the requirements of the Rules, leave can be granted outside the Rules where exceptional circumstances apply. In that regard, the Instructions state:

> "'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." (para 3.2.7d)

In determining whether there are exceptional circumstances, the decision maker is instructed to consider all relevant factors. Some examples are given:

> "The circumstances around the applicant's entry to the UK and the proportion of the time they have been in the UK legally as opposed to illegally. Did they form their relationship with their partner at a time when they had no immigration status or this was precarious? Family life which involves the applicant putting down roots in the UK in the full knowledge that their stay here is unlawful or precarious, should be given less weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK."

It is also pointed out that cumulative factors should be considered. In particular, although under the Rules family life and private life are considered separately, when considering whether there are exceptional circumstances both private and family life can be taken into account.

The facts: Agyarko

20. Ms Agyarko is a national of Ghana. She entered the UK as a visitor in 2003, when she was aged 40. Her leave to enter expired later that year. She has nevertheless remained in the UK ever since. Following the expiry of her leave to enter she began a relationship with Mr Benette, a naturalised British citizen of Liberian origin who has lived in the UK for almost all his life and is in full time employment. They married by proxy under Ghanaian customary law in 2012. They live together. They have no children together. Ms Agyarko has three children living in Ghana, but has not visited them since 2003.

21. In September 2012 Ms Agyarko applied for leave to remain in the UK. Her application conceded that her case fell outside the Rules, and submitted that it was an appropriate case for the grant of discretionary leave, consistently with article 8. It was said that she was settled in the UK and had developed strong social ties there, that her family ties in Ghana had been weakened by her long absence and that most of her friends there had moved abroad. The application disclosed that she had a mother, three children by a former husband, and two siblings living in Ghana. The effect of removal to Ghana upon her family life was addressed in the following terms:

> "Our client and her husband would be seriously disadvantaged in the sense that she may be separated from him and therefore the family life that they have established in the United Kingdom would be interrupted.
>
> Most disturbingly our client is likely to face an inordinate delay in obtaining an entry clearance to the UK if she were asked to do so and there is also a risk that her application would be refused due to the fact that she is a previous overstayer."

22. The application was refused by a notice of decision dated 7 October 2013. The decision considered separately whether Ms Agyarko qualified for leave to remain under the partner route provisions of Appendix FM (ie Section R-LTRP) or under the private life provisions of the Rules (which are not in issue in these appeals), and whether her application gave rise to any exceptional circumstances

which might warrant consideration of a grant of leave outside the Rules pursuant to article 8.

23. In relation to Appendix FM, the decision stated that Ms Agyarko failed to fulfil paragraph EX.1(b):

> "You have a genuine and subsisting relationship with your British partner. Whilst it is acknowledged that your partner has lived in the UK all his life and is in employment here, this does not mean that you are unable to live together in Ghana. Although relocating there together may cause a degree of hardship for your British partner, the Secretary of State has not seen any evidence to suggest that there are any insurmountable obstacles preventing you from continuing your relationship in Ghana."

The application under the partner route was therefore refused. Ms Agyarko was also found to fail to qualify for leave to remain on the basis of her private life. Finally, the decision stated that it had been considered whether the application raised any exceptional circumstances which, consistently with article 8, might warrant consideration of a grant of leave to remain outside the requirements of the Rules. It had been decided that it did not.

24. The refusal of Ms Agyarko's application was not appealable. She sought permission to apply for judicial review of the Secretary of State's decision, but that was refused by the Upper Tribunal. She was granted permission to appeal to the Court of Appeal against that refusal, but her appeal was dismissed. The judgment of the court is considered below.

The facts: Ikuga

25. Ms Ikuga is a national of Nigeria. She lived there until she entered the UK as a visitor in 2008, when she was aged 33. Her leave to enter expired in 2009. She has nevertheless remained in the UK ever since. At some point following the expiry of her leave to enter, she began a relationship with Mr Ijiekhuamhen, a British citizen. They have never married, and have no children together. It should be recorded that, in the course of this appeal, Ms Ikuga claimed that she was granted an extension of her leave to enter in 2010. That has not been verified.

26. In September 2012 Ms Ikuga applied for leave to remain in the UK on the basis that her removal to Nigeria would be in breach of article 8. It was said by the

solicitors acting on her behalf that she cohabited with her partner, Mr Ijiekhuamhen, and that they had been trying to conceive a child, but that due to her "medical issues" this had been very difficult. The letter also said that their relationship could not be maintained and enjoyed in Nigeria "as she is trying to conceive", and that Mr Ijiekhuamhen had been responsible for her medical bills while she was receiving private medical treatment. The letter also referred to her close relationship with her sister and her children, who lived in the UK, and with Mr Ijiekhuamhen's daughter, who lived with her mother but visited her father. It was said that Ms Ikuga had no family ties in Nigeria, and that most of her friends were now settled in the UK. It was also said that Ms Ikuga had been a regular visitor to the UK without breaching its immigration rules until she was taken seriously ill and admitted to hospital in September 2009.

27. A supporting letter from Mr Ijiekhuamhen gave a different address from that given by Ms Ikuga. He stated that they had lived together at his address for two years, that she was still not well, and that she relied on him for assistance with her daily needs. He did all the washing, cooking and shopping, and above all he maintained her financially and was her major carer. He had a full time job in the UK and could not leave the UK for Nigeria. He also stated that no-one else could provide the care Ms Ikuga needed, and that there was no medical care for her needs in Nigeria.

28. Medical documentation submitted with the application included correspondence from Lewisham Hospital and King's College Hospital, dating from 2010 and 2011, indicating that Ms Ikuga had a prolonged admission in 2009, during which she was treated in the intensive care unit, and that she underwent further investigations and treatment as a private patient during 2010 and 2011. There was also a letter from a consultant haematologist dated 19 January 2010, giving a provisional diagnosis that Ms Ikuga suffered from Adult Still's disease, and stating that she had been referred to a consultant rheumatologist, and a letter from a consultant rheumatologist dated 2 December 2010, stating that Ms Ikuga had musculo-skeletal pains and intermittent muscle weakness, with a likely diagnosis of an auto-immune organising pneumonia as part of an anti-synthetase syndrome, or alternatively of Adult Still's disease.

29. In response to the application, the Secretary of State requested documentary evidence that Ms Ikuga had been living with her partner, and letters from a GP or consultant detailing her current medical condition, her current medication or treatment, and her ability to travel. She was informed that, if she failed to provide the additional information requested, her application would be decided on the basis of the information currently available.

30. In their response, dated 24 October 2013, Ms Ikuga's solicitors submitted a household bill addressed to both herself and Mr Ijiekhuamhen at the address which he had given, and a print-out dated 24 October 2013 of Ms Ikuga's GP records, which recorded the hospital admission in 2009, investigations during 2009 and 2010, and consultations during 2012 in respect of tonsillitis and fertility problems. The most recent entry was dated 3 August 2012, and related to a skin rash.

31. The application was refused by a notice of decision dated 29 October 2013. The decision addressed the issues in the same order as that in Ms Agyarko's case. In relation to the partner route, it stated that Ms Ikuga had provided no evidence to show that she had been living at the same address as Mr Ijiekhuamhen. She did not therefore have a "partner" as defined in Appendix FM. Ms Ikuga was also found to fail to qualify for leave to remain on the basis of her private life. Finally, the decision stated that it had been considered whether the application raised any exceptional circumstances which, consistently with article 8, might warrant consideration of a grant of leave to remain outside the requirements of the Rules. It had been decided that it did not. Although she claimed to be suffering from medical conditions, she had been unable to provide any documentary evidence to show any recent conditions or treatment. Her claimed conditions had therefore been deemed not to be life threatening, or compelling and compassionate enough to grant leave outside the Rules.

32. Ms Ikuga was refused permission to apply for judicial review of the Secretary of State's decision. Although the Upper Tribunal judge accepted that there had been a failure to give proper consideration to the question whether Ms Ikuga and Mr Ijiekhuamhen lived together, he considered that her application for leave to remain was bound to fail in any event. Under the Rules, she would have to establish "insurmountable obstacles" within the meaning of paragraph EX.1(b), but the matters put forward on her behalf "could not possibly persuade any decision-maker that there were insurmountable obstacles to family life continuing in Nigeria". In that regard, the judge observed that the fact that Ms Ikuga's partner would have to change jobs was not an insurmountable obstacle; nor was Ms Ikuga's wish to continue fertility treatment in the UK. An application outside the Rules was also bound to fail: the matters put forward did not come close to establishing that it would be "unjustifiably harsh" to require her to return. An argument founded on *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40; [2008] 1 WLR 1420 was not capable of succeeding on the facts of the case. Ms Ikuga was granted permission to appeal to the Court of Appeal, where her appeal was heard together with that of Ms Agyarko, and was likewise dismissed.

The judgment of the Court of Appeal

33. The Court of Appeal dismissed the appeals for reasons given in the judgment of Sales LJ, with which Longmore and Gloster LJJ agreed. Sales LJ considered first an argument based on the phrase "insurmountable obstacles", used in paragraph EX.1(b) of Appendix FM. Sales LJ accepted that the phrase was intended to have the same meaning as in the jurisprudence of the European Court of Human Rights, where it originated. It imposed a stringent test, illustrated by *Jeunesse v The Netherlands* (2015) 60 EHRR 17, para 117, where the court found that there were no insurmountable obstacles to the applicant's family settling in Suriname, although they would experience a degree of hardship if forced to do so. It was to be interpreted, both in the European case law and in the Rules, in a sensible and practical rather than a purely literal way. On the facts of Ms Agyarko's case, the Secretary of State's conclusion that there were no insurmountable obstacles to relocation, and that paragraph EX.1(b) was therefore not met, was not irrational:

> "The statement made in Mrs Agyarko's letter of application of 26 September 2012 that 'she may be separated from' her husband was very weak, and was not supported by any evidence which might lead to the conclusion that insurmountable obstacles existed to them pursuing their family life together overseas. There was no witness statement from Mrs Agyarko or Mr Benette to explain what obstacles might exist. The mere facts that Mr Benette is a British citizen, has lived all his life in the United Kingdom and has a job here - and hence might find it difficult and might be reluctant to relocate to Ghana to continue their family life there - could not constitute insurmountable obstacles to his doing so." (para 25)

On the facts of Ms Ikuga's case, Sales LJ agreed with the Upper Tribunal judge's assessment that "the factors relied upon by Mrs Ikuga could not possibly persuade any decision-maker that there were insurmountable obstacles to family life continuing in Nigeria, within the meaning of [paragraph EX.1(b)]" (para 50).

34. The alternative argument in each case was that the refusal to grant leave to remain outside the Rules was in breach of article 8. It was argued that it was disproportionate to remove each of the appellants in circumstances where her husband or partner would have to follow her overseas if they wished to continue their family life together, especially when he was a British citizen; or, alternatively, because an out-of-country application for leave to enter would inevitably be granted, so that her removal served no good purpose. In relation to the latter argument, reliance was placed on the case of *Chikwamba*.

35. These arguments were rejected. In the case of Ms Agyarko, Sales LJ stated that, since her family life was established in the knowledge that she had no right to be in the UK and was therefore "precarious" in the sense in which that term had been used in the European and domestic case law, it was only if her case was exceptional for some reason that she would be able to establish a violation of article 8.

36. On the facts of Ms Agyarko's case, Sales LJ considered that there were no exceptional circumstances. The fact that Ms Agyarko's spouse was a British citizen did not make the case exceptional: several of the European cases in which applications were rejected had involved a partner or spouse who was a national of the state from which the applicant was to be removed. So far as *Chikwamba* was concerned, the House of Lords had found that there would be a violation of article 8 if the applicant for leave to remain in that case were removed from the UK and forced to make an out-of-country application for leave to enter which would clearly be successful, in circumstances where the interference with her family life could not be said to serve any good purpose. In Sales LJ's view, Ms Agyarko's case was very far from a *Chikwamba* type of case. She had not asked the Secretary of State to consider whether leave to remain should be granted on the basis of *Chikwamba.* This was not an argument of such obviousness that the Secretary of State had been obliged to consider it regardless of whether it was mentioned. Accordingly, the Secretary of State could not be said to have erred in law in failing to grant leave to remain on that basis. In any event, the materials submitted by Ms Agyarko did not demonstrate that an out-of-country application for leave to enter would succeed. On the contrary, the information provided about her and Mr Benette's financial circumstances, for example, indicated that she had no income and that he earned less than the minimum income requirement specified in Appendix FM.

37. Sales LJ considered that the Secretary of State's decision letter in the case of Ms Agyarko left something to be desired regarding the clarity of the reasoning, but had addressed the substance of her case under the Rules. There was no arguable case for leave to be granted outside the Rules which required to be addressed separately.

38. In relation to Ms Ikuga's appeal in respect of refusal of leave to remain outside the Rules on the basis of article 8, Sales LJ again considered that the Upper Tribunal judge's assessment could not be faulted. Ms Ikuga's case involved precarious family life, with no children. No compelling medical circumstances had been shown to exist. The claim for leave to remain had not been put to the Secretary of State on the basis of *Chikwamba*, and in any event no materials were submitted which might show that leave to enter would have to be granted under Appendix FM if applied for. Although the Secretary of State had not considered the issue on the correct factual basis as regards Ms Ikuga's relationship with her partner, this was very far from being a case in which exceptional circumstances could be found to exist, even on a correct understanding of the facts. Even if Ms Ikuga's application

were remitted to be reconsidered by the Secretary of State on the footing that Ms Ikuga and Mr Ijiekhuamhen cohabited and had a genuine subsisting relationship, there was no prospect whatever that the outcome would be a grant of leave to remain.

The present appeals

39. The issues raised in the appeals can be summarised as follows:

(1) What is the correct approach to the application of article 8 to the removal of a non-settled migrant?

(2) How is the "insurmountable obstacles" requirement in paragraph EX.1(b) of Appendix FM to be interpreted, prior to the 2014 changes to the Rules? Is it in accordance with article 8?

(3) How should "precariousness" be interpreted, and what role does it play in the article 8 assessment?

(4) Is the question whether there are "exceptional circumstances" one which the Secretary of State can properly ask when considering whether to grant leave to remain outside the Rules to a non-settled migrant with a "precarious" family life?

(5) Is Appendix FM unlawful under EU law, or under section 1(1) of the 1971 Act, insofar as it is based on the expectation that a British citizen with a non-national partner can relocate to the partner's country of origin unless there are insurmountable obstacles to their doing so?

(6) Were the Secretary of State's decisions lawful on the facts?

The correct approach to the removal of non-settled migrants

40. The European Court of Human Rights has considered in a number of judgments the application of article 8 to the removal of non-settled migrants (that is, those without a right of residence) who have developed a family life with a partner while residing unlawfully in the host state. In *Jeunesse v Netherlands*, the Grand Chamber analysed the situation of such a person, consistently with earlier judgments of the court, as raising the question whether the authorities of the host country were

under a duty, pursuant to article 8, to grant the person the necessary permission to enable her to exercise her right to family life on their territory. The situation was thus analysed not as one in which the host country was interfering with the person's right to respect for her private and family life, raising the question whether the interference was justified under article 8(2). Instead, the situation was analysed as one in which the person was effectively asserting that her right to respect for her private and family life, under article 8(1), imposed on the host country an obligation to permit her to continue to reside there, and the question was whether such an obligation was indeed imposed. In the light of this approach, counsel for the Secretary of State submitted that the refusal of leave to remain in the UK to persons unlawfully resident here should similarly be analysed as raising the question whether the state is under a positive obligation to permit the applicant to remain in the UK rather than whether the refusal of the application can be justified under article 8(2).

41. As the European court has noted, the boundary between cases best analysed in terms of positive obligations, and those best analysed in terms of negative obligations, can be difficult to draw. As this court explained in its judgment in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799, para 32, the mode of analysis is unlikely to be of substantial importance in the present context. Ultimately, whether the case is considered to concern a positive or a negative obligation, the question for the European court is whether a fair balance has been struck. As was explained in *Hesham Ali* at paras 47-49, that question is determined under our domestic law by applying the structured approach to proportionality which has been followed since *Huang*.

Insurmountable obstacles

42. In *Jeunesse*, the Grand Chamber identified, consistently with earlier judgments of the court, a number of factors to be taken into account in assessing the proportionality under article 8 of the removal of non-settled migrants from a contracting state in which they have family members. Relevant factors were said to include the extent to which family life would effectively be ruptured, the extent of the ties in the contracting state, whether there were "insurmountable obstacles" in the way of the family living in the country of origin of the non-national concerned, and whether there were factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (para 107).

43. It appears that the European court intends the words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned. In some cases, the court has

used other expressions which make that clearer: for example, referring to "un obstacle majeur" (*Sen v The Netherlands* (2003) 36 EHRR 7, para 40), or to "major impediments" (*Tuquabo-Tekle v The Netherlands* [2006] 1 FLR 798, para 48), or to "the test of 'insurmountable obstacles' or 'major impediments'" (*IAA v United Kingdom* (2016) 62 EHRR SE 19, paras 40 and 44), or asking itself whether the family could "realistically" be expected to move (*Sezen v The Netherlands* (2006) 43 EHRR 30, para 47). "Insurmountable obstacles" is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test. In *Jeunesse*, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to move, and the applicant's partner was in full-time employment in the Netherlands: see paras 117 and 119.

44. Domestically, the expression "insurmountable obstacles" appears in paragraph EX.1(b) of Appendix FM to the Rules. As explained in para 15 above, that paragraph applies in cases where an applicant for leave to remain under the partner route is in the UK in breach of immigration laws, and requires that there should be insurmountable obstacles to family life with that partner continuing outside the UK. The expression "insurmountable obstacles" is now defined by paragraph EX.2 as meaning "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner." That definition appears to me to be consistent with the meaning which can be derived from the Strasbourg case law. As explained in para 16 above, paragraph EX.2 was not introduced until after the dates of the decisions in the present cases. Prior to the insertion of that definition, it would nevertheless be reasonable to infer, consistently with the Secretary of State's statutory duty to act compatibly with Convention rights, that the expression was intended to bear the same meaning in the Rules as in the Strasbourg case law from which it was derived. I would therefore interpret it as bearing the same meaning as is now set out in paragraph EX.2.

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

Instructions: that is to say, in "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate". Is that situation compatible with article 8?

46. In considering that question, it is important to appreciate that the Rules are not simply the product of a legal analysis: they are not intended to be a summary of the Strasbourg case law on article 8. As was explained at para 10 above, they are statements of the practice to be followed, which are approved by Parliament, and are based on the Secretary of State's policy as to how individual rights under article 8 should be balanced against the competing public interests. They are designed to operate on the basis that decisions taken in accordance with them are compatible with article 8 in all but exceptional cases. The Secretary of State is in principle entitled to have a policy of the kind which underpins the Rules. While the European court has provided guidance as to factors which should be taken into account, it has acknowledged that the weight to be attached to the competing considerations, in striking a fair balance, falls within the margin of appreciation of the national authorities, subject to supervision at the European level. The margin of appreciation of national authorities is not unlimited, but it is nevertheless real and important. Immigration control is an intensely political issue, on which differing views are held within the contracting states, and as between those states. The ECHR has therefore to be applied in a manner which is capable of accommodating different approaches, within limits. Under the constitutional arrangements existing within the UK, the courts can review the compatibility of decision-making in relation to immigration with the Convention rights, but the authorities responsible for determining policy in relation to immigration, within the limits of the national margin of appreciation, are the Secretary of State and Parliament.

47. The Rules therefore reflect the responsible Minister's assessment, at a general level, of the relative weight of the competing factors when striking a fair balance under article 8. The courts can review that general assessment in the event that the decision-making process is challenged as being incompatible with Convention rights or based on an erroneous understanding of the law, but they have to bear in mind the Secretary of State's constitutional responsibility for policy in this area, and the endorsement of the Rules by Parliament. It is also the function of the courts to consider individual cases which come before them on appeal or by way of judicial review, and that will require them to consider how the balance is struck in individual cases. In doing so, they have to take the Secretary of State's policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case. This was explained in *Hesham Ali* at paras 44-46, 50 and 53.

48. The Secretary of State's view that the public interest in the removal of persons who are in the UK in breach of immigration laws is, in all but exceptional circumstances, sufficiently compelling to outweigh the individual's interest in

family life with a partner in the UK, unless there are insurmountable obstacles to family life with that partner continuing outside the UK, is challenged in these proceedings as being too stringent to be compatible with article 8. It is argued that the Secretary of State has treated "insurmountable obstacles" as a test applicable to persons in the UK in breach of immigration laws, whereas the European court treats it as a relevant factor in relation to non-settled migrants. That is true, but it does not mean that the Secretary of State's test is incompatible with article 8. As has been explained, the Rules are not a summary of the European court's case law, but a statement of the Secretary of State's policy. That policy is qualified by the scope allowed for leave to remain to be granted outside the Rules. If the applicant or his or her partner would face very significant difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship, then the "insurmountable obstacles" test will be met, and leave will be granted under the Rules. If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are "exceptional circumstances". In the absence of either "insurmountable obstacles" or "exceptional circumstances" as defined, however, it is not apparent why it should be incompatible with article 8 for leave to be refused. The Rules and Instructions are therefore compatible with article 8. That is not, of course, to say that decisions applying the Rules and Instructions in individual cases will necessarily be compatible with article 8: that is a question which, if a decision is challenged, must be determined independently by the court or tribunal in the light of the particular circumstances of each case.

Precariousness

49. In *Jeunesse*, the Grand Chamber said, consistently with earlier judgments of the court, that an important consideration when assessing the proportionality under article 8 of the removal of non-settled migrants from a contracting state in which they have family members, is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be "precarious". Where this is the case, the court said, "it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8" (para 108).

50. Domestically, officials who are determining whether there are exceptional circumstances as defined in the Instructions, and whether leave to remain should therefore be granted outside the Rules, are directed by the Instructions to consider all relevant factors, including whether the applicant "[formed] their relationship with their partner at a time when they had no immigration status or this was precarious". They are instructed:

> "Family life which involves the applicant putting down roots in the UK in the full knowledge that their stay here is unlawful or precarious, should be given less weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK."

That instruction is consistent with the case law of the European court, such as its judgment in *Jeunesse.* As the instruction makes clear, "precariousness" is not a preliminary hurdle to be overcome. Rather, the fact that family life has been established by an applicant in the full knowledge that his stay in the UK was unlawful or precarious affects the weight to be attached to it in the balancing exercise.

51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department.*

52. It is also necessary to bear in mind that the cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish - or, looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase - if there is a protracted delay in the enforcement of immigration control. This point was made by Lord Bingham and Lord Brown of Eaton-under-Heywood in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] AC 1159, paras 15 and 37. It is also illustrated by the judgment of the European court in *Jeunesse.*

53. Finally, in relation to this matter, the reference in the instruction to "full knowledge that their stay here is unlawful or precarious" is also consistent with the case law of the European court, which refers to the persons concerned being aware that the persistence of family life in the host state would be precarious from the outset (as in *Jeunesse*, para 108). One can, for example, envisage circumstances in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate.

Exceptional circumstances

54. As explained in para 49 above, the European court has said that, in cases concerned with precarious family life, it is "likely" only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8. That reflects the weight attached to the contracting states' right to control their borders, as an attribute of their sovereignty, and the limited weight which is generally attached to family life established in the full knowledge that its continuation in the contracting state is unlawful or precarious. The court has repeatedly acknowledged that "a state is entitled, as a matter of well-established international law, and subject to its treaty obligations, to control the entry of non-nationals into its territory and their residence there" (*Jeunesse*, para 100). As the court has made clear, the Convention is not intended to undermine that right by enabling non-nationals to evade immigration control by establishing a family life while present in the host state unlawfully or temporarily, and then presenting it with a fait accompli. On the contrary, "where confronted with a fait accompli the removal of the non-national family member by the authorities would be incompatible with article 8 only in exceptional circumstances" (*Jeunesse*, para 114).

55. That statement reflects the strength of the claim which will normally be required, if the contracting state's interest in immigration control is to be outweighed. In the *Jeunesse* case, for example, the Dutch authorities' tolerance of the applicant's unlawful presence in that country for a very prolonged period, during which she developed strong family and social ties there, led the court to conclude that the circumstances were exceptional and that a fair balance had not been struck (paras 121-122). As the court put it, in view of the particular circumstances of the case, it was questionable whether general immigration considerations could be regarded as sufficient justification for refusing the applicant residence in the host state (para 121).

56. The European court's use of the phrase "exceptional circumstances" in this context was considered by the Court of Appeal in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544. Lord Dyson MR, giving the judgment of the court, said:

> "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." (para 42)

Cases are not, therefore, to be approached by searching for a unique or unusual feature, and in its absence rejecting the application without further examination. Rather, as the Master of the Rolls made clear, the test is one of proportionality. The reference to exceptional circumstances in the European case law means that, in cases involving precarious family life, "something very compelling ... is required to outweigh the public interest", applying a proportionality test. The Court of Appeal went on to apply that approach to the interpretation of the Rules concerning the deportation of foreign criminals, where the same phrase appears; and their approach was approved by this court, in that context, in *Hesham Ali*.

57. That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.

58. The expression "exceptional circumstances" appears in a number of places in the Rules and the Instructions. Its use in the part of the Rules concerned with the deportation of foreign offenders was considered in *Hesham Ali.* In the present context, as has been explained, it appears in the Instructions dealing with the grant of leave to remain in the UK outside the Rules. Its use is challenged on the basis that the Secretary of State cannot lawfully impose a requirement that there should be "exceptional circumstances", having regard to the opinion of the Appellate Committee of the House of Lords in *Huang*.

59. As was explained in para 8 above, the case of *Huang* was decided at a time when the Rules had not been revised to reflect the requirements of article 8. Instead, the Secretary of State operated arrangements under which effect was given to article 8 outside the Rules. Lord Bingham, giving the opinion of the Committee, observed that the ultimate question for the appellate immigration authority was whether the refusal of leave to enter or remain, in circumstances where the life of the family could not reasonably be expected to be enjoyed elsewhere, taking full account of all

considerations weighing in favour of the refusal, prejudiced the family life of the applicant in a manner sufficiently serious to amount to a breach of article 8. If the answer to that question was affirmative, then the refusal was unlawful. He added:

> "It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar* [*R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368], para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test." (para 20)

60. It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word "exceptional", as already explained, as meaning "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate". So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that "exceptional" does not mean "unusual" or "unique": see para 19 above.

EU and British citizenship

61. It was submitted on behalf of the appellants that it was unlawful under EU law for the Secretary of State to adopt Rules and Instructions which took as their premise that the British partner of a non-national could relocate to the non-national's country of origin, in the absence of insurmountable obstacles or exceptional circumstances. The practical result, it was submitted, was to place pressure on an EU citizen to reside outside the EU, contrary to the judgment of the Court of Justice

in *Ruiz Zambrano*. Although this submission was not advanced before the Court of Appeal, this court will nevertheless address it.

62. The appellants' British partners enjoy, under article 20 TFEU, the status of Union citizen, and may therefore rely on the rights pertaining to that status, including the right to move and reside freely within the territory of the member states, subject to the limitations and restrictions laid down by the Treaty and the measures adopted for its implementation. Article 20 precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens. On the other hand, the Treaty provisions on citizenship of the Union do not confer any autonomous right on third-country nationals. Any rights conferred on third-country nationals are derived from those enjoyed by the Union citizen. The purpose and justification of those derived rights are based on the fact that a refusal to allow them would interfere with the Union citizen's freedom of movement: *Secretary of State for the Home Department v CS* (Case C-304/14), judgment of 13 September 2016, paras 24-28.

63. In that connection, the Court of Justice has held:

> "that there are very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence must nevertheless be granted to a third-country national who is a family member of his since the effectiveness of citizenship of the Union would otherwise be undermined, if, as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status." (*Secretary of State for the Home Department v CS*, para 29)

64. The Court's case law indicates the specificity of the situations in question. The case of *Ruiz Zambrano* concerned the refusal of a right of residence and a work permit in a member state to the third-country parents of dependent minor children who were citizens of that state, with the inevitable consequence that the parents would have to leave the EU and the children would have to accompany their parents. The principle established in that case has been applied and developed in other cases concerned with third-country parents of minor dependent children, such as *Alokpa and Moudoulou v Ministre du Travail, de l'Emploi et de l'Immigration* (Case C-86/12), judgment of 10 October 2013, and *Secretary of State for the Home Department v CS*.

65. Those judgments can be distinguished from others in which the same relationship of complete dependence between the EU citizen and the third-country national was not present. The case of *Dereci v Bundesministerium für Inneres* (Case C-256/11) [2011] ECR I-11315, concerned the refusal of a residence permit to a third-country national who had entered Austria unlawfully, married an Austrian citizen, and had three minor children who were Austrian citizens. His challenge to the refusal of the residence permit on the basis of *Ruiz Zambrano* was rejected by the Grand Chamber. It derived from *Ruiz Zambrano* that "the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of EU citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the member state of which he is a national but also the territory of the Union as a whole" (para 66). That criterion was not satisfied on the facts of *Dereci*, since the refusal of the residence permit to the third-country national would not necessitate the rest of the family leaving the EU: the children and their mother could remain in Austria without him. The Grand Chamber stated:

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

As the court made clear, that finding was distinct from the consideration of the case under article 8 of the ECHR or, if applicable, the corresponding provision (article 7) of the Charter of Fundamental Rights.

66. That approach was also applied in *Iida v Stadt Ulm* (Case C-40/11), judgment of 8 November 2012, and *Ymeraga v Ministre du Travail, de l'Emploi et de l'Immigration* (Case C-87/12), judgment of 8 May 2013. The first of these cases concerned, like *Dereci*, a third-country national who had married an EU citizen and had a minor child who was likewise an EU citizen. The second case was concerned with family reunification: it was brought by a naturalised citizen of Luxembourg whose complaint was that his Kosovan parents and brothers were unable to join him there. In both cases, arguments based on article 20 TFEU were rejected.

67. In the light of these cases, this ground of challenge to the Rules and Instructions cannot be upheld. In the event that a situation were to arise in which the refusal of a third-country national's application for leave to remain in the UK would force his or her British partner to leave the EU, in breach of article 20 TFEU, such a situation could be addressed under the Rules as one where there were

"insurmountable obstacles", or in any event under the Instructions as one where there were "exceptional circumstances". Typically, however, as in the present cases, the British citizen would not be forced to leave the EU, any more than in the case of *Dereci*, and the third-country national would not, therefore, derive any rights from article 20.

68. Counsel also referred to the right of a British citizen, under section 1(1) of the 1971 Act, "to live in ... the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person." This does not advance the argument. The entitlement conferred by section 1(1) is an important right, but it does not entitle a British citizen to insist that his or her non-national partner should also be entitled to live in the UK, when that partner may lawfully be refused leave to enter or remain.

The Secretary of State's decisions on the facts

69. Having concluded that the Rules and Instructions applied in these cases were consistent with the proper application of article 8, and having rejected the ground of challenge based on EU law, it remains to consider whether the Secretary of State's decisions on the facts were otherwise lawful.

70. Considering first whether the decision in the case of Ms Agyarko was compatible with article 8, the court has to bear in mind that this was a case of precarious family life, and that therefore, having regard to the Strasbourg case law, a very strong or compelling claim was required to outweigh the public interest in immigration control. The court has also to give due weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain under the partner route brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. There was no evidence placed before the Secretary of State on which a conclusion that there were insurmountable obstacles to relocation in Ghana could reasonably have been reached. There was nothing to suggest that there were "exceptional circumstances" as defined in the Instructions, that is to say, circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate. Considering all relevant factors, Ms Agyarko's claim could not be regarded as very strong or compelling. Nor was there anything to indicate that Ms Agyarko might come within the scope of *Chikwamba*.

71. Counsel pointed out that some parts of Ms Agyarko's notice of decision were in similar terms to Ms Ikuga's, with only factual details differing from one to the other. The use of standard forms of words was criticised as formulaic, and as being inconsistent with "anxious scrutiny". It was also pointed out that the decision in relation to the issue of "exceptional circumstances" contained no reference to any specific aspects of Ms Agyarko's application. It is true that the decision was briefly expressed and, in relation to the issue of exceptional circumstances, did not discuss the matters raised in the application. The notice of decision nevertheless addressed the relevant issues in Ms Agyarko's case, demonstrated that the most important points put forward on her behalf (her length of residence in the UK, her weakened family ties to Ghana, her relationship with her husband, his British citizenship, his full-time employment in the UK, and the difficulties which he might encounter in relocating to Ghana) had been considered, and explained why, notwithstanding those points, her application was refused. The use of standardised reasons is characteristic of modern decision-making practices in fields of public administration where large numbers of applications can be processed more efficiently by employing information technology, using decision templates, drop-down menus and other software. It is also often designed to facilitate internal auditing and management processes. The potential implications of this development for the law relating to the giving of reasons have not been considered in these appeals; nor has the manner in which the decision notices in question were produced. For present purposes, it is sufficient to say that the use of standard phrases is not in itself legally objectionable, provided the reasons given continue to explain adequately why the decision has been taken.

72. Ms Ikuga's application under the partner route was refused on the ground that she had provided no evidence to show that she had been living at the same address as Mr Ijiekhuamhen. It is accepted that that decision was erroneous: Ms Ikuga had in fact provided evidence that she and Mr Ijiekhuamhen lived at the same address. It follows that the Secretary of State has not yet considered Ms Ikuga's case on a correct understanding of all the material facts. In those circumstances, it would usually follow that the Secretary of State's decision should be quashed, and the application re-considered. The court's jurisdiction to quash being discretionary, however, it is open to it to decline to quash if satisfied that the decision, if re-taken, would inevitably be the same. It was on that basis that the Upper Tribunal and the Court of Appeal declined to grant permission to apply for judicial review.

73. In relation to this matter, this court has no basis for interfering with the decision of the specialist judge of the Upper Tribunal, affirmed by the Court of Appeal. So far as the application under the Rules was concerned, the judge correctly identified that Ms Ikuga would have to satisfy the "insurmountable obstacles" test in paragraph EX.1(b), and explained convincingly why she could not do so on the basis of the information which she had placed before the Secretary of State: see the summary of his reasoning at para 32 above, and the summary of the material which

Ms Ikuga had provided, at paras 26-28 and 30 above. Nothing in the discussion of that test in this judgment places in question his conclusion, with which the Court of Appeal agreed, that the test could not possibly be met on the basis put forward on Ms Ikuga's behalf: in summary, that her partner was in full-time employment in the UK, and she was undergoing fertility treatment. So far as leave to remain was sought outside the Rules, there is similarly nothing in this judgment which undermines his conclusion, with which the Court of Appeal agreed, that Ms Ikuga had not put forward anything which might constitute "exceptional circumstances" as defined in the Instructions, that is to say, unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate.

Conclusion

74. For these reasons, I would dismiss the appeals.