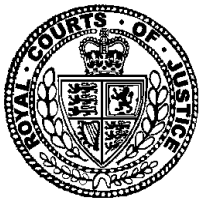

Neutral Citation Number: [2019] EWCA Civ 1630

Case No: C5/2016/0562

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Upper Tribunal
(Immigration and Asylum Chamber)
AA039852015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/10/2019

Before :

LORD JUSTICE GREEN
and
LADY JUSTICE SIMLER

- -

Between :

GM (Sri Lanka)	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -
- -

Mr Zainul Jafferji & Mr Arif Rehman (instructed by **Tamil Welfare Association (Newham)**) for the **Appellant**
Ms Katherine Apps (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: Thursday 25th July 2019

- -

Approved Judgment

Lord Justice Green:

A. Introduction

1. This is the judgment of the Court.

2. The Appellant appeals against the dismissal of her appeal by the Upper Tribunal ("UT") on 2nd December 2015 upholding the decision of the First-Tier Tribunal ("FTT") of 25th August 2015 upholding the decision of the Secretary of State of 20th February 2015 ("the Decision" and "the Respondent" respectively), refusing her application for asylum and for leave to remain on human rights grounds *outside* the Immigration Rules ("IR") and seeking to remove her from the United Kingdom.

3. The judgment under appeal was made in 2015. Since then the Supreme Court has clarified a series of issues relating to the test to be applied under Article 8 in relation to the IR and section 117B Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002" and "section 117B"). The main judgments are: *Agyarko v SSHD* [2017] UKSC 11 ("*Agyarko*"); *Ali v SSHD* [2016] UKSC 60 ("*Ali*"); *KO (Nigeria) v SSHD* [2018] UKSC 53 ("*KO*"); and, *Rhuppiah v SSHD* [2018] UKSC 58 ("*Rhuppiah*").

4. These judgments clarify such matters as: the application of the applicable proportionality test and the relative weight to be attached to various factors in the balancing and weighing exercise; the relationship between the IR, the NIAA 2002 and Article 8; the meaning of "*little weight*" in sections 117B(4) and (5); the extent to which the "*little weight*" test applies to family rights; the relevance of a person's immigration status in a family life assessment; and the relevance of "*insurmountable obstacles*" to return in the family life context.

5. The FTT Judge in the present case did not have the benefit of these judgments. She plainly adopted considerable care in her approach to the evidence and the law. And it is right to note that the focus of the appeal before her was on the asylum claim of the Appellant. The Article 8 family rights issues were secondary, albeit, as is evident from the material before the FTT and included in the bundles before us, they were not advanced merely as a makeweight. A serious argument was advanced.

6. It is our judgment that (not having had the benefit of the Supreme Court rulings to guide her) the Judge erred in the approach that she adopted to the issue relating to Article 8 family life rights. This is the context in which we have concluded that the Decision, and the judgment and decisions of both the FTT and the UT must be set aside.

7. The position of the family has materially changed in the period elapsing between the FTT judgment and this appeal. This means that in this appeal we must consider to what extent the decision we take reflects the most up to date position. This raises a point of principle. When a Court is required to address an issue relating to fundamental norms or human rights that Court must ensure that any order that *it* makes is also compliant with such rights. Under section 6 Human Rights Act 1998 all public bodies, *including courts*, must apply the Act and thereby the ECHR. It follows that if an appellate court finds that a lower court or tribunal acted lawfully by reference to the evidence before it but that based upon the facts now known to the appeal court to uphold the decision would violate fundamental norms, then the appellate court must ensure that the decision

it takes is compliant with the law. This was made clear by Lord Reed in *Agyarko* (ibid) paragraph [5]. In this case there has been a material change of circumstances brought about primarily by fresh decisions made by the Respondent which have fundamentally altered the legal position of the Appellant's husband and children by conferring settled status upon them. Mr Jafferji, for the Appellant, argued that the sensible way to proceed was to address the impugned FTT decision upon the basis of the evidence that was before the Judge but, in the light of our conclusion, then to consider the up to date evidence in relation to what follows by way of relief, in other words, to defer consideration of the changed circumstances. Ms Apps, for the Respondent, did not demur that there would need to be a two stage process, but reserved the Secretary of State's position on relief as subject to instructions. This is the course we have adopted.

8. We therefore consider the present-day evidence when it comes to relief. We set out our conclusions on this at section F below. In short, to give effect to our conclusion that the FTT erred we will simply set aside the Decision and relevant judgments. We will not remit the matter back to the FTT. We direct that the Respondent considers the position of the Appellant afresh, in the light of the altered circumstances. We leave it, in the first instance, to the Appellant and the Respondent to discuss and agree the best way in which this can be achieved.

9. We heard argument in this case on 25th July 2019. We are grateful to both counsel for their careful written and oral submissions which raised a series of interesting and difficult points about the scope and effect of the test to be applied in cases such as this, in the light of the recent guidance of the Supreme Court. We indicated the result of this appeal at the end of the hearing, namely that the appeal would be allowed. However, we reserved judgment in order that we could consider carefully the points arising.

B. Relevant Facts

(i) Key dates

10. The Appellant is a national of Sri Lanka, born on 13th August 1978. She arrived in the United Kingdom on 18th January 2010 with entry clearance as a student. In or about January 2011, the Appellant met her husband. They were married on 13th August 2012. The Appellant's leave to remain expired on 30th May 2013. The Appellant's husband had been granted limited leave to remain until 2018. He had been in the United Kingdom since 1998 and had not returned to Sri Lanka since that date. The couple had a child, born on 31st October 2012.

11. On 1st September 2014, the Appellant claimed asylum and also advanced an argument based upon the human rights claim. The Decision of the Respondent was issued on 20th February 2015. It rejected both the asylum application and the human rights claim. An appeal against the Decision was lodged with the FTT. By this time the Appellant had a second child with her husband. The decision of the FTT Judge was promulgated on 25th August 2015. It rejected the appeal on all grounds. A subsequent appeal to the UT was rejected on 7th December 2015.

(ii) The Decision

12. The Decision focused upon the Appellant's asylum application and dealt secondarily with the claim under Article 8. In paragraph [37], it is stated that the Appellant's

husband was not "*settled*" in the United Kingdom because he only had limited leave to remain until 5th February 2018 and the Appellant was not therefore entitled to apply for leave to remain as a parent. The Respondent considered exceptional circumstances and referred briefly to the fact that the husband had recently been granted discretionary leave to remain outside the IR. In paragraph [41] the Respondent focuses upon the absence of insurmountable obstacles to return as a reason for rejecting exceptional circumstances:

> "This is due to the fact that you and your husband are both Sri Lankan nationals, there are no apparent obstacles to you living together as a family in Sri Lanka…. Furthermore, it is noted that according to your marriage certificate, you married your husband in 2012, meaning at the time of your marriage you were aware that your status in the UK was temporary on a student visa, and you would have been aware that you were expected to return to […] Sri Lanka upon expiry of this visa. Given the young age of your daughter, it is considered that there are no significant obstacles to her integration to life in Sri Lanka. Additionally, given that your asylum claim has been rejected in its entirety (save for your marriage), it is not accepted that there are any risks on return to Sri Lanka for you and your family on the basis [of] your asylum claim."

13. The Respondent considered the best interests of the child pursuant to Section 55 Borders, Citizenship and Immigration Act 2009. The decision of the UT in *E-A (Article 8 – best interests of child) Nigeria* [2011] UKUT 315 was cited for the proposition that the starting point in considering the welfare and best interest of a young child, was that the child should live with and be brought up by his or her parents subject to any very strong contra-indication. The Decision indicates that those who have families with them during a period of study in the United Kingdom must do so in the light of an expectation of return. In paragraph [44], it is stated that it is considered in the Appellant's child's best interest "*…to live with and be brought up by you*" ie. by the child's mother.

(iii) The First Tier Tribunal (FTT)

14. Before the FTT the grounds focused mainly upon the asylum claim. But the appeal also concerned Article 8 which, as already observed, was fully argued. It was not an afterthought. The Article 8 appeal is dealt with briefly in the judgment. The approach adopted by the Judge can be distilled as follows:

    a) The Appellant did not meet the requirements of the IR (paragraph [37] and her case therefore had to be considered under Article 8 outside the IR.

    b) Nonetheless, the "*statement of policy*" in the IR could "*again re-enter the debate*" as part of the proportionality test (paragraph [38]). The public interest question was whether an interference with a person's private and family rights under Article 8 was justified.

    c) The public interest considerations in Section 117B were applicable "*in all cases*" (paragraph [43]).

d) The Appellant and her husband married in full knowledge that their immigration status was precarious and under section 117B "*little weight should be placed on private life*" that was precarious at the time a marriage was entered into (paragraph [44]).

e) The husband gave evidence that he would not return to Sri Lanka with the children. This evidence was not rejected. The Judge held: (i) that notwithstanding he was able to return and (ii) whether he did so was a matter of "*choice*" for him (paragraph [47]).

f) The Appellant was entirely dependent upon her husband and had "*limited finances*" (paragraph [49]).

g) The best interests of the children lay with their being with both parents. But they were very young and had not established strong links to the United Kingdom and would adapt (paragraph [48]).

h) To remove the Appellant was not a violation of Article 8.

(iv) UT Decision

15. An appeal was dismissed by the UT. The judge construed the FTT decision as recognising that the Appellant and her husband and children had a genuine family life worthy of protection. The UT found that the FTT judge had taken into account that the Appellant had a precarious status during the relevant time. The FTT had taken account of the position of the husband and the children. Section 117B(4) and (5) had been "*specifically*" applied by the FTT judge "*as she was bound to do*" (paragraph [15]).

(v) Events arising after the decision of the FTT and UT

16. On 3rd August 2018, the Secretary of State granted indefinite leave to remain ("ILR") to the Appellant's husband and to her two children. This was discretionary for reasons not covered by the IR. The relevant papers are before the Court. No reasons or explanations are given for this in the decision of the Respondent. It was however explained to us during the hearing that the grant was because the husband had been granted Discretionary Leave to Remain ("DLR") as a "*legacy*" applicant. Upon the basis of the Respondent's policy as set out in "*Asylum Policy Instruction- Discretionary Leave*" Version 7.0 (18th August 2015) the father was on a pathway to settled status, and when this occurred the children would also acquire settled status as dependents. This was clear from the "*Transitional Arrangements*" set out in Section 10 of the Policy Document. We accept, and take, this description as the basis for analysis.

17. There was some discussion in Court as to whether this policy gave rise to a legitimate expectation of settled status. Mr Jafferji suggested that on balance the case law was against his client on this. But it is not necessary for us to consider that issue or the well-known line of authority that addresses it, because in fact settled status was conferred in due course.

18. In view of this on 9th August 2018, the Tamil Welfare Association (Newham) ("*TWAN*"), acting for the Appellant, wrote to the Government Legal Department ("GLD") drawing attention to the fact that the Respondent had granted ILR to the

Appellant's husband and two children. The letter made a number of points. First, the husband was now a "*qualifying partner*" within the meaning of Section 117D(1) NIAA 2002 and accordingly fell to be treated as "*settled*" in the United Kingdom. Second, the Respondent would now need to reassess the best interests of the two children who had also been granted ILR in line with the status of their father. Third, the Respondent would have to address whether it was in the children's best interest to leave the United Kingdom to reside in Sri Lanka for the sole purpose of continuing the established close family life with their mother taking due account of their circumstances including their ages, the impact upon their ongoing education and, the fact that both children were born in the United Kingdom, had resided in the United Kingdom continuously since birth and had never resided in Sri Lanka. Fourth, the Respondent would need to take into account that by compelling the husband and children to leave the United Kingdom, they risked losing their ILR status pursuant to paragraph 20 of the IR and Article 13 of the Immigration (Leave to Enter and Remain) Order 2000 which provided that a person absent from the United Kingdom for more than 2 consecutive years automatically loses ILR status.

19. The letter stated that the recent grant of ILR was a significant supervening event which should prompt the Respondent to review her stance. Parties were under an ongoing duty to review the merits of litigation in the face of material supervening matters. This need for a reconsideration was especially important given that the husband and children had established stronger ties to the United Kingdom which affected the reasonableness of requiring them to leave the United Kingdom to accompany the Appellant for the sole reason of continuing to live together as a family unit.

20. The letter invited the Respondent to agree to have the appeal allowed by consent and for the matter to be remitted to enable a reconsideration of the Appellant's human rights claims. There was however no response to this letter and a variety of email chasers were sent.

21. On 29th October 2018, the GLD responded stating briefly, without addressing the merits of the points advanced, that the grant of ILR was not a matter arising upon the appeal. If the Appellant wished to rely upon evidence post-dating the decision of the UT she could "*...upon conclusion of this appeal*" make further submissions under paragraph 353 and the Respondent would consider those submissions accordingly.

22. On 20th November 2018, the TWAN wrote to the Civil Appeals Office informing the Office of the developments set out above.

23. The Respondent has not, in the event, re-opened the Appellant's application. In a skeleton argument submitted 12th December 2018, it is stated that the Appellant had not made any further valid application for leave to remain but has only made an invalid application to be added to her husband's ILR. It is argued that even if the Court was minded to determine this application afresh, the Appellant could still not succeed on this appeal even taking account of the later grant of ILR to the husband and children.

C. Section 117B NIAA 2002

24. Before turning to the analysis, it is convenient to set out Section 117B which sets out the position adopted by Parliament as to the application of Article 8. It applies in all cases and therefore applies to any decision on family rights outside the IR. It identifies

various factors which are always to be considered as being "*in the public interest*" (in section 117B(1)-(3)). And it then also identifies two factors (in section 117B(4) and (5)) which applicants for leave to remain will routinely rely upon, but which are to be accorded "*little weight*":

> "**Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

D. Issues arising out of the Supreme Court judgments

(i) General points about the proportionality test

25. We turn now to consider the legal issues arising. We start with some general observations. Leave to appeal was granted upon limited grounds with others being deferred for the full court to rule upon. At the heart of the appeal is whether, at base, the approach taken by the FTT Judge to the evidence was lawful, in the light of guidance set out in the Supreme Court judgments. The Appellant focuses upon six issues which can be summarised as follows: (i) The relevance of the nature of the rights that would have to be relinquished if a person (such as the husband and children of the Appellant) had to leave the United Kingdom in order to retain a family life abroad; (ii) the application of section 117B(4) and (5) and the application of the "*little weight*" provisions therein as applied to family life created when an immigration status was precarious; (iii) the relevance of awareness from the outset that the "*persistence*" of family life would be precarious; (iv) the paramountcy of the interests of the children; (v) the relevance of the existence of in/surmountable obstacles to return; and (vi), the value of comparator cases. Mr Jafferji, for the Appellant, argued that the FTT erred by failing to address a relevant matter and/or erred in attributing the incorrect weight to particular factors. He argued that ultimately the FTT improperly applied the relevant, proportionality, test. This covers points (i) - (v) above. He also argued, in response to reliance by the Respondent upon various decided cases, that great care had to be used when looking to comparator cases given that all cases under Article 8 were fact and context sensitive and the result in one case would not necessarily translate to another case. This is point (vi) above.

26. Before turning to the arguments, we make six preliminary observations about the test to be applied.

27. First, the IR and section 117B must be construed to ensure consistency with Article 8. This accords with ordinary principles of legality whereby Parliament is assumed to intend to make legislation which is lawful (see for example *R v SSHD ex p. Simms* 2 AC 115 at page 131; and *Bennion on Statutory Interpretation* (7th Edition) at page 718 – there is "*a high threshold for rebutting this presumption*"). Were it otherwise then domestic legislation could become inconsistent with the HRA 1998 and the ECHR and be at risk of a declaration of incompatibility.

28. Second, national authorities have a margin of appreciation when setting the weighting to be applied to various factors in the proportionality assessment: *Agyarko* (ibid) paragraph [46]. That margin of appreciation is not unlimited but is nonetheless real and important (ibid). Immigration control is an intensely political matter and *"within limits*" it can accommodate different approaches adopted by different national authorities. A court must accord "*considerable weight*" to the policy of the Secretary of State at a "*general level*": *Agyarko* paragraph [47] and paragraphs [56] - [57]; and see also *Ali* paragraphs [44] - [46], [50] and [53]. This includes the policy weightings set out in Section 117B. To ensure consistency with the HRA 1998 and the ECHR, section 117B must, however, have injected into it a limited degree of flexibility so that the application of the statutory provisions would always lead to an end result consistent with Article 8: *Rhuppiah* (ibid) paragraphs [36] and [49].

29. Third, the test for an assessment outside the IR is whether a "*fair balance*" is struck between competing public and private interests. This is a proportionality test: *Agyarko* (ibid) paragraphs [41] and [60]; see also *Ali* paragraphs [32], [47] - [49]. In order to

ensure that references in the IR and in policy to a case having to be "*exceptional*" before leave to remain can be granted, are consistent with Article 8, they must be construed as not imposing any incremental requirement over and above that arising out of the application of an Article 8 proportionality test, for instance that there be "*some highly unusual" or "unique"* factor or feature: *Agyarko* (ibid) paragraphs [56] and [60].

30. Fourth, the proportionality test is to be applied on the "*circumstances of the individual case*": *Agyarko* (ibid) paragraphs [47] and [60]. The facts must be evaluated in a "*real world*" sense: *EV (Philippines) v SSHD* [2014] EWCA Civ 874 at paragraph [58] ("*EV Philippines*").

31. Fifth, there is a requirement for proper evidence. Mere assertion by an applicant as to his/her personal circumstances and as to the evidence will not however necessarily be accepted as adequate: In *Mudibo v SSHD* [2017] EWCA Civ 1949 at paragraph [31] the applicant did not give oral evidence during the appeal hearing and relied upon assertions unsupported by documentary evidence which were neither self-evident nor necessarily logical in the context of other evidence. The FTT and the Court of Appeal rejected the evidence as mere "*assertion*".

32. Sixth, the list of relevant factors to be considered in a proportionality assessment is "*not closed*". There is in principle no limit to the factors which might, in a given case, be relevant to an evaluation under Article 8, which is a fact sensitive exercise. This obvious point was recognised by the Supreme Court in *Ali* (ibid) at paragraphs [115ff]] and by the Court of Appeal in *TZ (Pakistan) and PG (India) v SSHD* [2018] EWCA Civ 1109 ("*TZ*") at paragraph [29]. Nonetheless, there is in practice a relatively well trodden list of factors which tend to arise in the cases. We address those of relevance to this appeal below. But others exist, identified in Strasbourg and domestic case law, such as the personal conduct of an applicant or family member in relation to immigration control eg. breach of immigration rules or criminal law, or public order considerations; the extent of social and economic ties to the UK; and the existence of prolonged delay in removing the applicant during which time the individual develops strong family and social ties: See generally *Ali* paragraph [28] citing with approval *Jeunesse v The Netherlands* (2014) 60 EHRR 17 ("*Jeunesse*")

33. We turn now to the specific criticisms made of the FTT judgment and to our conclusions about those arguments.

(ii) The nature of the rights that risk being relinquished if a person has to leave in order to retain a family life

34. The first point focuses upon the nature of the rights held by the husband and children. Mr Jafferji argues that the FTT failed to address a relevant consideration, namely the nature of the rights that (non-Appellant) family members might have to relinquish in order to leave and reside with the Appellant in Sri Lanka. It was pointed out that if the husband and children returned to Sri Lanka then under the present law, they stood to lose their present DLR and any advantages, such as legacy rights and a pathway to settlement, that such rights conferred (cf the point made in the TWAN letter set out at paragraph [17] above). In *KO* (ibid) at paragraph [18] Lord Reed observed that a relevant question was always "*where the parents … are expected to be*" since it was generally reasonable for children to reside with them. The Court cited with approval the Scottish judgment in *SA Bangladesh v SHHD* 2017 SLT 1245 paragraph [22] ("*SA*

Bangladesh") where in answering the question: why would a child be expected to leave the United Kingdom, it was held that a court had to consider whether the parents had a right to remain. In answering this latter question a court will need to evaluate the nature of the family's residence rights in the United Kingdom. A similar point was also made by the Court of Appeal in *EV (Philippines)* (ibid) at paragraph [58] per Lewison LJ cited with approval in *KO* by Lord Reed at paragraph [19]. In *Ali* (ibid paragraph [32]) the Supreme Court held that a person's immigration status could "*greatly affect the weight*" to be given to that person's Article 8 rights. Lord Reed (ibid paragraph [34]) made the important point (of relevance to the present case) that there might not be very much difference in practice between a person with settled status and one lacking such settled status but who would have been permitted to reside in the UK if an application was made, for instance from outside the United Kingdom. The underlying point is a practical one: the law is not concerned with form but with the practical substance of the actual immigration status of the person in issue. It is for this reason that case law has indicated that even if a person has a "*settled*" status that might not be construed as inalienable if for instance the settled person then commits serious crimes which would nonetheless warrant removal on public order grounds (see the discussion in *Rhuppiah* paragraphs [39(e)] and [47]). It follows that a person who could be said to be on a pathway to settled status might, in relative terms, be in a stronger position than one with DLR who was not on such a pathway and this relative position needs at least to be taken into account in the proportionality, fair balance, assessment. It might be correct that in both cases the rights may still be said to be "*precarious*" but nonetheless the nature of the rights *actually* held was a relevant consideration to be taken into account. Yet here they were not.

35. In the present case the Judge did not analyse or weigh the nature and relevance of the legacy rights held by the Appellant and the children as part of the proportionality exercise. That omission reflects a failure to address a relevant consideration. We cannot say that the failure is immaterial.

(iii) The application of section 117B(4) and (5) and the weight to be attached to family life created when immigration status was precarious

36. Mr Jafferji, whilst acknowledging that the reasoning of the FTT was ambiguous, argued that taken as a whole and upon a fair reading the Judge wrongly applied the "*little weight*" provisions of section 117B(4) and (5) to the generality of the evidence relating to family life and in so doing made an error of law and also of assessment. On our reading of the text of the judgment it is unclear whether the judge did improperly discount the family life evidence by reference to section 117B(4) and/or (5). But we do see how the criticism could well be correct. The Judge did refer to sections 117B and it is of some relevance that the UT construed the judgment as applying section 117B(4) and (5). The starting point is that neither section has any material relevance in the context of a family life case such as the present. In *Rhuppiah* the Court clarified that the "*little weight*" provision in section 117B(4) applied only to private life, or a relationship formed with a qualifying partner, established when the person was in the United Kingdom unlawfully. It did not therefore apply when family life was created during a *precarious* residence ie. a temporary, non-settled, but lawful, residence, which is the case in this appeal. At paragraph [22] the Court held:

> "22. Section 117B(4) is not engaged in the present case: it is agreed that Ms Rhuppiah established her relevant private life in

> the UK in particular her role in caring for Ms Charles, long before 2010 and at a time when her presence here was predominantly lawful."

37. The Court also clarified that section 117B(5) applied only to private life and not family life:

> "37. It is obvious that Parliament has imported the word "precarious" in section 117B(5) from the jurisprudence of the ECtHR to which I have referred. But in the subsection it has applied the word to circumstances different from those to which the ECtHR has applied it. In particular Parliament has deliberately applied the subsection to consideration only of an applicant's private life, rather than also of his family life which has been the predominant focus in the ECtHR of the consideration identified in the Mitchell case. The different focus of the subsection has required Parliament to adjust the formulation adopted in the ECtHR. Instead of inquiry into whether the persistence of family life was precarious, the inquiry mandated by the subsection is whether the applicant's immigration status was precarious. And, because the focus js upon the applicant personally and because, perhaps unlike other family members, he or she should on any view be aware of the effect of his or her own immigration status, the subsection does not repeat the explicit need for awareness of its effect,"

38. Mr Jafferji candidly accepted before us that to have relied upon the Appellant's private life rights before the FTT would have been hopeless. But he pointed out that the appeal focused upon family rights and the statutory discounting of the rights in section 117B(4) and (5) therefore had no part to play. Yet, the Judge seemed to have considered that they did. She did not for instance distinguish between the weight to be attributed to family life rights and private life interests in the assessment which followed; they were treated as one. We accept this submission. The FTT seems to have considered that the "*little weight*" provisions <u>were</u> relevant and to this extent it follows that the Judge wrongly discounted the weight to be attached to the family rights relied upon in the proportionality assessment. This was an error of law and, again, we cannot say that it was immaterial.

(iv) The relevance of awareness from the outset that the persistence of family life would be precarious

39. A further argument advanced by Mr Jafferji concerned the subjective knowledge of the family as to the persistence of their family life in the United Kingdom. In *Ali* Lord Reed described this as an "*important consideration*" (ibid paragraph [28]). This is a point arising out of the Strasbourg case law and first principles. In *Rhuppiah* (paragraph [28]) the Supreme Court articulated the point as follows: "…*the question became whether family life was created at a time when the parties were aware that the immigration status of one of them was such that the persistence of family life within the host state would from the outset be precarious*". Mr Jafferji points out that this is a different test from the normal precariousness test as applied to an applicant's own, personal, private life interest (as set out in section 117B(5)). This is because the

awareness referred to by the Supreme Court concerns the position of all the relevant parties, and in a family life case would include the partner of an Appellant or applicant and any children capable of being relevant on the facts to such an awareness.

40. This must be right and flows directly both from the logic of collective family life cases as distinct from individualised, private life cases, and is a distinction drawn in the case law. Indeed, in *Rhuppiah*, at paragraph [37], Lord Wilson referred to the "*explicit need for awareness*" when distinguishing between a precariousness analysis of an individual applicant (under section117B(5)) and the analysis of a family. The same point was made in *Ali* paragraphs [28] and [33] citing the judgment of the Strasbourg Court in *Jeunesse* (ibid) with approval.

41. In the present case the FTT did not analyse precariousness from this vantage point. The Judge heard oral evidence from the husband, but this issue seems not to have been the subject matter of questioning and if it was, it did not register as relevant to the analysis. And had it done so it seems at least arguable that as of the date when the Appellant married her husband, he was by then on a recognised pathway to settled status which could, realistically, in due course have affected his and her knowledge of the ability of their family life in the United Kingdom to persist. We make no definitive findings on this save to say that the omission of any recognition or analysis of the issue was potentially material.

(v) The paramountcy of the interests of the children

42. Where children are involved their best interests are said to be "*paramount*": *Ali* paragraph [29] citing with approval *Jeunesse (ibid)* at paragraph [109]. Standing alone the rights of children cannot be decisive; nonetheless they must be "*afforded significant weight*": *Ali* paragraph [28]. See also section 55 of the Borders, Citizenship and Immigration Act 2009. In *KO* (ibid) Lord Reed, summarising the position, pointed out: (i) that a child cannot be blamed for the conduct of the parents even where that is characterised by criminality or misconduct (which is not the case in this appeal) (paragraphs [15] and [16]); (ii) the question is "*what is reasonable*" for the child (paragraph [16]); (iii) it is "*inevitably relevant*" to determine where the parents "*are expected to be*" and the record of the parents might thereby become relevant if it leads to their ceasing to have a right to remain in the United Kingdom and having to leave (paragraph [18] citing with approval the judgment *SA (Bangladesh) v SSHD* 2017 (ibid) at paragraph [22]). Lord Reed also cited, to similar effect, Lewison LJ in *EV Philippines* (ibid) at paragraphs [58] where the Court of Appeal made clear that if one parent has no right to remain, but the other parent does, then that is the "… *background against which the assessment*" must be conducted.

43. The Appellant argued that the Judge erred in her assessment of the position of the children. She wrapped this up in her conclusion that the father was able to move to Sri Lanka and therefore he *should*, and any refusal to do so was his "*choice*". That being so she held that the children would not suffer because the family could remain together in Sri Lanka. But she failed to analyse the case upon the basis of the unchallenged evidence, which was that the husband had strong reasons, including his legacy DLR status, which meant that he would not leave the United Kingdom. Mr Jafferji pointed out, in this regard, that were the father and children to leave for Sri Lanka they risked losing their valuable DLR status with its possible pathway to settled status.

44. It is also argued that it would have been open to the Judge to reject the husband's evidence (as she did in relation to much of the evidence tendered by the mother) but she did not do so, no doubt because his position was based upon strong evidential factors which had an air of real plausibility about them. Accordingly, she erred when she proceeded upon the basis that the children would not suffer because of this choice. She could not lawfully proceed upon the assumption that the father *would* choose to leave the United Kingdom. The position of the children had to be analysed in the context of an acceptance that the father would stay and, this being so, the family would be ruptured and fractured and the children would suffer either from separation from their mother (one child was only two months old at the time) or from their father when it was common ground that he was the bread winner and the children benefited from having *two* parents.

45. The law supports this argument. In our judgment the Judge did not analyse the position of the children from the correct perspective. She proceeded upon the basis that the husband would make a choice that he said that he would not take. She ignored the implications of the fact that she did not reject his evidence about remaining in the United Kingdom. She overlooked the risk that the family could be ruptured as a result of her decision (which is to be avoided: see *Ali* at paragraph [28]). Once again, we cannot conclude that this failure was immaterial.

(vi) The relevance of the existence of in/surmountable obstacle to return

46. We have already addressed the findings of the Judge that it was the husband's choice whether to leave or not. The Appellant argued that (i) the Judge wrongly applied an overly narrow ability or capability test; and (ii) treated her conclusion on ability/capability as essentially dispositive rather than simply one factor amongst others to take into account. We start by considering whether the test is ability/capability, or some broader test.

47. In domestic law an analysis of whether a person confronted with insurmountable obstacles to return arises under the IR where the individual concerned is resident in breach of the IR: *Agyarko* paragraphs [44] and [45]. The insurmountable obstacles assessment amounts to a free-standing prima facie test. It is prima facie because to ensure that the IR are compatible with Article 8, even where residence is in breach of the rules, leave can be granted in exceptional circumstances where removal would result in "*unjustifiably harsh consequences*" or where the family would face "*very serious hardship*" or "*very significant difficulties in continuing family life outside the UK*": *Agyarko* (ibid) paragraphs [45] and [48].

48. In relation to the position under Article 8 *outside* the IR, under ECHR case law the extent to which obstacles to return can be overcome is simply a "*relevant factor*" in relation to "*non-settled*" applicants; it is not the test: *Agyarko* paragraph [48].

49. As to the substance of the test it must be applied in a "*practical*" and "*realistic sense*": *Agyarko* paragraph [43] and "*in the light of the particular circumstances of each case*" (ibid paragraph [48]). It is an individualised appraisal: *TZ* (ibid) paragraph [31]. A court will consider whether the applicant or his or her partner would face "*very significant difficulties*" in continuing family life together outside the UK which could not be overcome or would entail "*very serious hardship*". Equally, if the refusal of an application would result in "*unjustifiably harsh*" consequences, such that refusal would

not be proportionate, then leave will be granted outside the IR on the basis that there are "*exceptional circumstances*". In *TZ (ibid*) the Court of Appeal (in relation to the development of a family life during a period when the parent's rights were precarious and in relation to an assessment outside the IR) described a test of reasonableness. The Court stated (ibid paragraph [28]) that the question was whether it could: "… *reasonably be expected that s/he will follow the removed person to keep their relationship intact*".

50. An important point was made in *Ali* by Lord Reed (at paragraph [29]) who stated that national decisions makers should "… *advert to and address evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give sufficient protection and sufficient weight to the best interests of children*". Practicality and feasibility are not the sole lodestars since the Court also identified "*proportionality*" which is separate and broader, and this involves assessing the issue from the perspective of a "*fair balance*".

51. We turn now to the Appellant's arguments. It is said that on a fair reading of the judgment the FTT applied, in a mechanistic manner, an ability or capability test. The Judge simply asked whether the husband *could* return. Having rejected his asylum arguments, the Judge rejected cursorily arguments about the husband having no social or economic links in Sri Lanka given the length of time that he had been away from the country without ever having returned, and his argument that he would not be able readily to find employment. The analysis was conclusionary, partial and ignored relevant matters, such as the rights that the husband (and children) would risk losing if they returned to Sri Lanka (the husband's legacy DLR with its established pathway to settled status for the husband and children).

52. In our judgment the Judge did err. It was made clear by the Supreme Court in *Ali* (supra) that even if it is practicable and feasible for a person to return that is not the end of the story - proportionality must also be considered which necessitates a careful analysis of the fair balance that exists between the State's interest in immigration control and the individual's interests. As Mr Jafferji pointed out in this case the State had accorded the husband and the children DLR and they were (at the time of the FTT hearing) on a pathway to settled status and this being so, the State had no discernible, sensible, objection to the husband and children being in the United Kingdom. This was relevant to any assessment of the proportionality of compelling the father and children to move to Sri Lanka if family life was to be preserved.

53. In this case the Judge did not say that she was considering the "*reasonableness*" of the husband leaving and instead focused upon whether he had the ability / capability to move to Sri Lanka: see FTT paragraph [46]. The UT judge when rejecting the appeal commented that although the Judge did not make a finding that it was "*reasonable*" for the husband to return to Sri Lanka that this is what she intended to so find: UT paragraph [13]. However, this is not clear on our reading of the FTT ruling, which is about ability not reasonableness or fair balance. There will of course be some nexus between the two concepts, but they are not the same: a person might be able to return to a foreign country, yet it might still be unreasonable or disproportionate to compel return. The point is made for the Appellant that if her husband and children were to follow her then they would lose their leave to remain and with it the chance (which of course did materialise) of settled status in the UK. There is no analysis of whether in such circumstances this was proportionate or reasonable for the husband or for the children.

54. In our judgment the Judge wrongly applied a mechanistic ability or capability test. She did not apply a proportionality test and she failed to address herself to relevant factors. Yet again, we cannot say that this error was immaterial

(vii) The value of comparator cases

55. There is one final matter we would mention concerning the value of precedents as comparators on their facts. The Respondent submits that the instant appeal is on a par with the unsuccessful appeal of PG in the *TZ case (Pakistan) v SSHD* [2018] EWCA Civ 1109. But the facts of that case were materially different and predated the clarification in *Rhuppiah*. At the relevant time: (i) PG was married to a British citizen and pregnant with their child; (ii) PG could reapply for entry clearance as a spouse from India and there was therefore no question of long term separation if the husband did not accompany her to India; (iii) the removal of PG would not have resulted in separation between her and the (unborn) child. Mr Jafferji argues for the Appellant that each claim and case is different, and inevitably has different strengths and weaknesses and the "*pertinent question is whether in this claim, the FTT weighed the strengths and weaknesses properly. If there was an error in the weighing of the relevant factors, or if relevant factors were simply not considered, then the proportionality balance is undermined*". We agree. Article 8 assessments are fact intensive so recourse to comparators may be of limited utility.

E. Relief

56. In our judgment the decision of the FTT was based upon failure to consider relevant facts and misapplications of the appropriate tests in law. The judgment of the FTT must be set aside as must the affirming judgment of the UT and the initial Decision of the Respondent.

57. We turn to the question of relief. The Court has a duty to do what is right (and consistent with human rights law) and which takes account of the most up to date information. Given the developments in the facts referred to at paragraphs [16] – [23] above there has been a material change in circumstances.

58. In particular, the Secretary of State has now formally recognised that the husband and both children should be entitled to remain in the United Kingdom indefinitely. They have "*settled*" status. Their position is now no longer precarious in any practical or real sense. When these new decisions were made in 2018 the Respondent must be taken to have been aware that the effect of the grant of these important rights was to give with one hand but take with another. Three members of the family can stay permanently, but the mother cannot and on the analysis of the Respondent she must leave, and notwithstanding her decision to grant settled status to the husband and children they must leave with her if the family is to survive intact.

59. On this analysis the family is placed in the most awful dilemma. If the father and children are to reap the benefits of their newly granted settled status, then they would have to do so without the wife and mother. Indeed, as matters stand the Respondent has rejected an application for the Appellant's position to be re-considered and, moreover, in the letter from the GLD (referred to at paragraph 21 above) has stated that her position would only be considered after this appeal ended. And in this appeal the Respondent opposes the Appellant's arguments including that the altered circumstances

of the husband and children affect her status. On the Respondent's case, for the husband and children to enjoy the rights granted, great harm will therefore have to be imposed upon them all by the destruction and rupturing of a family life in this country.

60. On the other hand, if the family is to be preserved as a unit then the father and the two children must leave the United Kingdom and thereby place in jeopardy their ILR and the settled status of three of the four family members. Further, the children are now much older than they were at the time of the Decision and FTT judgment. They are (at the time of this judgment) five and approaching seven years old respectively and will undoubtedly have developed tangible and strong social links within the United Kingdom, which was not the case when the matter was before the FTT. No one questions that the best interests of the children lie in remaining with both parents.

61. There is a deeply disjointed feel to this case. We are at a loss to understand why, in the light of the grant of ILR to the husband and children, the Respondent has not pragmatically agreed to revisit the position of the Appellant.

62. In our judgment the way forward is for the Respondent to reconsider the position of the Appellant. We do not see any sense in the matter being remitted to the FTT since any hearing there would be on substantially new and different facts to those set out in the Decision and this matter can most expeditiously be addressed by a fresh decision of the Respondent. This has the added advantage of preserving full rights of challenge if the new decision is considered by the Appellant to be flawed.

63. For all these reasons: the appeal is allowed; the judgments of the UT and FTT are set aside; The Secretary of State is directed pursuant to Section 87 of the Nationality, Immigration and Asylum Act 2002 to reconsider the Appellant's human rights claim that it would be a breach of Article 8 ECHR for her to be removed from the UK.