Upper Tribunal
(Immigration and Asylum Chamber)

Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 January 2014	
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Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ATIF SHAHZAD

Respondent

Representation:

For the Appellant: Mr P Deller, Senior Home Office Presenting Officer

For the Respondent: Mr S Kumar, Legal Representative, Capital Solicitors

(i) Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it.

(ii) "Maintenance of effective immigration control" whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of "prevention of disorder or crime" or an aspect of "economic well-being of the country" or both.

(iii) *"[P]revention of disorder or crime" is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.*

(iv) *MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.*

(v) *It follows from this that any other rule which has a similar provision will also constitute a complete code;*

(vi) *Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.*

DETERMINATION AND REASONS

1. In Article 8 immigration cases is "prevention of disorder and crime" only a "legitimate aim" under Article 8(2) where there is criminal conduct involved? Is it open to a judge in an immigration case in which there is no criminal conduct involved to consider that the only or primary legitimate aim being pursued by the SSHD is "economic well-being"? In either type of case is it incumbent on the Secretary of State to have identified in her decision what legitimate aim she considers that decision to pursue? Given that there exists nearly 60 years of Strasbourg jurisprudence on Article 8, one would have thought these questions would have received definitive answers long ago, but alas not. That anyway is how we see things and is why as well we seek in this decision to provide clarification. As we shall see the particular circumstances of the case have led us to consider each of these questions and several related ones.

2. This is an appeal brought by the appellant (hereafter the Secretary of State for the Home Department abbreviated as SSHD) against a determination of First-tier Tribunal Judge Hindson who on 28 August 2013 dismissed the respondent's (hereafter claimant's) appeal under the Immigration Rules but allowed it on Article 8 grounds.

The claimant's antecedent immigration history

3. The claimant is a citizen of Pakistan who on 6 May 2008 had been granted leave to remain as a student until 1 January 2010. Prior to expiry of his leave – on 22 September 2009 to be exact - he applied for further leave to remain in the same capacity, but this was refused. He appealed and his case came before First-tier Tribunal Judge Eban. On 14 September 2009 she allowed his appeal under the Immigration Rules. Noting that the only

reason the SSHD gave for refusing his application was the fact that his uncle the sponsor was not a parent, the judge decided to allow his appeal. Her reasoning was that at the relevant time the requirement for funds to be provided by a parent or legal guardian was only contained in Policy Guidance, not in the Immigration Rules. Applying the guidance set out in *Pankina* [2010] EWCA Civ 719 the judge concluded that the claimant's appeal should be allowed because his sponsoring uncle had shown he was (i) in *loco parentis*; and (ii) both willing and able to provide the requisite funds for maintenance.

4. In response, on 15 December 2010, the SSHD granted him further leave to remain until 29 February 2012. Before the end of 2010 he had obtained an MBA from the College of Technology London. On 28 February 2012, he applied for further leave to do a Diploma in Information Technology at Lincoln College, London (London International College of Management). On 19 July 2012 the SSHD wrote to him explaining that as she had made a decision to revoke the licence of the London International College of Management and in line with her own Rules and guidance, she would give him 60 days to find a new Tier 4 educational sponsor. On 14 September 2012 the claimant made a renewed application for leave to remain as a Tier 4 (General) Student Migrant under the Points Based System (PBS) to pursue a Level 7 Diploma in Tourism and Hospitality Management. When this subsequent application was refused on 4 March 2013, he appealed to Judge Hindson whose determination is the subject of this appeal brought by the SSHD.

5. In the grounds of appeal before Judge Hindson, it was argued first of all that the claimant's current position was on all fours with that which existed at the time of the previous appeal and there was no reason to go behind the findings of Judge Eban; secondly, that the SSHD should have exercised "evidential flexibility" when faced with the evidence produced showing financial support from the uncle and should have requested further evidence from the claimant.

6. Judge Hindson swiftly disposed of the "evidential flexibility" ground, correctly pointing out that there was no evidence that the uncle had become the claimant's legal guardian and so "there would therefore have been no point in the decision-maker seeking further evidence, since no such evidence exists". Neither party takes issue with this finding.

7. As regards the second ground, Judge Hindson was equally concise. He pointed out that, contrary to what had been argued on behalf of the claimant, his position was not on all fours with that existing before Judge Eban. Judge Hindson wrote:

> "The requirement that private financial support be from a parent or legal guardian is now enshrined within the Rules, not in guidance. It is therefore a mandatory requirement. The claimant accepts that there is no such legal relationship between him and his uncle and therefore the appeal must be dismissed under the Rules".

Again, neither party takes issue with this finding. The new provision to which Judge Hindson refers had come into force on 4 July 2011.

8. The judge decided nonetheless to allow the appeal on the basis of Article 8 in the following terms:-

> "22. The appellant has been in the UK as a student since 2008 and there is no suggestion that he has ever been in breach of requirements of the student visa. He has paid the fees for his current course in full and they are not refundable. I accept that adequate funding is available from his uncle. I accept that the appellant could have arranged the transfer of those funds into his mother's account, or to his own account, prior to making this application, in which case he would have had no difficulty. He did not do so because he did not believe it was necessary. He was advised by his college that this was not necessary. He previously succeeded on appeal on the same issue; I have no doubt that he was unaware of the change in the rules. The consequence of the response [sic] decision is that the appellant would have to return to Pakistan and make a fresh application for entry clearance as a student. This would have financial implications for him and he would almost certainly miss one academic year of study.
>
> 23. I find that the consequence of the response [sic] decision is of sufficient gravity as to potentially engage Article 8 (private life). I accept that the interference is in accordance with the law and that it has the legitimate aim of securing the economic well-being of the UK by sensible immigration control. I am not satisfied that the interference is proportionate to that aim. I have already described the consequences to the appellant, and they are substantial. There is no suggestion that the appellant's presence in the UK will have an adverse effect on the country's economic well-being. Indeed he is bringing substantial funds into the country to pay his course fees and to meet the costs of his maintenance and accommodation."

The SSHD's Grounds of Appeal

9. By way of challenge two grounds were raised by the SSHD. In ground 1 it is averred that the judge failed to have regard to the immigration rules in making his Article 8 assessment. In ground 2 it is argued that the judge had in effect applied a 'Near-Miss' principle contrary to what was decided by the Court of Appeal in *Miah* [2012] EWCA Civ 261, in which Burnton LJ at [26] stated:

> "In my judgment, there is no Near-Miss principle applicable to the Immigration Rules. The Secretary of State, and on appeal the Tribunal, must assess the strength of an Article 8 claim, but the requirements of immigration control is not weakened by the degree of non-compliance with the Immigration Rules."

10. The SSHD sought additional support for ground 2 from Tribunal case law dealing with claims for private life based on studies, in particular *MM (Zimbabwe)* [2009] UKAIT 00037 which highlighted the point that "a student here on a temporary basis has no expectation of a right to remain in order to further these ties and relationships if the requirements of the points-based system are not met". It was submitted that the claimant's private life in the UK was neither lengthy nor significant and that he had been fully aware upon arrival that his stay was on a limited basis and that upon completion of his studies he would be required to return to Pakistan. There were no exceptional circumstances in the way of his continuing his private life abroad. "It is respectfully submitted", it was stated by the author of the SSHD's grounds, "that it is proportionate to remove the appellant to maintain an effective immigration control".

11. Before turning to summarise oral submissions we should note at this stage that their effect was to advance a third ground (based, Mr Deller said, on the grant of permission by the Upper Tribunal). Ground 3 combined two contentions. One was that the judge had erred in considering that the public interest of the state in the maintenance of effective immigration control was only to be considered by reference to whether the claimant's continued stay in the UK had an adverse effect on this country's "economic well-being". Arguably there was also a separate legitimate aim, namely, "prevention of disorder and crime". The other contention was that the judge had wrongly confined the weight to be given to the legitimate aim of "economic well-being" to a consideration of the claimant's circumstances, without attaching any weight to the general interest(s) which this aim pursued.

Oral Submissions

12. As regards ground 1 (asserting in effect that the judge should have considered the claimant's Article 8 circumstances solely under the immigration rules) , Mr Deller for the SSHD said that its central premise had been upheld by the Court of Appeal in *MF (Nigeria)* [2013] EWCA Civ 1192, although he accepted that the Court had also made clear that if a judge had considered Article 8 outwith the rules that was an error of form rather than substance and so it was not enough to vitiate a judicial decision unless the Article 8 exercise the judge had conducted was flawed in other respects.

13. As regards ground 2 (addressing the 'Near Miss' issue) Mr Deller relied on what had already been canvassed in the written grounds. Moving on to ground 3, Mr Deller made two main points. First, he took issue with the judge reducing the test of "economic well-being" to a simple calculation of the individual claimant's cost to the State in respect of the financing of his studies (which only directly helped his college). Second, he said the judge should have recognised as "known to all" that the current government considered that the maintenance of effective immigration control was an important objective and one that should be considered as legitimate under all relevant heads of restriction in Article 8(2), which self-evidently included "prevention of disorder and crime". The judge's blinkered approach to the Article 8(2) legitimate aim issue caused him to oversimplify his conduct of the Article 8 balancing exercise and proportionality assessment.

14. Observing that the only mention of Article 8 in the claimant's grounds of appeal to the First-tier Tribunal to Article 8 was by way of a reference to *CDS (PBS: "available": Article 8) Brazil* [2010] UKUT 00305 (IAC), Mr Deller maintained that that case did not say that a student could succeed on Article 8 grounds without separately establishing strong ties and connections with the UK; and the claimant in this case had singularly failed to establish such ties and connections. In any event, *CDS (Brazil*) had to be read in the light of the case law of the higher courts, the Supreme Court decision in *Patel* [2013] UKSC 72 in particular. He did not intend to belittle the claimant's situation, especially as he had succeeded on two occasions before a First-tier Tribunal, but, in response to the Court of Appeal judgment in *Pankina* (which was what had swayed the first FtT judge (Judge Eban)) the government had amended the immigration rules to make it a requirement of the Rules themselves that financial support had to come from a parent or guardian and

corresponding changes relating to Article 8 had made clear that considerations of immigration control reflected in the Rules could only be outweighed if there were compelling or exceptional circumstances.

15. In answer to questions from the bench, Mr Deller said that there was nothing to suggest the claimant had had any involvement in the circumstances which led to his college's licence being revoked in 2012. In respect of the claimant's academic progress, the SSHD had not taken any point about lack of academic progress, although it was a fact about the claimant's situation that he appeared to be moving sideways rather than upwards. However, as regards whether or not the claimant could be said to have merited further leave on Article 8 grounds because he (or his uncle) had paid significant sums to his college, he stated that payment for a course should not be equated with a right to stay.

16. It was a feature of the claimant's case, added Mr Deller, that the SSHD had refused him not just on sponsorship grounds but also on the ground that he had failed to submit bank statements covering the entirety of the requisite period over which he had to show he had sufficient funds. He asked the Tribunal not to consider that the SSHD's evidential flexibility policy was intended to apply to a case where documents submitted failed to cover relevant dates. If the Upper Tribunal were persuaded by the reasons given by the SSHD in the grounds that the First-tier Tribunal judge had erred in law, then we should set aside his decision and re-make the decision by dismissing the claimant's appeal.

17. Mr Kumar for the claimant urged us to find the First-tier Tribunal decision correct in law. The judge was correct to find the Rules did not apply but that he had discretion to consider the claimant's circumstances outside the Immigration Rules. He had done that in a fact-sensitive way. It was his finding of fact that the claimant was unaware of changes in the Rules relating to sponsorship and the judge was entitled to attach weight to that factor. The claimant had made his application himself after having consulted a college adviser. It was also the judge's finding that the claimant's uncle was in loco parentis and so was a de facto guardian. The role played by his uncle also accorded with the cultural values of the Indian sub-continent.

18. As regards the judge's view that the state's "economic well-being" was not adversely affected by the claimant's continued stay as a fee-paying student, it was surely right to contrast his case with that of a student who had not paid fees. In addition, there was ample evidence in the public realm that overseas students positively contribute to the UK economy. As regards the "public interest" more generally, in terms of maintenance of immigration control, the claimant had done everything right. He had met the requirements of the Immigration Rules in substance even if not in form.

19. Properly understood, submitted Mr Kumar, the Court of Appeal judgment in *MF* pointed in the claimant's favour. Whether that judgment meant to address the treatment of Article 8 within the immigration rules generally – or just its treatment within the provisions dealing with criminal deportation – it made clear that so long as a judge deals in substance with Article 8 there is no legal error and in this case (there being no first stage to conduct) the judge had conducted a viable second-stage Article 8 assessment.

20. An important feature of the claimant's private life was that he had already begun his course and would not be able to complete it anywhere else. Pakistan had a very different system.

21. In conclusion Mr Kumar invited the Upper Tribunal, if we were not persuaded to uphold the decision of the First-tier Tribunal Judge, and decided instead to go on to re-make the decision for itself, to reach a very similar conclusion, namely that the refusal decision violated the claimant's right to respect for private life. The SSHD has not been asked to grant the claimant indefinite leave to remain (ILR); just further limited leave to remain sufficient for the claimant to complete his studies; such a grant would represent a proportionate remedy for the breach.

Our Assessment

22. It will assist if we first address a number of wider issues raised by the grounds and the discussion at the hearing.

The MF Issue

23. Both parties were careful in the way in which they sought to invoke the judgment of the Court of Appeal in *MF*. The difficulty both identified was that whilst in that judgment the court made clear that the provisions of the new immigration rules pertaining to deportation of foreign criminals are to be regarded as a "complete code", it did not make clear whether it viewed that as also true of all other provisions of the rules. Whilst it is not essential to our disposal of this appeal, it may assist if we give our own observations on this matter. In our judgment, the ratio of *MF* is twofold: to hold that in assessing an Article 8 claim it is necessary to carry out a two stage process; and to hold that in relation to deportation of foreign criminals the new rules are a complete code.

24. It will assist if we first of all explain why we have concluded that *MF* is not authority for the proposition that the new rules in their entirety are a complete code.

(i) The submission put by the SSHD was limited to the provisions of the new rules dealing with deportation of foreign criminals (see [31]-[34]) and it was that submission which the Court said it accepts (see [40]);

(ii) In [2] the Court defines "the new rules" as "rules 398, 399 and 399A";

(iii) the paragraph in which the court states that "the new rules are a complete code" [44] immediately follows a paragraph identifying the relevant Rules as paragraphs 398, 399 and 399A;

(iv) The Court specifically envisages that where paragraphs 399 and 399A did not apply, the "general law" would. So much seems clear from [45] where the Master of the Rolls comments: "Even if we were wrong about [the new rules being a complete code], it would be necessary to apply the proportionality test outside the new rules as was done by the UT. Either way, the result should be the same. In these circumstances, it is a sterile question whether this is required

by the new rules or it is a requirement of the general law. What matters is that it is required to be carried out if paras 399 or 399A do not apply.";

(v) the logic of the Court's reasoning is based on the fact that paragraph 398(c) specifies that if paragraphs 399 or 399A do not apply then "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors". In that way, reasons the Court, these rules "*expressly* contemplate a weighing of the public interest in deportation against other factors" (emphasis added). The Court observes: "in our view this must be a reference to all other factors which are relevant i.e. proportionality...";

(vi) when addressing submissions by Mr Hussain QC for the claimant highlighting respects in which the new Rules did not incorporate any Article 8 consideration [39], the Court's rejection is limited to the special nature of paragraphs 398, 399 and 399A;

(vii) The judgment sets out in some detail the policy statement issued by the Home Office on 13 June 2012, in advance of the new rules coming into force and quotes from paragraph 67 of that statement which explained that there would be some cases, albeit "rare" which would needed to be considered "outside the Rules" [11]. Miss Giovenetti QC for the SSHD nowhere sought to resile from that position and the Court, in accepting the SSHD's main submission that the new rules on deportation were a complete code, nowhere sought to disagree with that position;

(viii) if the judgment were read as holding that the new rules in their entirety were a complete code for dealing with Article 8, that would entail adopting the somewhat fanciful position that an "exceptional circumstances" clause akin to that set out in paragraph 398 was to be read into all other provisions of the rules. We feel sure that if the Court had meant to say that it would have said so;

(ix) the Court's discussion of *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin), which was a non-deportation case, clearly approved of its analysis of exceptional circumstances, but that analysis was based on the Home Office policy statements to the effect that where there were exceptional circumstances it would be necessary for the decision-maker to go outside the rules.

25. We would add that nothing said so far by different panels of this Tribunal about *MF* is inconsistent with the analysis we offer here: see e.g. *Kabia (MF: para 398 - exceptional circumstances) (Gambia)* [2013] UKUT 569 (IAC) (which confined itself to saying that it derived from *MF* the proposition that in the deportation context the immigration rules were a complete code) and *Gulshan (Article 8 – new Rules – correct approach)* [2013] UKUT 640 (IAC). Indeed, if the Tribunal in *Gulshun* had understood *MF* to hold that the new rules in their entirety were a complete code, it could not have stated, without self-contradiction, in its headnote that:

> "*after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);*.

26. On the logic of the Court of Appeal judgment in *MF* (which the Tribunal referred to at its [23]) in the context of deportation of foreign criminals there could never be "good grounds for granting leave outside [the rules] - because the Court held they were a "complete code".

27. Even assuming we are right about the limited ambit of *MF* in relation to when the new Rules are to be considered a complete code, that does not mean we think that the Court's ratio was wholly confined to the context of deportation of foreign criminals (this brings us back to what we see as the first part of the ratio of *MF*). Far from it, it was clearly fundamental to its reasoning as well that Article 8 generally requires a two-stage consideration (as had been held by the Upper Tribunal in this same case, *MF (Article 8: new Rules) Nigeria* [2012] UKUT 393). Having concluded that in relation to paragraphs 398, 399 and 399A the new rules required both the first and second stages of the Article 8 assessment to be carried out *within* the rules the Court noted at [46] that:

> "The UT concluded (paragraph 41) that [the second stage] is required because the new rules do not fully reflect Strasbourg jurisprudence. But either way, it is necessary to carry out a two stage process"

and at [50] added:

> "Although we have disagreed with the UT on the question whether the new rules provide a complete code, the difference between our approach and theirs is one of form, not substance."

28. In relation to the new rules on deportation, the Court made clear that the first stage was to consider whether paragraphs 399 or 399A applied and the second stage was to consider whether paragraph 398(c) applied[36], [46]. Outside that particular context the Court described the two-stage process (as applied in *MF* and *Izuazu (Article 8-new rules)* [2013] UKUT 000045 in the Tribunal) as being to first ask whether the claimant could benefit under the new rules and if not, to go on in a second stage to consider Article 8 under the general law[21], [30].

29. We have emphasized that the ratio of *MF* is twofold and we have placed first the holding that consideration of an Article 8 claim requires a two-stage process because it seems to us that that part has primacy. Without it, the holding that the new rules on deportation of foreign criminals are a complete code would seem on its face an extremely limited reaction to an appeal brought against a Tribunal decision (*MF*) which had cast its guidance in broad terms, in relation to the new rules as a whole. But once regard is had to the Court's conclusion that the difference between the Tribunal approach in *MF* and its own approach was "one of form not substance" and that the question whether it is necessary to apply a proportionality test outside the new rules "is a sterile question" [45],

then it is immediately apparent that there would have been no point in the Court going on to consider what the correct approach was under the new rules at large. On our reading of *MF* in the Court of Appeal, the fact that a decision-maker wrongly decides to treat the two-stage process as entirely within or partly within or partly without the new rules will not give rise to legal error, so long as the substantive Article 8 consideration accords with the general law.

30. It follows from the other part of the ratio of *MF* - that the new rules on deportation of foreign criminals are a complete code because they contain an express provision requiring consideration in the Article 8 context of "exceptional circumstances" and "other factors" - that any other rule which has a similar provision will also constitute a complete code (rule S-EC.1.4, dealing with exclusion, would seem to be a further example);

31. Where an area of the rules does not have such an express mechanism, the approach in *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin) ([29]-[31] in particular and *Gulshan (Article 8 – new Rules – correct approach)* [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

Article 8 (2) and the legitimate aim standard

32. Before considering the immigration context (using that term here in a wide sense to cover both immigration and asylum cases) it will aid perspective if we first of all briefly survey the Article 8 jurisprudence, with particular reference to 8(2). Article 8 of the Convention provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Strasbourg jurisprudence on Article 8(2)

33. The case law bearing on Article 8(2) is voluminous, commentary on it even more so. So far as concerns the leading UK cases, it is noteworthy that they all present themselves as being based on the Strasbourg jurisprudence. It is well-established, of course, that whilst it is not unlawful for UK courts and tribunals to depart from Strasbourg jurisprudence, as a general principle "the Convention should not be interpreted and applied more generously in favour of an applicant than the Strasbourg jurisprudence clearly warrants" (Lord Brown in *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45 [97]).

34. Leaving aside for the moment the immigration context, it is almost holy writ in Strasbourg that analysis of an Article 8 claim requires a structured approach and the Court will typically reflect that in its use of sub-headings, so that it first deals with whether the claim engages an Article 8(1) right and whether there has been an interference with that right. Reflecting the fact that Article 8 is one of the Convention's derogable rights, the Court next goes on to consider limitations imposed by Article 8(2). The structure of Article 8(2) is designed to qualify the exercise of the rights guaranteed under the first paragraph by specifying six grounds which the state is permitted to use to justify limitations or restrictions on Article 8(1) rights - commonly termed (heads or grounds of) "permissible restrictions" or "permitted exceptions". The six grounds are: interests of national security, public safety, economic well-being of the country, prevention of disorder or crime, protection of health or morals, protection of the rights and freedoms of others.

35. Article 8(2) requires it to be determined whether any interference with an Article 8(1) right can be justified on the basis of three standards: that it must be "in accordance with the law"; that such interference must pursue any of the legitimate aims exhaustively laid down in the second paragraph; and thirdly that an interfering measure must be considered as "necessary in a democratic society" (which essentially calls for a proportionality assessment by reference to whether there is a "pressing social need").

Legitimate Aim and Article 8(2)

36. It is a feature of the jurisprudence that very little attempt has been made to delineate a precise definition of any of the six grounds or exceptions; and indeed in many cases the treatment of the legitimate aim is perfunctory and formulaic. It is even possible to find some cases (e.g. *Gul v Switzerland* [1996] ECHR 5) where the Court does not address it at all. Why we do not consider that curious will become clearer below.

Shorthand of 'public interest'

37. It is apparent from perusal of the Strasbourg and UK case law that these grounds are sometimes given the shorthand descriptor "public interest" or "interests of the community": see e.g. *Powell and Rayner v the United Kingdom* [1990] ECHR 2, 21 February 1990, [41], Series A no. 172).

Exhaustively enumerated

38. The six grounds of permissible restriction are not an open-ended list; they are exhaustively defined: see *Golder v UK* (1975) 1 EHRR 524, at [44] where the Court held that there are no implied limitations on Article 8 rights: the only lawful limitations are those specified in paragraph 2.

Restrictively interpreted

39. The burden rests on the state to establish that the interference with rights under Article 8 was justified under paragraph 2 of the Article (*R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45 [44]). Being exceptions they must not be applied so as to unduly restrict Article 8(1) rights; in consequence the exceptions provided for in

paragraph 2 of Article 8 are to be "narrowly interpreted" (*Silver and Others* [1983] ECHR 5 [97]; *Klass and Others v Germany* [1978] ECHR 4 [42]) and any restriction "must be convincingly established" (*Funke v France* [1993] ECHR 7 [55], *Société Colas Est and Others v France*, no. 37971/97, [47], ECHR 2002-III).

40. At the same time, the grounds themselves are broadly drawn: in the words of A H Robertson in his seminal work, Human Rights in Europe, 1963 "the net is widely cast". For example the "economic well-being" ground is defined in terms of the "economic well-being *of the country*". The disjunctive wording of the "prevention of disorder or crime" ground entails that even if there is no criminal dimension the maintenance of order is also covered. And what could be more extensive than "the rights and freedoms of others". So however narrowly such grounds are to be interpreted, their material scope is intrinsically wide.

Each head's general and particular aspects

41. As noted by Baroness Hale in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 at [28], "each of the legitimate aims listed [in Article 8(2)] may involve individual as well as community interests". In most cases it is the general or community interest which is highlighted. Thus the "economic well-being" ground has been found to justify a wide range of government policies and activities. In *Powell and Rayner v UK*, for example, the Court accepted that pursuit of the legitimate aim of "economic well-being" was demonstrated by the fact that Heathrow Airport occupied a position of central importance in the economy of the UK. But in a significant number of cases the Court has also had regard either to individual or more specific elements of this ground, Thus in *Lopez Ostra v Spain* [1994] ECHR 46 at [58] the legitimate aim pursued was not described as the country of Spain's economic well-being, but "the town's economic well-being- that of having a waste treatment plant".

Identification

42. In Article 8 cases brought before the Court the submissions of the respondent government will typically seek to identify the legitimate aim said to be pursued by the impugned measure, but it is significant that that does not always happen and even when it does the Court will not necessarily engage with those submissions or, if it does, it will not necessarily agree with them. Essentially the Court reconstructs for itself what it considers to be the legitimate aim or aims in play. Its focus is on whether the allegation of a violation is made out and in that context it has regard to everything that is known about the impugned measure including its wider legislative context and how the relevant law or rules are applied in practice. So although it is for the state to justify any interference with an Article 8(1) right, that is not seen to require the state necessarily to identify expressly the legitimate aim or aims. The state does not have to pin its "legitimate aim" flag to the mast.

Impact and importance

43. The above observation serves in part to explain why, to quote from another leading text, van Dijk et al Theory and Practice of the European Convention on Human Rights, 4th

ed.2006 at 341, "the Strasbourg organs have very rarely found a violation of Convention rights by reference to the legitimate aim standard". This commentary goes on to identify the main reason for this as being that "assessment of this standard is normally carried out in conjunction with the third standard, "necessary in a democratic society", and in particular , with the application of proportionality". That fully accords with the approach of the Court, e.g. in *Vasquez v Switzerland* [2013] ECHR 1182 at [43], where it noted that in order to justify interference with an Article 8(1) right measures must be "in accordance with the law and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued". To similar effect, using slightly different terminology, Lester and Pannick, in Human Rights Law and Practice, 2nd ed.p.306 describe the three standards enshrined in Article 8(2) as being closely interconnected:

> "Should the measure prove to be in accordance with the law, the test of necessity involves deciding whether there is a "pressing social need" for the interference and whether the means employed are proportionate to the legitimate aim(s) pursued by the state. *In conducting such an examination, the nature, context and importance of the right asserted and the extent of interference must be balanced against the nature, context and importance of the public interests asserted as justification*". (Emphasis added).

44. In this way the identification of the legitimate aim or aims only becomes instrumental at the stage of assessing proportionality. Justification of an impugned measure has to be made by reference to the aim or aims it is seen to pursue. Hence it may sometimes be important to the striking of the balance to particularise what the elements of the relevant legitimate aim or aims is/are and how much weight should be accorded to it/them in the particular case. The rationale for this understanding was noted by Lord Bingham in *Huang* [2007] UKHL 11 at [19] where he made reference to *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80, in which the Privy Council, drawing on South African, Canadian and Zimbabwean authority, defined the questions generally to be asked in deciding whether a measure is proportionate as:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

45. Thus (to reformulate in Article 8 terms) an integral part of the proportionality assessment is examining whether there is a rational connection between the aim pursued and the measure taken and whether the means used to pursue that aim are no more than is necessary.

Multiple aims

46. It is uncontroversial that a measure constituting interference with a person's Article 8(1) rights can pursue more than one legitimate aim and it is extremely common for the Court to identify more than one legitimate aim. Thus in *Klass v Germany* the legitimate aim of the legislation for monitoring communications was accepted by the Court as being to safeguard national security and/or prevent disorder or crime. Thus in *Silver v UK* (1983) 5

EHRR 347 interference with prisoners' correspondence was seen to pursue the legitimate aim of both protection of morals and of the rights and freedoms of others. In *Funke v France* (1993) 16 EHRR 297 customs investigations were seen to pursue the "economic well-being of the country" and "perhaps also…the prevention of crime".

The Strasbourg jurisprudence on Article 8 in the immigration context

47**.** The particular need for a structured approach to Article 8 in the field of immigration has been driven home in a number of decisions: see e.g. *Nhundhu and Chiwera* 01/TH/0613 and *Razgar* [2004] UKHL 27. In the latter case Lord Bingham said at [17] that in a case where removal is resisted in reliance on article 8, the questions are likely to be:

(1) Will the proposed removal be interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

He added the following commentary:-

18. If the reviewing court is satisfied in any case, on consideration of all the materials which are before it and would be before an adjudicator, that the answer to question (1) clearly would or should be negative, there can be no ground at all for challenging the certificate of the Secretary of State. Question (2) reflects the consistent case law of the Strasbourg court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention: see, for example, *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112. If the reviewing court is satisfied that the answer to this question clearly would or should be negative, there can again be no ground for challenging the certificate. If question (3) is reached, it is likely to permit of an affirmative answer only.

19. Where removal is proposed in pursuance of a lawful immigration policy, question (4) will almost always fall to be answered affirmatively. This is because the right of sovereign states, subject to treaty obligations, to regulate the entry and expulsion of aliens is recognised in the Strasbourg jurisprudence (see Ullah and Do, para 6) and implementation of a firm and orderly immigration policy is an important function of government in a modern democratic state. In the absence of bad faith, ulterior motive or deliberate abuse of power it is hard to imagine an adjudicator answering this question other than affirmatively.

20. The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and

consequences of the interference will call for careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have been before the Secretary of State. A reviewing court must assess the judgment which would or might be made by an adjudicator on appeal. In *Secretary of State for the Home Department v Kacaj* [2002] Imm AR 213, paragraph 25, the Immigration Appeal Tribunal (Collins J, Mr C M G Ockelton and Mr J Freeman) observed that:

"although the [Convention] rights may be engaged, legitimate immigration control will almost certainly mean that derogation from the rights will be proper and will not be disproportionate."

In the present case, the Court of Appeal had no doubt (paragraph 26 of its judgment) that this overstated the position. I respectfully consider the element of overstatement to be small. Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis. (Emphasis added).

Legitimate aim in immigration cases

48. Bearing out what was noted in our general survey, we have not found any immigration case in Strasbourg which has turned on the sole issue of whether any legitimate aim standard was met. And it is only relatively rarely that the issue of legitimate aim has been seen to play a significant part in judicial deliberations. The best explanation for why this should be so is perhaps afforded by what was said by Lord Bingham at [19] of *Razgar* (see above). Question 4, he said, would "[a]lmost always fall to be answered affirmatively".

49. Undoubtedly one key reason why the case law has seen the legitimate aim standard to be easily satisfied (both generally and in the immigration context) is linked to the fact that the Convention accords contracting states a "margin of appreciation" and it is not to be expected of such states in the context of derogable rights to reliably establish by empirical evidence that the aim it pursues is legitimate. As explained by Maurice Kay LJ in *R (Bibi and others) v SSHD* [2013] EWCA Civ 322; Imm AR [2013] 1007 in relation to the new English language test introduced in Immigration Rules:

"28. I do not doubt that the Rule creates anomalies. For example, a foreign spouse who is from one of the exempt countries but who does not speak English is able to enter without satisfying the pre-entry test, whilst a fluent English-speaking spouse from a non-exempt country who does not have the necessary educational qualifications has the inconvenience of satisfying the pre-entry requirement. It is simply not possible to predict with precision how many people fall into either of those categories. This brings me to the heart of Mr Gill's conceptual case. His principal complaint, it seems to me, is that the justification proffered by the Secretary of State is long on estimates, assumptions, predictions and speculative assertions but short on empirical proof that the amended Rule will not operate in a disproportionate manner.

29. In my judgment, there are two answers to this submission. First, it is difficult for a court to adjudicate upon such a submission in the abstract. In a sense, the appellants have set a hypothetical ball rolling and are seeking to take advantage of its hypothetical nature. Secondly, and more importantly, the submission misunderstands

the scope for judicial intervention in a case such as this. I consider this to be the most important point in this case. It calls for further elucidation.

30. The pre-entry test was conceived as a benign measure of social policy with the purpose of facilitating the integration of non-English-speaking spouses. Where a State seeks to change its immigration rules in order to produce a benign result, *it would be regrettable if, in order to justify the measure, whether pursuant to Article 8.2 or Article 14, it faced a burden which could only be discharged by irrefutable empirical evidence. The Secretary of State's perception is essentially one of predictive judgment. Many a well-intentioned social change is supported by a rational belief in its potential to achieve its benign purpose but without being susceptible to empirical proof prior to its introduction. It is for this reason that it is appropriate for the State authority to be accorded a margin of appreciation in the formulation of its social policy. Without such an indulgence, many benign reforms would be stifled in limine.* Of course the implications of the change of policy may be so dubious that it is demonstrably not justifiable. However, in some situations a margin of appreciation has to be pitched at a level which allows for change, even if there is some risk to some individuals, that they will be adversely affected by it. The principle was articulated in Stec v United Kingdom [2006] 43 EHHR 47, a case concerning Article 14, together with Article 1 of the First Protocol, but relevant to the present case, not least because the appellants emphasise the discriminatory aspect of the pre-entry test requirement (to which I shall return). The Strasbourg Court said (at paragraph 52):

> "… a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. … Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'."

This test informed the recent decision of the Supreme Court in Humphreys v Revenue and Customs Commissioners ([2012] 1 WLR 1545, [2012] UKSC 18). Without it, it might become impossible for a government to govern without waiting for judges to judge." (Emphasis added)

(See also Blake J in MM, R (On the Application Of) v The Secretary of State for the Home Department [2013] EWHC 1900 (Admin) (05 July 2013) at [111]).

50. Notable also in immigration cases is impatience on the part of the Court with evaluation of the legitimate aim standard in isolation. Thus in Alim v Russia [2011] ECHR 1453 the Court stated at [85]: "It was argued by the respondent Government that this interference pursued a legitimate aim of protecting public safety or order. However, the key question for the Court is whether the measure was necessary in a democratic society and proportionate to the legitimate aim pursued."

51. That question requires the Court to consider the differential impact of the proportionality doctrine depending on the nature and source of the State policy which interferes with the Article 8 right (SS (Nigeria v SSHD) [2013] EWCA Civ. 550 [13]). Thus in Article 8 immigration cases involving expulsion of criminals it is apparent that in addition to the need to prevent the individual concerned committing a further offence, there has also to be weighed on the "public interest" side of the scales the additional interest of the

state in deterrence and in expression of public revulsion at criminality: this "may contribute to the legitimate aim" (Blake J in *Sanade (British Children: Zambrano: Dereci)*, [2012] UKUT 00048 (IAC) [48]).

Identification

52. As observed in our general survey, the legitimate aim pursued by a state's measure which interferes with an Article 8(1) right is typically identified by the Court itself but that is not always the case. We already noted the example of *Gul v Switzerland* where the Court made no mention of it at all, although the logic of their decision was plainly that there was such an aim. It is not uncommon for the Court to note that whilst the respondent government has identified two or three grounds, it will mention only one as being engaged: see e.g. *Slivenko v Latvia* [2003] ECHR 498 in which the government had identified "national security" and "prevention of disorder and crime" but the Court treated the legitimate aim as being "national security" only [112].

Identification in terms of "public interest"

53. One can find some decisions of the Court and many decisions of UK courts and tribunals where the only identification given of the legitimate aim is in terms of "the public interest" or the "community's interests". Thus in the Grand Chamber judgment in *Vasquez v Switzerland* 1785/08 [2013] ECHR 1182 (26 November 2013 at [39] it is stated that:"[t]he Court has further consistently held that the Contracting States have a certain margin of appreciation in assessing the need for interference, but it goes hand in hand with European supervision. The Court's task consists in ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual's rights protected by the Convention on the one hand and the community's interests on the other (see *Slivenko and Others*, cited above, § 113, and *Boultif* cited above)."The same principle is set out in *Razgar, R (on the Application of) v Secretary of State for the Home Department* at [20]. We see no problem with that as a shorthand so long as it is not forgotten what it summarises: the six grounds of permissible restriction do not encompass all aspects of the "public interest", e.g. they do not cover the cultural or religious well-being of the state.

54. However, use of "public interest" or "community's interests" as a shorthand does carry with it the very significant difficulty that in some cases it may weaken or obscure the particular justification given as part of the proportionality assessment for the impugned measure or decision.

55. In the UK context the new immigration rules introduced in July 2012 contain references to "the public interest": see e.g. paragraph 276B(ii). The introductory paragraph to Appendix FM, GEN.1.1 states that the route this appendix provides for those seeking to enter or remain in the UK on the basis of their family life "reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims…" It then proceeds to list all 6 grounds of permissible restriction set out in Article 8(2). The rules dealing with Article 8 claims made by foreign criminals that their deportation would be contrary to the UK's obligations under Article 8 refer simply to "the public interest in deportation" (see para 398(c))

without any other elaboration or more precise identification of any legitimate aim. However, as is recorded by the Court of Appeal in MF at [11]-[13], in a 13 June 2012 statement entitled "Immigration Rules on Family and Private Life: Grounds of Compatibility with Article 8 of the ECHR", in the course of discussing the new 10-year route to settlement for those whose removal would breach Article 8, it is said at paragraph 67:

> "Bringing A8 [Article 8] within the Rules will ensure consistency, fairness and transparency in decision-making. We will retain discretion to grant leave outside the Rules in genuinely exceptional cases where it is considered that the Rules will produce a disproportionate result. However, it is considered that those cases will be rare since the new Rules reflect the Government's view – which Parliament will be invited to endorse – of *how the balance should be struck between individual rights under A8 and the public interests in safeguarding the UK's economic well-being in controlling immigration and in protecting the public from foreign criminals*." (Emphasis added)

56. And in the Explanatory Memorandum attached to the new rules itself it is stated, under the heading "Approach to ECHR Article 8" at paragraph 7.2:

> "The new Immigration Rules will reform the approach taken as a matter of public policy towards ECHR Article 8 – the right to respect for family and private life – in immigration cases. The Immigration Rules will fully reflect the factors which can weigh for or against an Article 8 claim. The rules will set proportionate requirements that reflect the Government's and Parliament's view of *how individuals' Article 8 rights should be qualified in the public interest to safeguard the economic well-being of the UK by controlling immigration and to protect the public against 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. Outside exceptional cases, it will be proportionate under Article 8 for an applicant who fails to meet the requirement of the rules to be removed from the UK." (Emphasis added)

Partial identification: "maintenance of immigration control"

57. In a significant number of immigration cases one finds some attempt at identification of the legitimate aim but it is limited to identifying the aim as "maintenance of effective immigration control": see e.g. (Strasbourg cases) *Ahmut v Netherlands* [1996] ECHR 61 [73], *Osmond v Denmark* [2011] ECHR 926 at [58], *Omoregie* [2008] ECHR 761 [68], *Osmond v Denmark* [2011] ECHR 926, *Nunez* [2011] ECHR 1047 [84], *Antwi* [2012] ECHR 259 [86], [93], *Ajayi* [1999] ECHR 197 [29] *Alem Biraga* [2012] ECHR 785[56]; and (UK cases) Lord Hope in [44], the HL in *Huang* [2007] UKHL 11 [16], *VW (Uganda)* [2009] EWCA Civ 5 at [29], *SS (India) v SSHD* [2010] EWCA Civ 388 at [53], *AN (Afghanistan)* [2013]EWCA Civ 1189 [17]; *GS (Article 8, public interest not a fixity)* Serbia and Montenegro [2005] UKAIT 00121; *PO (interests of the state –Article 8)* Nigeria [2006] UKAIT 00087, *Nasim and others (Article 8) Pakistan* [2014] UKUT 25 (IAC)[14], [19]; Blake J in *Mansoor* [2011] EWHC 832 (Admin) [38]. (Indeed in the SSHD's grounds of appeal in this case "maintenance of effective immigration control" was the aim the decision to refuse the claimant was said to pursue.) On its face that has struck some commentators as curious because "maintenance of effective immigration control" is palpably not one of the grounds of permissible restriction, which as we have seen are set out exhaustively in Article 8(2). But it is clear

from such cases that the Court regards this formulation as condensing the most important aspect of the legitimate aim or aims in play. Lord Bingham's observations cited above in Razgar at [19] convey well why that should be so: "implementation of a firm and orderly immigration policy is an important function of government in a modern democratic state"; immigration control which secures the borders is of crucial importance to the interests of the state and wider community in diverse respects. It is one of the interests of the state that gives rise to a sovereign right of a state to control entry and exit and the Court has routinely prefaced its treatment of Article 8 immigration cases by confirming that position: In *Maslov* [2008] ECHR 546 at [68] the Grand Chamber reiterated what was said in *Üner* [2006] ECHR 873 [54], namely that:

> " The Court reaffirms at the outset that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 34, § 67, *Boujlifa v. France*, judgment of 21 October 1997, *Reports of Judgments and Decisions* 1997 VI, p. 2264, § 42)."

58. In these cases the Court must be taken to presuppose that "maintenance of effective immigration control" is the most relevant aspect of at least one of the six grounds – "national security", "public safety", "economic well-being, "prevention of disorder or crime","protection of health or morals", "rights or freedoms of others".

59. We shall deal below with the more vexed question of whether "maintenance of effective immigration control" properly falls within either (or both) the "prevention of disorder or crime" ground or "the economic well-being" ground.

Ancillary aims

60. In the UK jurisprudence certain cases, mostly those concerned with issues of whether legislation and policy itself violates Article 8 (or Article 8 in conjunction with Article 14) rights, the related point has been made that it is not always easy to encapsulate relevant aims or purposes squarely within any of the Article 8(2) heads: e.g. in *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45 which concerned the compatibility with the Convention of new Immigration Rules requiring persons eligible for marriage visas to be at least 21 of age, Baroness Hale noted at [72]-[73] that there were other *ad hoc* purposes pursued by the relevant immigration rules distinct from "pure immigration control", in particular to prevent forced marriages. At [73] she concluded that "This is undoubtedly a legitimate aim, in article 8(2) terms, "for the protection of the rights and freedoms of others".

61. In *Chapti & Ors, R (on the application of) v Secretary of State for the Home Department & Ors* (Rev 1) [2011] EWHC 3370 (Admin) (16 December 2011at [83], which concerned a human rights challenge to new Immigration Rules introducing a pre-entry English language test, Beatson J noted JCWI's submission that "immigration control" is not a free-standing legitimate aim and that the less squarely the aims of a measure fall within the stated aims of Article 8(2) "the harder it will for the SSHD to discharge her burden of establishing that the interference is proportionate". In advance of giving reasons for rejecting this submission, at [64], Beatson J noted two features of the case law that did not

sit easily together. First, it was clear that "immigration control" has been regarded as a legitimate aim for the purposes of Article 8(2) without particular reference to any of the specified legitimate aims. On the other hand, it was not always the case that case law placed focus on the overall system of immigration control: e.g. in *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45 Lord Wilson and Lady Hale had examined a particular aim (prevention of forced marriages) and a particular rule rather than the overall system of immigration control. (We note that at [45] Lord Wilson had agreed with Lady Hale in identifying the amendments to the legislation as pursuing the legitimate aim of protection of the rights and freedoms of others). Beatson J's resolution of this tension at [85] was as follows:

> "The breadth of the aims expressly identified in Article 8(2) means that many more specific aims will fall within them and be capable of justifying an interference with a person's Article 8 rights. In *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45 the aim of deterring forced marriages fell into the last of the Article 8(2) categories, "the protection of the rights and freedoms of others". In the present case the categories of protection of "economic wellbeing" (in view of the evidence about the impact on job prospects), "health" (in view of the evidence about accessing health services), and possibly "public safety" or the "protection of the rights and freedoms of others" (in view of the evidence about the protection of women from domestic violence) mean that the new requirement does pursue a legitimate public aim."

62. Since it was clear in these cases that legitimate aims were in play, this must be taken as recognition that their broadly-drawn character means that they may include a number of ancillary aims.

Multiple aims

63. Whilst most Strasbourg immigration cases identify either "prevention of disorder or crime" or (much less commonly) "economic well-being" as a legitimate aim, it would be wrong to think that other grounds have not also been seen quite often to be in play: e.g. in *Slivenko* [110]-[112], whereas the government argued that its legitimate aim was prevention of crime or disorder and national security, the Court said it was just national security. National security was the only aim considered in play in *Liu v Russia* [2007] ECHR 1056 at [60]. In *Alim v Russia* it was public safety [85] although at [96] this was expressed as a seeming amalgam of the public safety and "prevention of disorder or crime" ground ("the protection of public safety or order"). In *Vasquez v Switzerland*, the two legitimate aims said to be pursued were "public safety" and "prevention of disorder and crime". In *Omoregie* [56] the legitimate aims were prevention of crime or disorder and economic well-being. "The "protection of health or morals" (alongside "prevention of disorder or crime") has been a particularly prominent legitimate aim noted in cases concerning expulsion of serious drugs offenders: see e.g. *El-Khaouli* 40266/98 and *Laarej v France* 41318/98.

Most common ground - "prevention of disorder and crime"

64. Surveying Strasbourg jurisprudence, both that emanating from the former Commission and that emanating from the Court, it is clear that in the great majority of immigration

cases the principal (often only) ground identified as a legitimate aim is "prevention of disorder or crime". Within this category are two main types of case: (a) criminal cases; and (b) non-criminal cases. By "criminal cases" we mean here cases in which the state has sought to expel a foreign national solely or mainly because he or she has committed criminal offences other than those arising solely out of breaches of immigration law. We draw the distinction in this way because in most if not all Council of Europe states violation of immigration controls can give rise to criminal liability, but the Court has ordinarily made very clear that it regards criminal liability of the latter sort as a by-product of a civil wrong consisting of the flouting of immigration law: see e.g. *Nunez v Norway* [71].

(a) Criminal cases

65. In criminal cases, the "prevention or disorder or crime" ground is seen to be in play almost invariably: see e.g. *C v Belgium* [1996] ECHR 28 [26]; *Sezen v Netherlands* [2006] ECHR 87; In the UK the higher courts have tended to regard the fact that deportation action has been taken because of a person's criminal history as *ipso facto* meaning that the legitimate aim is that of "prevention of crime or disorder": see e.g. *SS (India) v SSHD* [2010] EWCA Civ 388 [35] and *N (Kenya)* [2004] EWCA Civ 1094.

66. In such cases UK courts and tribunals have also seen an important aspect of the legitimate aim to be that of deterrence. Thus in *RU (Bangladesh)* [2011] EWCA Civ 651 at [43] it was said:

> "The point about "deterrence" is not whether the deportation of a particular "foreign criminal" may or may not have a deterrent effect on other offenders or prospective offenders. It concerns a much more fundamental concept which is explained by Judge LJ at [83] of his judgment in *N (Kenya)*. The UK operates an immigration control system by which control is exercised over non-UK citizens who enter and remain in the UK. The operation of that system most take account of broad issues of social cohesion in the UK. Moreover, the public has to have confidence in its operation. These requirements are for the 'public good' or are in the 'public interest'." (See to similar effect *DS (India)* [2009] EWCA Civ 544 [37] and *AM v SSHD* [2012] EWCA Civ 1634 at [24]).

(b) Non-criminal cases

67. However it is important to note that "prevention of disorder or crime" has also been seen as a legitimate aim even in cases not involving persons who have a criminal history and where the only wrongdoing resides in ordinary breaches of immigration law. That observation carries with it this caveat: that certainly seems a fair summary of the first 40 years or so of Strasbourg jurisprudence, but the position is less clear in the past two decades. In this more recent period, it is difficult to find many cases that have come before the Court that fall into the non-criminal category and in many of those cases the Court appears to prefer to frame the legitimate aim by reference to "maintenance of immigration control" only, leaving unclear which legitimate aim(s) this is seen as an aspect of: see e.g. *Ahmut v Netherlands* [73], *Antwi* [86], [93], *Nunez* [84], *Alem Biraga* [56]; (in the UK) see the House of Lords in *Huang* [16]). Or, as in *D v UK* (1997) 24 EHRR 423 [48], *Bensaid v United*

Kingdom - 44599/98 [2001] ECHR 82 [48] and *Omeregie* [56], the Court couples "prevention of disorder or crime" with "economic well-being".

68. In relation to the position taken in the older cases, the reason for identifying "prevention of disorder or crime" is not stated, but it must surely reside in the textual fact, already noted, that the "prevention of disorder or crime" ground has two components, one which does not refer to crime but to "prevention of disorder". Put simply, the rationale appears to be that but for "maintenance of effective immigration control" there would be a real threat of disorder.

69. In line with this, the Court has been at pains to reject any suggestion that the "maintenance of effective immigration control" head is only apposite when the case has a criminal element. Thus in *Nunez* [71], having identified the legitimate aim as "the public interest in ensuring effective immigration control" [84], the Court held that "the applicant's argument to the effect that the public interest in an expulsion would be preponderant only where the person concerned had been convicted of a crime must be rejected"[71], [84].

70. The Court has also made clear that even when there is no criminal conduct involved, the aim of "effective immigration control" also encompasses general, not just particular, deterrence. Such deterrence is not just invoked in relation to crime. Thus in *Antwi v Norway* at [90] the Court noted:

> "Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see *Nunez*, cited above, § 71, and *Darren Omoregie and Others v. Norway*, no. 265/07, § 67, 31 July 2008; see also *Kaya v. the Netherlands* (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see *Nunez* and *Darren Omoregie and Others*, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see *Nunez*, cited above, § 73)."

71. In a similar vein, Sir Stanley Burnton in *FK & OK (Botswana)* [2013] EWCA Civ 238 at [11] stated (in relation to non-criminal cases): "[t]hat the individuals concerned in the present case are law-abiding (other than in respect of immigration controls) does not detract from the fact that the maintenance of a generally applicable immigration policy is, albeit indirectly, a legitimate aim for the purposes of article 8.2."

72. Particularly bearing in mind the fact that it is very hard to find recent non-criminal cases where the Strasbourg Court has identified "prevention of disorder or crime" as the sole legitimate aim, it must be observed that there are at least two difficulties in the way of regarding "effective maintenance of immigration control" as routinely being an aspect of the "prevention of disorder or crime"aim. One is that it if it were such it would have been very easy for the Court to have said so in all the cases where it identifies the aim as the former. The other is that when setting out factors to be taken into account for the purposes of the proportionality assessment in immigration cases the Court often uses a formulation

which, read literally, would appear to suggest that "immigration control" is distinct from considerations of order. Thus for example in *Nunez* at [70] the Court said:

> "70. The Court further reiterates that Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see Gül, cited above, § 38; and Rodrigues da Silva and Hoogkamer, cited above, § 39). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and *whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion* (see Rodrigues da Silva and Hoogkamer, cited above, ibid.; Ajayi and Others v. the United Kingdom (dec.), no. 27663/95, 22 June 1999; Solomon v. the Netherlands (dec.), no. 44328/98, 5 September 2000). Another important consideration 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 (see Jerry Olajide Sarumi v. the United Kingdom (dec.), no. 43279/98, 26 January 1999; Andrey Sheabashov c. la Lettonie (dec.), no. 50065/99, 22 May 1999). Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances (see Abdulaziz, Cabales and Balkandali, cited above, § 68; Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998, and Ajayi and Others, cited above; Rodrigues da Silva and Hoogkamer, cited above, ibid.)." (Emphasis added)

But perhaps indicative that the Court does not in fact mean by this formulation to treat immigration control and considerations of public order as antinomies, the Court in *Omoregie* combined use of this same formulation with a finding that the legitimate aim was both "prevention of disorder or crime" and "economic well-being".

"Economic well-being"

73. There are non-criminal immigration cases in which "economic well-being" is the only ground identified, e.g. *Berrehab v The Netherlands* (1988) 11 EHRR 322, *Abdulaziz* [1985] ECHR 7 [58] and *Rodriguez da Silva* [2006] ECHR 86 [44] and *Ciliz v The Netherlands* [2000] 2 FLR 469. Indeed (albeit unusually) in *Berrehab* the Court went so far as to specifically reject the government's attempt to rely on the legitimate aims of "prevention of disorder or crime" and "rights and freedoms of others":

> "25. In the applicants' submission, the impugned interferences did not pursue any of the legitimate aims listed in Article 8 § 2 (art. 8-2); in particular, they did not promote the "economic well-being of the country", because they prevented Mr. Berrehab from continuing to contribute to the costs of maintaining and educating his daughter.
>
> The Government considered that Mr. Berrehab's expulsion was necessary in the interests of public order, and they claimed that a balance had been very substantially achieved between the various interests involved.

> The Commission noted that the disputed decisions were consistent with Dutch immigration-control policy and could therefore be regarded as having been taken for legitimate purposes such as the prevention of disorder and the protection of the rights and freedoms of others.
>
> 26. The Court has reached the same conclusion. It points out, however, that the legitimate aim pursued was the preservation of the country's economic well-being within the meaning of paragraph 2 of Article 8 (art. 8-2) rather than the prevention of disorder: the Government were in fact concerned, because of the population density, to regulate the labour market."

74. But such cases are few and far between and of these some also mention another legitimate aim as being in play: e.g., *Abdulaziz* [57], [76], [86] and *Omoregie* [56].

75. The position is different, however, when we turn to consider UK cases, as we shall see when we turn to consider more closely the criminal/non-criminal classification.

Criminal/non-criminal classification

76. In the UK case law there are decisions that make some attempt to divide immigration cases into two categories, criminal and non-criminal with the former being seen to engage "prevention of disorder or crime" and the latter "economic well-being". Thus Baroness Hale in *Razgar* stated:

> "44. Article 8 cases in the immigration and expulsion context tend to be of two different types. Most commonly, the person to be expelled has established a family life in the contracting state. His expulsion will be an interference, not only with his own right to respect for his private and family life, but also with that of the other members of his core family group: his spouse (or perhaps partner) and his children. The Strasbourg court regards its task as to examine whether the contracting state has struck a fair balance between the interference and the legitimate aim pursued by the expulsion. The reason for the expulsion and the degree of interference, including any alternative means of preserving family ties, will be explored and compared.
>
> 45. Sometimes, the reason for expulsion will be immigration control, which is a legitimate aim 'in the interests of the economic well-being of the country'. In *Berrehab v The Netherlands* (1988) 11 EHRR 322 the applicant was a Moroccan who was refused a further residence permit after his divorce from his Dutch wife. This was an interference with his right to respect for his family life with his young daughter, whom he saw four times a week for several hours each day. The interference was disproportionate. The applicant had lived there legitimately for several years, had a home and a job there, and very close ties with his daughter which his expulsion threatened to break. A similar case was *Ciliz v The Netherlands* [2000] 2 FLR 469; the applicant was a Turk who was refused a further residence permit after separating from his Dutch wife, despite the fact that he was still pursuing an application for contact with his son; the expulsion thus interfered with the process which was designed to fulfil the state's positive obligation to enable family ties to develop between father and son. In neither case was there an alternative means of preserving or establishing family ties between father and child.

46. Sometimes, the legitimate aim will be 'the prevention of disorder or crime'. This has arisen in a long line of cases concerning people who have lived in the contracting state since childhood but remain liable to expulsion if they commit serious crimes."

77. Something similar was said by (now) Lady Hale in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 at [17]-[19]:

18. These questions tend to arise in two rather different sorts of case. The first relates to long-settled residents who have committed criminal offences (as it happens, this was the context of *WL (Congo) v Secretary of State for the Home Department*, above). In such cases, the principal legitimate aims pursued are the prevention of disorder and crime and the protection of the rights and freedoms of others. The Strasbourg court has identified a number of factors which have to be taken into account in conducting the proportionality exercise in this context. The leading case is now *Üner v The Netherlands* [2007] 45 EHRR 14. The starting point is, of course, that states are entitled to control the entry of aliens into their territory and their residence there. Even if the alien has a very strong residence status and a high degree of integration he cannot be equated with a national. Article 8 does not give him an absolute right to remain. However, if expulsion will interfere with the right to respect for family life, it must be necessary in a democratic society and proportionate to the legitimate aim pursued. At para 57, the Grand Chamber repeated the relevant factors which had first been enunciated in *Boultif v Switzerland* [2001] 33 EHRR 50 (numbers inserted)….
19. The second sort of case arises in the ordinary immigration context, where a person is to be removed because he or she has no right to be or remain in the country. Once again, the starting point is the right of all states to control the entry and residence of aliens. In these cases, the legitimate aim is likely to be the economic well-being of the country in controlling immigration, although the prevention of disorder and crime and the protection of the rights and freedoms of others may also be relevant. Factors (i), (iii), and (vi) identified in *Boultif* and *Üner* are not relevant when it comes to ordinary immigration cases, although the equivalent of (vi) for a spouse is whether family life was established knowing of the precariousness of the immigration situation. "

78. In *FK & OK (Botswana)* the Court was faced with a submission that there could be no legitimate aim justified by reference to maintenance of immigration control unless it was linked to fear of violence or other crime. Sir Stanley Burnton gave three reasons for rejecting that submission:

"10.I would reject this submission for three reasons. The first is that this point was not taken before either the First-tier Tribunal or the Upper Tribunal. Immigration Judge Hanson …

11. The second reason is that the maintenance of immigration control is not an aim that is implied for the purposes of article 8.2. Its maintenance is necessary in order to preserve or to foster the economic well-being of the country, in order to protect health and morals, and for the protection of the rights and freedoms of others. If there were no immigration control, enormous numbers of persons would be able to enter this country, and would be entitled to claim social security benefits, the benefits of the National Health Service, to be housed (or to compete for housing with those in this country) and to compete for employment with those already here. Their children would be entitled to be educated at the taxpayers' expense (as was the second appellant). All such matters (and I do not suggest that they are the only matters) go to the economic well-being of the country. That the individuals concerned in the present case are law-abiding (other than in respect of immigration controls) does not detract from the fact

that the maintenance of a generally applicable immigration policy is, albeit indirectly, a legitimate aim for the purposes of article 8.2.

12. The third reason for rejecting this submission is that it is inconsistent with binding authority. For present purposes, it is sufficient to refer to *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 [2004] 2 AC 368 and to *Huang v Secretary of State for the Home Department* [2007] UKHL 11 [2007] 2 AC 167. In *Razgar*, Lord Bingham of Cornhill cited the judgment of the European Court of Human Rights in *D v UK* (1997) 24 EHRR 423, in which the Court said, at paragraph 48, in relation to the deportation of the appellant to Algeria, that:

> "such interference may be regarded as complying with the requirements of article 8, namely as a measure 'in accordance with the law', pursuing the aims of the protection of *the economic well-being of the country* and the prevention of disorder and crime, as well as being 'necessary in a democratic society' for those aims."
>
> The italics are mine."

79. In *JO (Uganda) v Secretary of State for the Home Department* [2010] EWCA Civ 10 Richards LJ said:

> 28. I have concentrated so far on deportation. Cases of ordinary administrative removal of persons unlawfully present in the country operate within the same legal framework and in my view require essentially the same approach. There, too, the essential question is whether, if expulsion would interfere with rights protected by article 8(1), such interference is proportionate to the legitimate aim pursued; and the answer to that question generally requires a judgment to be made on the basis of a careful and informed evaluation of the facts of the particular case.
>
> 29. There is, however, one material difference between the two types of case, in that they generally involve the pursuit of different *legitimate aims*: in deportation cases it is the prevention of disorder or crime, in ordinary removal cases it is the maintenance of effective immigration control. The difference in aim is potentially important because the factors in favour of expulsion are in my view capable of carrying greater weight in a deportation case than in a case of ordinary removal. The maintenance of effective immigration control is an important matter, but the protection of society against serious crime is even more important and can properly be given correspondingly greater weight in the balancing exercise. Thus I think it perfectly possible in principle for a given set of considerations of family life and/or private life to be sufficiently weighty to render expulsion disproportionate in an ordinary removal case, yet insufficient to render expulsion disproportionate in a deportation case because of the additional weight to be given to the criminal offending on which the deportation decision was based. I stress "in principle", because the *actual* weight to be placed on the criminal offending must of course depend on the seriousness of the offences and the other circumstances of the case.
>
> 30. Where the person to be removed is a person unlawfully present in this country who has also committed criminal offences, the decision to remove him may pursue a double aim, namely the prevention of disorder or crime as well as the maintenance of effective immigration control. If that is the case, it should be made clear in the reasons for the decision, since it affects the way in which the criminal offending is factored into the analysis. Where the prevention of disorder or crime is an aim, the person's criminal offending can weigh positively in favour of removal, in the same way as in a deportation

case. But if reliance is placed only on effective immigration control, it is difficult to see how the person's criminal offending would relate to that aim or, therefore, count as a factor positively favouring removal. On the other hand, it might still have a significant effect on the proportionality balance by reducing the weight to be placed on the person's family or private life: to take an obvious example, where a person has spent long periods in detention, his family ties and social ties are likely to be fewer or weaker than if he has been in the community throughout. Criminal offending can therefore remain relevant even if the maintenance of effective immigration control is the only aim of the removal decision; but careful account must be taken of how it bears on that decision.

31. The criteria in *Üner* are not directed in terms to an ordinary case of removal in pursuit of effective immigration control, but some of them have obvious relevance in that context too, both as regards family life and as regards private life. For example, what is said about ties arising from length of residence is obviously pertinent to an ordinary removal case: any difference in the extent or quality of ties established by a person present in this country unlawfully, as compared with those established by a lawfully settled immigrant, goes simply to weight. Similarly, the emphasis given to the position of a person who has been in the host country since childhood is relevant in the context of ordinary removal too. The first sentence of para 75 of the *Maslov* judgment ("for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion") does not apply in terms to the removal of a person who has spent his life in the host country unlawfully, but the fact that the person has been there since childhood is still a weighty consideration in the article 8 balancing exercise

80. It is not stated in this decision what legitimate aim under Article 8(2) it is considered "maintenance of immigration control" pursues other than to negative in defeasible terms the notion that it is "prevention of disorder or crime".

81. In *Mansoor, R (on the application of) v Secretary of State for the Home Department* [2011] EWHC 832 (Admin) Blake J stated at [34] that "maintaining the integrity of our system of immigration control is a means of protecting the economic well-being of a country". …protecting the economic well-being of the country is normally the most appropriate one to consider".

82. We have already noted that the Secretary of State in a 13 June 2012 statement trailing the new immigration rules and in an Explanatory Memorandum attached to the new rules described them as reflecting the government's view of how the balance should be struck between individual rights under Article 8 "and the public interests in safeguarding the UK's economic well-being in controlling immigration and in protecting the public from foreign criminals". This formulation would appear to suggest that in respect of immigration control the aim pursued is "economic well-being" whereas in relation to deportation of foreign criminals the aim is "protecting the public".

83. It has to be said, however, that there are no Strasbourg cases that seek to classify criminal and non-criminal cases in this way and, as already noted, it is extremely rare for the Court to identify "economic well-being" as a legitimate aim in any of the immigration cases.

84. It would appear that (i) the above trends in the UK case law, particularly the formulation given in *JO (Uganda) v Secretary of State for the Home Department* [2010] EWCA Civ 10, which as we have noted left as an unanswered question what the precise legitimate aim was in non-criminal cases, together with (ii) the posture adopted by the Home Office in policy statements and in an Explanatory Memorandum to the new immigration rules, have been picked up and understood in some quarters as establishing that in non-criminal cases the legitimate aim cannot be "prevention of disorder or crime" and that (at least normally) the only legitimate aim is "economic well-being". In our judgment that cannot be right. Not only does such an understanding find (virtually) no support in the Strasbourg jurisprudence, it also does not withstand a closer inspection of the UK cases just cited.

85. First of all, it is clear that the observations they make are attempts to discern trends, not to establish fixed formulae (see the above quote from Baroness Hale in *Razgar* ("Article 8 cases ….tend to be") and the use by Richards LJ of the adverb "generally" in JO (Uganda) at [29] and by Blake J in *Mansoor* of the word "normally". Second, Lady Hale in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 at [18] emphasises the point that even when economic well-being is engaged other grounds may also be in play: ("although the prevention of disorder and (sic) crime and the protection of the rights and freedoms of others may also be relevant.") Third, insofar as this line of cases seeks to treat "economic well-being" as the most appropriate head, that is because it is considered that "maintenance of effective immigration control" is an essential aspect of this ground and as we have seen, there are strong grounds for regarding this formulation as an aspect of the "prevention of disorder" clause. Fourth, in [12] of *FK & OK*, immediately after the paragraph which might be thought to hold that "effective immigration control" is an aspect of the "economic well-being" legitimate aim, Sir Stanley Burnton draws support for his position from Lord Bingham's citation in *Razgar* of the judgment of the European Court of Human Rights in *D v UK* (1997) 24 EHRR 423 in which the Court had said, at paragraph 48, in relation to the deportation of the appellant to Algeria, that:

> "such interference may be regarded as complying with the requirements of article 8, namely as a measure 'in accordance with the law', pursuing the aims of the protection of *the economic well-being of the country* and the prevention of disorder and crime, as well as being 'necessary in a democratic society' for those aims."

86. Sir Stanley Burnton placed the emphasis (by means of italics) on "economic well-being" but that does not alter the fact that the text refers to both this ground and "prevention of disorder or crime".

87. Fifth, as already noted, although the Strasbourg Court in more recent times has only rarely expressly identified "maintenance of effective immigration control" as an aspect of "prevention of disorder or crime", it has made clear in its reasoning that it regards immigration control as having a rationale outside the criminal context. Thus in *Antwi v Norway,* a non-criminal case, at [90] the Court noted that, "as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act".

88. A similar approach can be discerned in UK cases. If one considers what was said by Judge LJ in *N (Kenya)* at [83], what he describes is not an immigration control system concerned only with prevention of crime. As he describes it, such a system exists to control the entry and residence of non-UK citizens and its operation "must take account of broad issues of social cohesion in the UK".

89. In our judgment, "issues of social cohesion" go as much to the issue of "[dis]order" as to "crime". At the level of theory and practice, therefore, immigration control cannot be disentangled from considerations of public order and the "prevention of disorder" aspect of the "prevention of crime or disorder" head. Immigration control may also be an aspect of protecting "economic well-being", but here at the general level there are no dichotomies.

Summary of general conclusions on legitimate aims in Article 8 immigration cases

90. We would summarise our general conclusions so far on legitimate aims in Article 8 immigration cases as follows:

(a) "Maintenance of effective immigration control", whilst not as such a legitimate aim under Article 8(2) of the ECHR, can normally be assumed to be either an aspect of "prevention of disorder or crime" or an aspect of "economic well-being of the country" or both.

(b) In expulsion cases "[p]revention of disorder or crime" is normally a legitimate aim both in cases where there has been criminal conduct on the part of the claimant and in cases where there have only been breaches of immigration law.

Our Assessment

91. We turn to consider the Secretary of State's appeal in the light of our foregoing analysis.

The issue of identification of the legitimate aim(s)

92. It is pertinent to ask at the outset whether it can be said that the judge erred because he chose to address the issues of legitimate aim and proportionality at all. Indeed, in her refusal decision the SSHD did not mention Article 8 and only mentioned human rights at all in the context of notifying the claimant of his appeal rights. The claimant for his part had only glancingly asked in his grounds of appeal to the First-tier Tribunal to be considered under Article 8 inasmuch as he had cited *CDS (Brazil)* (which as we know dealt with Article 8) and he had not raised any specific argument to the effect that the decision under challenge did not pursue a legitimate aim or lacked proportionality. So far as we can tell, at the hearing before Judge Hindson his representative did not raise Article 8 nor did the Home Office Presenting Officer refer to it. The only reference of any relevance to this issue was made by the SSHD in her grounds of appeal to the Upper Tribunal which avowed that her decision served the purpose of maintenance of effective immigration control.

93. Whilst if the claimant or the parties had addressed these two issues substantively that would have properly informed the judge's assessment, their failure to do so did not prevent the judge from addressing them of his own motion. Indeed, so long as a judge considers that an appeal engages an Article 8 argument with a realistic prospect of success, it is incumbent on him to resolve it, so as to comply with his obligation under section 6 of the Human Rights Act and that will ordinarily require at least a proportionality assessment. We would emphasise, however (and consistently with what was said by Sales J in *Nagre*), that the test is whether there is a realistic prospect of success. It would not in our view be erroneous of a judge to fail to deal with an Article 8 claim that is only raised in vague and non-specific terms unless there was a *Robinson*-obvious dimension to it.

94. It is also pertinent to ask at this stage whether the failure by the SSHD to identify any legitimate aim pursued by her adverse decision (prior to an indirect mention in her grounds of appeal to the Upper Tribunal) precluded the judge from considering for himself what the legitimate aim or aims (if any) was/were. Again, we consider the answer will be sufficiently clear from our earlier analysis which highlighted the fact that the Strasbourg Court essentially reconstructs for itself from the materials before it what the legitimate aim or aims is/are.

95. But by virtue of binding domestic authority our answer must go further than that. Any notion that there is an onus on the SSHD as a public authority to identify any legitimate aim which she considers to be pursued by the decision under appeal must be strongly rejected as being inconsistent with binding domestic authority. As noted by Lord Mance in *Belfast City Council v. Miss Behavin' Ltd (Northern Ireland)* [2007] UKHL 19 (25 April 2007), which concerned a decision by Belfast City Council to refuse to grant a license to a sex shop:

> 43. The Court of Appeal cited *Re Connor's Application* [2004] NICA 45 for the uncontroversial proposition that the evaluation of the interests protected by the Convention was primarily one for the Council (paragraph 55). But it went on to rely on that case (decided in relation to article 8) for the proposition that:
>
> > "Where no appraisal of the relevant interests had been made, the court could only conclude that the interference was justified if, on analysis, it determined that it was inevitable that the decision-maker would have decided that the article 8 rights of the individual would have to yield to protect the wider interests outlined in article 8(2)".
>
> The Court of Appeal went on to apply that proposition in relation to both article 1 of the First Protocol (paragraph 56) and article 10 of the Convention (paragraph 63). It said (paragraph 56):
>
> > "The interference with the appellant's rights can only be justified, therefore, if either the public authority has decided that the general interest demands it or it is inevitable that it would have so decided had it been conscious of the interference with the appellant's rights that refusal of the application entailed."
>
> 44. Authority now shows that this is not the correct approach. The court's role is to assess for itself the proportionality of the decision-maker's decision: *R (SB) v. Governors of Denbigh*

High School [2006] UKHL 15, [2007] 1 AC 100. The court will not require a decision-maker to put itself through the hoops of a complex series of questions such as the Court of Appeal suggested in that case ([2005] EWCA Civ 199; [2005] 1 WLR 3372). In the *Denbigh* case, Lord Bingham rejected the "new formalism" that the Court of Appeal's approach would have involved, and said that "what matters in any case is the practical outcome, not the quality of the decision-making process that led to it" (paragraph 31).

…

46. ….But, what is the position if a decision-maker is not conscious of or does not address his or its mind at all to the existence of values or interests which are relevant under the Convention?

47. The court is then deprived of the assistance and reassurance provided by the primary decision-maker's "considered opinion" on Convention issues. The court's scrutiny is bound to be closer, and the court may, as Baroness Hale observes in paragraph 37 of her opinion, have no alternative but to strike the balance for itself, giving due weight to such judgments as were made by the primary decision-maker on matters he or it did consider."

96. See the similar observations made by Lord Hoffman at [15] and [26], by Baroness Hale at [31]-[32].

97. It is also noteworthy that in *Belfast City Council v Miss Behavin' Ltd* their lordships saw the role of the court (in cases where the public authority has not addressed human rights) as extending to taking it upon themselves to identify (or at least to postulate) whether there was a legitimate aim: see Lord Hoffman at [19], Baroness Hale at [37], Lord Mance at [42], Lord Neuberger at [83].

98. It may be thought that where the "public authority" is the SSHD rather than a local council or a school governor, that should make a difference in that caseworkers acting on behalf of the SSHD must be assumed to know (and are instructed) that they must decide whether their decisions are in compliance with a person's human rights, but in our view any such difference cannot extinguish the general principle enunciated by their lordships in relation to what a court or tribunal must do when considering the decision of a "public authority" which has not addressed human rights.

99. Further, in relation to any failure to identify a legitimate aim, the extent of any difference is mitigated by at least two factors. First, to the extent that it can be said that SSHD caseworkers can be assumed to know they must consider a person's human rights, by the same token, it can be assumed that the public knows that such officials make decisions on behalf of a government department which has a statutory responsibility to apply a legal framework of immigration control over third-country nationals as contained in statute and immigration rules. Indeed (as noted earlier at [55], in respect of family members rule GEN.1.1 of Appendix FM states that this appendix reflects how the balance is to be struck between the individual's right to respect for family life and *all 6* of the "legitimate aims" set out in Article 8(2). To this extent (and absent special circumstances) it is self-evident that decisions made by the SSHD (and by ECOs) normally pursue the aim of maintaining effective immigration control.

100. Second, the SSHD has stated in the public realm that she considers the new immigration rules brought into force in July 2012 to comply with the Human Rights Act and has said on numerous occasions before the courts and in published policy and in the June 2012 Explanatory Memorandum that she considers these rules to be an important mechanism for maintaining effective immigration control.

101. Accordingly in our judgment it was not incumbent on the SSHD in these proceedings to have identified what she considered the legitimate aim pursued by her decision to be. That she considered her decision to pursue the effective maintenance of immigration control was something the claimant could be considered to be on notice of.

The SSHD's grounds

102. As regards ground 1 (which sought to rely on an *MF*-related argument that the judge was wrong not to have treated the claimant's Article 8 circumstances solely under the new rules), it will be apparent that whether one interprets *MF* as establishing that the new Immigration Rules are a complete code regarding Article 8 in general or only in relation to the deportation provisions set out in paragraphs 398,399 and 399A, the First-tier judge conducted a substantive Article 8 assessment by reference to his understanding of the general law on Article 8. As Mr Deller conceded, that assessment cannot be vitiated by legal error just because it was not made within the Rules.

103. Concerning ground 2, we do not consider that the First-tier Tribunal judge relied in any significant way on a "Near-Miss" principle. He did, it is true, attach significant weight to the fact that the claimant had met the requirements of the immigration rules in substance, but the reasons he gave for allowing the appeal on Article 8 grounds dwelt not on the fact of a 'Near Miss' but, as he saw it, on the disproportionality of the adverse immigration decision given the claimant's particular circumstances. We do not think the judge was doing anything more here than what Lord Carnwath described approvingly in *Patel* at [56] as treating "the context of the rules [as] relevant to the consideration of proportionality". If the judge has fallen into error, then, it is in the way he has conducted the proportionality assessment in the light of the relevant legitimate aim or aims.

104. This brings us to ground 3, in respect of which we do think the judge did fall into legal error.

105. Applying the main principles we have derived from case law on Article 8(2) to the judge's assessment of the claimant's case, it will be immediately apparent that the judge wrongly addressed his task when considering the proportionality of the legitimate aim of "economic well-being" (which was the only legitimate aim he considered to be engaged). Although making reference to "the legitimate aim of securing the economic well-being of the UK by sensible immigration control" (which clearly identified that this head extended to the general (or "macro") level, he wholly confined his actual assessment of the weight to be attached to the legitimate aim pursued by the decision of the SSHD to a simple calculus at the individual or "micro" level, so that all that appeared in the balance sheet were the funds the claimant had paid in course fees and the fact that he had enough to maintain and accommodate himself. He wholly overlooked that even in cases where there

is no cost to the state incurred by an individual student in terms of fees and maintenance and accommodation, the immigration rules reflect an assessment made by the government with the sanction of Parliament of what requirements are necessary in order to ensure sufficient control on the number of persons entering into or being able to stay in the UK and for how long and under what conditions. Their terms quintessentially require an assessment at the "macro" level. He failed to take into account whether general aspects of "economic well-being", including the need to limit the numbers who have access to public services and the benefits of the NHS and who are able to compete for housing and for employment with those already here: see *FK & OK* [11] (supra [78]).

106. Even if we were to reject Mr Deller's argument that the judge at [23] appeared to confine the issue of "economic well-being" to the economic well-being of a private college ("the judge said "he is bringing substantial funds into the country to pay his course fees….") and instead inferred that the judge had also in mind the contribution made to the country's economy by overseas students, it is plain that he did not take into account other general aspects of the legitimate aim of "economic well-being" identified in the previous paragraph.

107. That is not to say that a judge is prevented when conducting the balancing exercise of assessing proportionality from weighing in a person's favour that he contributes financially or in other ways to the economy or the public good or that he has not been a drain on the public purse. If such factors are combined with other strong factors in favour of that person, that might mean that general considerations of economic well-being are outweighed. But in the claimant's case there was a glaring lack of factors strongly in his favour.

108. In our view this error by the judge fundamentally skewed his proportionality assessment. It led him to attach no or virtually no weight to the legitimate aim of "economic well-being" pursued by the decision of the SSHD and as a consequence to regard the scales as weighted in favour of the individual claimant notwithstanding that his case had no strong or compelling features. This error necessitates that we set aside his decision.

109. We have yet to comment on the other limb to Mr Deller's ground 3 which argued that the judge had also erred in law in considering that the public interest was only to be adjudged by reference to whether the claimant's continued stay in the UK had an adverse effect on this country's "economic well-being" thereby ignoring a separate legitimate aim of "prevention of disorder or crime". We have concluded that this contention has not been made out. We have in mind that in describing the legitimate aim as "securing the economic well-being of the UK by sensible immigration control", the judge appeared to amalgamate two aims, that of "economic well-being" and that of "maintenance of effective immigration control". Whilst as we have seen the latter is not a legitimate aim as such, it could be said that the judge was doing no more than what is commonly done by the Strasbourg Court and the UK courts, of treating it as a self-evident aspect of at least one of the legitimate aims sanctioned by Article 8(2). Whilst we think that normally "maintenance of effective immigration control" should be regarded as an aspect of "prevention of disorder or crime", we recognise that some Strasbourg jurisprudence has seen it as an aspect of "economic well-being" on its own or (more commonly) as well.

That also comports with a line of UK cases which has linked "maintenance of effective immigration control" and "economic well-being".

Our Decision

110. We turn then to re-make for ourselves the decision against which the claimant appealed. We take into account a short statement submitted by the claimant dated 3 February 2014, although it adds nothing to the evidence we already have about his case.

111. In most respects the claimant's is a run of the mill case. He is someone who has been in the UK now for nearly 6 years (he came in May 2008); has never been in breach of immigration controls; was considered by the SSHD to have met all of the requirements of the relevant immigration rules save for two and of these one (relating to his sponsor) he met *de facto*, the other may possibly have been rectified if the SSHD had told him his bank statements did not fully cover the requisite period; is someone who via his uncle has invested a considerable sum in order to advance his own level of education and skills; and is someone who believes that if his appeal is refused, "then the hard earned money of my family will go to drain".

112. There are also two somewhat unusual features of his case. There is first of all the fact that when the SSHD previously refused to extend his leave to remain as a student on the basis that he was not funded by a parent or guardian, a First-tier Tribunal judge allowed his appeal on *Pankina* grounds. There is the further fact that when the SSHD later refused him on the same ground, a First-tier Tribunal judge also found that he was a genuine student who had only failed to comply with the new requirement of the rules regarding financial support by sponsors because he had relied on college advisors.

113. On the other side of the scales, the claimant had not been in the UK for a lengthy period; although he had never been in breach of immigration laws, he had only ever been granted entry and leave to remain as a student here for temporary purposes of study; in the time he had been here he had already obtained the qualification which had been the basis of his entry clearance application (a Masters in Business Administration from Alpha College in 2010); in respect of other aspects of his private life ties he did not seek to rely on ties of friendship or community, even in the witness statement submitted shortly before the hearing before the First-tier Tribunal in August 2013; although he had succeeded before the First-tier Tribunal in 2009 on *Pankina* grounds, the law had subsequently changed and it is settled law that applicants must take the immigration rules at the time their cases fall for decision: see *Munir and Patel*; although he was unaware of the changes in the Immigration Rules (an unchallenged finding of Judge Hindson), as a general rule ignorance of the law is no excuse; the fact of the matter was that the rules had been amended so as to incorporate earlier policy guidance that a financial sponsor must be a parent or guardian: the claimant's application was not only refused because he did not meet the financial sponsor requirement, he had also failed to submit bank statements covering the entirety of the requisite period.

114. Judge Hindson considered that if the appeal was not allowed on Article 8 grounds "he would almost certainly miss one academic year of study". Since by virtue of s.85(4) we

must decide this appeal on the basis of facts as they stand today (this being a case in which we are re-making the decision), that point has a diminished weight because the claimant is now only a few weeks away from completing his course (ending 18 March 2014). But even as matters stood before Judge Hindson, it is difficult to see what evidential foundation he had for considering the consequence would "almost certainly" be the missing one academic year. Certainly many courses of this kind are available in modular form. In the absence of evidence as to what credit colleges in Pakistan might give for modules completed on a UK course of this kind (or as to whether his UK college would allow him to complete the course by electronic means), we draw no firm conclusions ourselves, but we can certainly say that we have not seen any evidence to show that the claimant would lose as much as a whole academic year. In any event that consideration, whilst not a trivial matter, is not in our view one which takes (or should take) matters much further in the context of Article 8.

115. Particularly bearing in mind the observations made by Lord Carnwath in *Patel* both about student cases in general [at 57] and about the two student appeals of Mr Anwar and Mr Alam at [58]-[59] and also the observations made by the Upper Tribunal in *Nasim and others (Article 8*) at [26]-[27], we consider the claimant cannot succeed on Article 8 grounds. There are simply no strong or compelling circumstances surrounding his case. In our view, to allow his appeal on Article 8 grounds would be to debase the currency. There are no significant elements of private life engaged by the circumstances of his case. To the extent that he can be said (via his uncle) to have invested in a UK education, he has already obtained one degree and the further one he is now doing does not represent a higher level degree, although it is right to say that the SSHD did not seek to refuse his decision under the relevant requirement of the Rules governing academic progress. In relation to his family life, he has close ties back in Pakistan with his mother and his uncle and his family. He has not adduced any evidence to show that he has significant private life ties with friends or a wider community.

116. For the above reasons we dismiss this appeal. The claimant does not succeed under the Immigration Rules or under Article 8.

117. To conclude:

The First-tier Tribunal erred in law and its decision is set aside.

The decision we re-make is to dismiss the appeal on all grounds.

Signed Date

Upper Tribunal Judge Storey