Neutral Citation Number: [2016] EWCA Civ 82

Case Nos: C2/2014/3929
C2/2015/1350

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Upper Tribunal (Immigration and Asylum Chamber)
Upper Tribunal Judge Eshun (3929)
Upper Tribunal Judge Macleman (1350)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2016

Before :

LORD DYSON
(Master of the Rolls)
LORD JUSTICE UNDERHILL
and
LORD JUSTICE FLOYD

- -

Between:

SAMIA WASIF	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

Between:

MOHAMMED HOSSAIN	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Michael Fordham QC and **Raza Halim** (instructed by **Duncan Lewis Solicitors**) for **Ms Wasif**
Zane Malik (instructed by **Seb Solicitors**) for **Mr Hossain**
Deok Joo Rhee (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 7 December 2015

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Judgment

Lord Justice Underhill :

INTRODUCTION

1. This is the judgment of the Court. These two appeals have been listed together because they both raise an issue about the proper approach to be taken in considering whether to certify an application for permission to apply for judicial review as "totally without merit". That question was considered by this Court as recently as June 2014 in *R* (*Grace*) *v Secretary of State for the Home Department* [2014] EWCA Civ 1191, [2014] 1 WLR 3432; but it has continued to give rise to difficulties. We will address it first as a general matter before turning to the facts of the particular cases. All that it is necessary to say at this stage is that in both cases the Appellant sought permission from the Upper Tribunal to apply for judicial review of a decision of the Respondent to refuse them leave to remain in the UK; that that permission was refused on the papers; and that the Tribunal's orders concluded with a statement that the application was considered to be totally without merit, with the consequence (by reason of the rules to which we refer below) that they were not entitled to ask for their applications to be reconsidered at an oral hearing.

2. Ms Wasif was represented before us by Mr Michael Fordham QC and Mr Raza Halim. Mr Hossain was represented by Mr Zane Malik. The Respondent was represented by Ms Deok Joo Rhee.

THE CORRECT APPROACH TO TWM CERTIFICATION

THE RULES

3. By rule 54.12 of the Civil Procedure Rules a claimant whose application to the High Court for permission to apply for judicial review is refused (in whole or in part) on the papers is entitled to request that that decision be reconsidered at a hearing. Such a request is generally, though this is not the language of the rule, referred to as a renewal application.

4. However, paragraph (7) of the rule (introduced, with effect from 1 July 2013, by the Civil Procedure (Amendment no. 4) Rules 2013) provides that:

> "Where the court refuses permission to proceed and records the fact that the application is totally without merit in accordance with rule 23.12, the claimant may not request that decision to be reconsidered at a hearing."

Rule 23.12, there referred to, reads:

> "If the court dismisses an application (including an application for permission to appeal or for permission to apply for judicial review) and it considers that the application is totally without merit-
>
> (a) the court's order must record that fact; and

(b) the court must at the same time consider whether it is appropriate to make a civil restraint order."

5. Following the transfer of the jurisdiction to hear "immigration judicial reviews" to the Upper Tribunal, an equivalent provision was inserted into the Upper Tribunal Rules 2008. The relevant parts of rule 30 (as amended by the Tribunal Procedure (Amendment no. 4) Rules 2013 and the Tribunal Procedure (Amendment) Rules 2014) read:

> "(1) – (2) …
>
> (3) Paragraph (4) applies where the Upper Tribunal, without a hearing—
>
> (a) determines an application for permission to bring judicial review proceedings by—
>
> (i) refusing permission or refusing to admit the late application, or
>
> (ii) giving permission on limited grounds or subject to conditions; or
>
> (b) …
>
> (4) Subject to paragraph (4A), in the circumstances specified in paragraph (3) the applicant may apply for the decision to be reconsidered at a hearing.
>
> (4A) Where the Upper Tribunal refuses permission to bring immigration judicial review proceedings or refuses to admit a late application for permission to bring such proceedings and considers the application to be totally without merit, it shall record that fact in its decision notice and, in those circumstances, the applicant may not request the decision to be reconsidered at a hearing.
>
> (5) …"

6. We will refer to the recording by the Court or the Upper Tribunal of the fact that it considers an application for permission to apply for judicial review to be totally without merit as a "TWM certification".

7. We should also set out the terms of rules 52.15 and 52.15A, which apply to applications to this Court for permission to appeal against the refusal of permission to apply for judicial review by, respectively, the High Court and the Upper Tribunal. Rule 52.15 reads (so far as material):

> "(1) Where permission to apply for judicial review has been refused at a hearing in the High Court, the person seeking that permission may apply to the Court of Appeal for permission to appeal.

> (1A) Where permission to apply for judicial review of a decision of the Upper Tribunal has been refused by the High Court or where permission to apply for judicial review has been refused and recorded as totally without merit in accordance with rule 23.12 –
>
> (a) the applicant may apply to the Court of Appeal for permission to appeal;
>
> (b) the application will be determined on paper without an oral hearing.
>
> (2) ...
>
> (3) On an application under paragraph (1) or (1A), the Court of Appeal may, instead of giving permission to appeal, give permission to apply for judicial review.
>
> (4) Where the Court of Appeal gives permission to apply for judicial review in accordance with paragraph (3), the case will proceed in the High Court unless the Court of Appeal orders otherwise."

Rule 52.15A reads:

> "(1) Where permission to bring judicial review proceedings has been refused by the Upper Tribunal and permission to appeal has been refused by the Upper Tribunal, an application for permission to appeal may be made to the Court of Appeal.
>
> (2) Where an application for permission to bring judicial review proceedings has been recorded by the Upper Tribunal as being completely without merit and an application for permission to appeal is made to the Court of Appeal in accordance with paragraph (1) above, the application will be determined on paper without an oral hearing."

One consequence of those provisions – and specifically rules 52.15 (1A) (b) and 52.15A (2) – is that where a permission application has been certified as TWM a judge of this Court is precluded from directing that the application for permission to appeal be heard orally even if he or she believes that in the particular circumstances of the case a hearing would be desirable. It is surprising, and sometimes inconvenient, that the hands of a judge of this Court should be tied in this way by a decision taken at first instance, and we rather doubt whether this was the rule-makers' intention; but it has been decided that that is the effect of the rules – see *GR (Albania) v Secretary of State for the Home Department* [2013] EWCA Civ 1286.

8. We should mention for completeness that there is also a provision for TWM certification in relation to applications for permission to appeal. Rule 52.3 (4) provides that where an appeal court refuses permission to appeal on the papers

the person seeking permission may request that the decision be reconsidered at a hearing. But that is subject to paragraph (4A), which provides that where an appeal court judge refuses permission to appeal without a hearing "and considers that the application is totally without merit, the judge may make an order that the person seeking permission may not request the decision to be reconsidered at a hearing". It will be noted that that differs from the rules relating to permission to apply for judicial review in that the loss of the right to a hearing is not an automatic consequence of the judge considering the application to be totally without merit but will follow only if the judge makes an order to that effect.

THE DECISION IN *GRACE*

9. In *Grace* a claimant of Jamaican nationality had been refused leave to remain in the UK without a right of appeal. She issued proceedings in the Administrative Court seeking judicial review of that decision. Kenneth Parker J refused permission to apply for judicial review and certified the application as TWM: accordingly her application could not be renewed at an oral hearing. Permission to appeal was given by this Court only for the purpose of providing guidance on the meaning of the phrase "totally without merit".

10. The claimant's case on the appeal was that an application should not be certified TWM for the purpose of CPR rule 54.12 (7) unless the claim was so hopeless or misconceived that a civil restraint order would be justified if such applications were persistently made: see para. 12 of the judgment of Maurice Kay LJ (p. 3436D). That submission was founded on the fact that the phrase "totally without merit" first, as Maurice Kay LJ put it at para. 8 (p. 3435 E-F), "came into the lexicon of civil procedure" in the context of civil restraint orders. The claimant also relied on observations by Laws LJ in *Sengupta v Holmes* [2002] EWCA Civ 1104 about the central role played by oral argument in the common law system: see para. 38 of his judgment in that case.

11. This Court rejected that argument. The *ratio* appears at para. 13 of the judgment of Maurice Kay LJ (p. 3436 E-G). He said:

> "I return to the purpose of CPR 54.12.7. It is not simply the prevention of repetitive applications or the control of abusive or vexatious litigants. It is to confront the fact, for such it is, that the exponential growth in judicial review applications in recent years has given rise to a significant number of hopeless applications which cause trouble to public authorities, who have to acknowledge service and file written grounds of resistance prior to the first judicial consideration of the application, and place an unjustified burden on the resources of the Administrative Court and the Upper Tribunal. Hopeless cases are not always, or even usually, the playthings of the serially vexatious. In my judgment, it would defeat the purpose of CPR 54.12.7 if TWM were to be given the limited reach for which Mr Malik contends. It would not produce the benefits to public authorities, the Administrative Court or its other users which it was intended to produce. I have no doubt that in this

> context TWM means no more and no less than 'bound to fail'. …"

We should also quote para. 15 of his judgment (pp. 3436-7), which reads:

> "The adoption of this approach does contain within it two important safeguards. First, no judge will certify an application as TWM unless he is confident after careful consideration that the case truly is bound to fail. He or she will no doubt have in mind the seriousness of the issue and the consequences of his decision in the particular case. Secondly, the claimant still has access to a judge of the Court of Appeal who, with even greater experience and seniority, will approach the application independently and with the same care. To my mind, these safeguards are sufficient. CPR 54.12.7 so applied does not detract from the vital constitutional importance of the judicial review jurisdiction. Moreover, it is consistent with the overriding objective of the CPR."

It is clear that those observations were intended to apply equally to rule 30 (4A) of the Upper Tribunal Rules, to which Maurice Kay LJ referred expressly at para. 2 of his judgment.

12. The other members of the Court, Lord Dyson MR and Sullivan LJ, agreed with Maurice Kay LJ's judgment. Lord Dyson added, at para. 19 (p. 3437 C-D):

> "The phrase 'totally without merit' is now firmly embedded in our Civil Procedure Rules. It is perhaps unfortunate that the word 'merit' is included in the phrase. We are familiar with the notion of a claim being meritorious or having merit, connoting the idea that the claim is just or 'is in accordance with the merits', but the word 'merit' in the phrase 'totally without merit' does not have this meaning. Although the court always seeks to do justice, the purpose of 'totally without merit' is to enable the court to root out claims which are bound to fail, and, for the reasons given by my Lord, I would construe that phrase as meaning 'bound to fail'."

DISCUSSION

13. The point raised by these appeals is this. Neither CPR rule 54 nor section 16 of the Tribunal Courts and Enforcement Act 2007, which impose the permission requirement applying to applications for judicial review in the High Court and the Upper Tribunal respectively, defines the criteria by which the decision whether to grant permission should be granted. But it is now generally accepted that the touchstone is whether the application is "arguable" or has "a realistic prospect of success": the cases are legion, but the *locus classicus* is the judgment of Lord Bingham and Lord Walker in *Sharma v Brown-Antoine*, [2006] UKPC 57, [2007] 1 WLR 780, at para. 14 (4) (p. 787E). As a matter simply of language it could be strongly argued that there is

no real difference between that criterion and the criterion for TWM certification as established by *Grace*: if a case is unarguable is it not bound to fail ? But if that were so the result would be that whenever a judge refused permission to apply for judicial review the application should also be certified as TWM. It was common ground before us, and is plainly correct, that that cannot be the intention behind the relevant rules. The rule-maker evidently intended that applications certified as TWM should represent a sub-set of applications in which permission was refused: there must, therefore, be a difference between "not arguable" and "bound to fail", despite the conceptual awkwardness. The problem is how to define the difference.

14. Ms Rhee in her skeleton argument identified the *travaux préparatoires* which preceded the introduction of rule 54.12 (7). The proposal originated in a Consultation Paper entitled *Judicial Review: proposals for reform* issued by the Ministry of Justice in December 2012. It was put forward on the basis that it would shorten the process of weeding out "weak or hopeless cases" (or, elsewhere, "unfounded or misconceived cases"). The senior judiciary in their response welcomed the proposal, saying that it would be "effective in filtering out weak cases early while minimising the risk of injustice". The Government in its response to the consultation again referred to "weak or hopeless cases", though there was also a reference to the procedure having an impact "only on the weakest cases". All this is, unsurprisingly, in line with what Maurice Kay LJ says at para. 13 of his judgment in *Grace*; but it does not cast light on exactly how the TWM criterion differs from that for the grant or refusal of permission. (There is a reference in the original consultation paper to the concept of certifying cases as "totally without merit" being familiar to judges from the existing rules about civil restraint orders; but any argument that it should therefore have the same meaning as in that context is ruled out by *Grace*.)

15. In our view the key to the conundrum is to recognise that the conventional criterion for the grant of permission does not always in practice set quite as low a threshold as the language of "arguability" or "realistic prospect of success" might suggest. There are indeed cases in which the judge considering an application for permission to apply for judicial review can see no rational basis on which the claim could succeed: these are in our view the cases referred to in *Grace* as "bound to fail" (or "hopeless"). In such cases permission is of course refused. But there are also cases in which the claimant or applicant (we will henceforth say "claimant" for short) has identified a rational argument in support of his claim but where the judge is confident that, even taking the case at its highest, it is wrong. In such a case also it is in our view right to refuse permission; and in our experience this is the approach that most judges take. On this approach, even though the claim might be said to be "arguable" in one sense of the word, it ceases to be so, and the prospect of it succeeding ceases to be "realistic", if the judge feels able confidently to reject the claimant's arguments. The distinction between such cases and those which are "bound to fail" is not black-and-white, but we believe that it is nevertheless real; and it avoids the apparent anomaly identified at para. 13 above.

16. Once that is recognised, there is a sensible basis for distinguishing between the two kinds of case as regards the right to an oral renewal hearing. The provision for such a right, in the rules as currently structured, recognises that oral argument may on occasion persuade a court that a claim for which the judge has refused permission on the papers does in fact have a realistic chance of success. To allow for that possibility is reasonable where the judge has recognised a rational case but has felt able to reject it on the papers; and it reflects the value which the common law tradition attaches to oral argument. But where the judge has found that the claim is bound to fail, in the sense identified above, it necessarily follows that there is no such chance; and to allow a hearing would be pointless and would merely – contrary to the policy behind the 2013 rule-changes – waste the resources of the Court and unjustifiably prolong an apparent uncertainty about the lawfulness of the challenged decision.

17. It is inescapable that the distinction between those cases which are "bound to fail" (and thus fall for certification as TWM) and those where permission is refused on the less definitive basis identified above is a matter for the assessment of the judge in each case. The scope for general guidance is limited: adjectives and phrases of the kind such as "bound to fail", "hopeless" and "no rational basis" are, we hope, helpful, but they are necessarily imprecise. However, we would make the following observations:

(1) At the risk of spelling out the obvious, judges should certainly not certify applications as TWM as the automatic consequence of refusing permission. The criteria are different.

(2) We repeat what Maurice Kay LJ said in para. 15 of his judgment in *Grace*, as quoted above:

> "[N]o judge will certify an application as TWM unless he is confident after careful consideration that the case truly is bound to fail. He or she will no doubt have in mind the seriousness of the issue and the consequences of his decision in the particular case."

(3) The potential value of an oral renewal hearing does not lie only in the power of oral advocacy. It is also an opportunity for the claimant to address the perceived weaknesses in the claim which have led the judge to refuse permission on the papers (and which should have been identified in the reasons). The points in question may not always have been anticipated or addressed in the grounds and skeleton argument (particularly if the judge has drawn them from the respondent's summary grounds – see (6) below). The judge should only certify the application as TWM if satisfied that in the circumstances of the particular case a hearing could not serve such a purpose; the claimant should get the benefit of any real doubt.

(4) Mr Fordham submitted that the essential question for a judge in deciding whether to certify was "whether another Judge, with the benefit of oral submissions at an oral hearing, would be bound to refuse [permission]".

That is broadly in line with what we have said above, but the reference to "another Judge" is not quite right. Although it will generally be the case that any renewal hearing will be before a different judge than the one who refused permission on the papers, the rules do not require that that be the case; and in any event in an ideal world one judge's standard of what is arguable should be the same as another's. The point of a renewal hearing is not that the claimant is entitled to another dip into the bran-tub of Administrative Court or Upper Tribunal judges in the hope of finding someone more sympathetic. Having said that, we do not deny that some judges may find it a useful thought-experiment to ask whether they can conceive of a judicial colleague taking a different view about whether permission should be granted.

(5) Judges considering permission applications will quite commonly encounter cases – particularly where the claimant is unrepresented – in which the claim form/grounds and/or the supporting materials are too confused or inadequate to disclose a claim which justifies the grant of permission but where the judge nevertheless suspects that proper presentation might disclose an arguable basis of claim. In such cases he or she should not certify the application as TWM. The right course will usually be to refuse permission, with reasons which identify the nature of the problem, giving the claimant the opportunity to address it at an oral renewal hearing if they can; but there may sometimes be cases where the better course is to adjourn the permission application to an oral hearing, perhaps on an *inter partes* basis.

(6) Mr Fordham pointed out that at the time that a judge decides the permission application on the papers the respondent will have had the opportunity to file an Acknowledgment of Service, incorporating summary grounds of defence, to which the claimant has under the Rules no right of reply (though some claimants do provide responses which are in practice put before the Judge). Judges should not certify a claim as TWM on the basis of points raised in the summary grounds to which the claimant might have had an answer if given the opportunity.

18. In so far as the trend of those observations might be regarded as cautionary, we would not want to be understood to be expressing any particular view about the current level of TWM certifications. We are concerned only to identify the correct approach. The policy considerations underlying the 2013 rule-changes are as powerful as they ever were, if not more so; and judges should feel no inhibition about certification when they believe the criteria are met.

19. In any case where a judge refuses permission to apply for judicial review on the papers he or she must of course give reasons. It is common, both in the Administrative Court and the Upper Tribunal, for those reasons to be given in extremely summary form. That may be acceptable in cases where the claimant has the right to renew the application – though even then the reasons should be sufficient to show with sufficient particularity why permission has been refused.

But where the application is certified as TWM, so that the claimant has reached the end of the road (subject to appeal), peculiar care must be taken to ensure that all the arguments raised in the grounds are properly addressed. This is not just for the important reasons of principle discussed in *Flannery v Halifax Estate Agents Ltd* [2000] 1 WLR 377 and in the many other authorities to the same effect. There is the further point that if permission to appeal is then sought from this Court, real difficulties can be caused if the judge refusing permission at first instance has not given adequate reasons, particularly since the option of directing an oral hearing is not open.

20. It does not follow that the reasons for refusing permission need always be lengthy. On the contrary, conciseness is a virtue, and if a ground can properly be disposed of adequately in a sentence or two so much the better. But what is necessary depends on the case. All the claimant's points must be identified and addressed. If there are professionally pleaded grounds, those grounds should be taken in turn. If, however, as is alas too often the case, the grounds are discursive or repetitious, it is the Judge's responsibility to analyse them into their component parts and say why each fails to give the claimant a realistic prospect of success (unless the case is one where disposing of one ground renders it unnecessary to consider the others).

21. There is a further point about reasons in TWM cases. It is in our view important in principle that the judge gives reasons for the TWM certification separately from the reasons for refusing permission. We acknowledge that since the difference between the two thresholds is one of degree it may be that all that can be said in many or most cases is something to the effect of "I consider the application is totally without merit: my reasons are those already given above". But even saying that much is a valuable discipline because it reminds the judge that the exercises are distinct. And there will be some cases where it is possible to identify a particular reason which the Judge regards as taking the claim over the TWM threshold.

22. We have in the foregoing taken account of most of the parties' submissions about the proper approach to TWM certification. There is, however, one further point which we wish to mention. Ms Rhee submitted that the criterion for the grant of permission to apply for judicial review was "flexible" and drew attention to a passage in the judgment of Lord Bingham and Lord Walker in *Sharma*, immediately following that to which we have already referred, where they said:

> "[A]rguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application."

They went on to refer to the line of authorities about the flexibility of the civil standard of proof, referring in particular to *R (N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468. We must confess to some difficulty with that passage: we do not see how the arguability of a claim can be affected by the nature or gravity of the issue. It may be that what was meant was that a higher degree of arguability might be required to justify the grant of permission in a claim that was trivial, or a lower

degree for one which was very grave. But in that case it is a slightly different point from that which we have been addressing.

THE INDIVIDUAL CASES

A PRELIMINARY QUESTION

23. The grounds of appeal in both cases are directed, in whole or in part, specifically to the TWM certification of the applications rather than to the refusal of permission as such. Mr Hossain's grounds, settled by Mr Malik, read:

> "There is one ground of appeal, namely: The Upper Tribunal erred in law marking the Appellant's application for permission to apply for Judicial Review as Totally Without Merit."

The position about Ms Wasif's grounds, settled by Mr Halim, is not quite so clear-cut. Two grounds are pleaded. The first is, to summarise, that the Upper Tribunal Judge could not reasonably have concluded that her claim was "bound to fail": that is, necessarily, a challenge to the certification. The second, again in summary, is that the Judge gave inadequate reasons for her decision: that could be read as relating to the substantive decision to refuse permission, rather than to the certification, though we are far from sure that that is what was intended, since he goes on to plead that the ordinary duty to give reasons is "heightened" where the application is certified as TWM.

24. In so far as the challenge is to the TWM certification as opposed to the refusal of permission, the logic of the Appellants' position is that the outcome of a successful appeal should be for the permission applications to be remitted to the Upper Tribunal for the renewal hearing of which they had been wrongly deprived. Mr Malik faced up to that logic and said that that was indeed what he sought: the right to an oral hearing before the Upper Tribunal was important, particularly as it was the specialist tribunal. Mr Fordham's position was more equivocal. He submitted that neither rule 52.15 nor rule 52.15A (see para. 7 above) conferred any right to appeal against a TWM certification as such. A claimant who was refused permission to apply for judicial review could under those rules only appeal against that refusal. Any challenge to the certification only came in as "ancillary" to that appeal. Ms Rhee made no submissions on this issue.

25. We agree with Mr Fordham that there is no right of appeal to this Court against a TWM certification, but the route to that result is not altogether straightforward. Mr Fordham is right that the terms of rules 52.15 and 52.15A are inconsistent with the existence of such a right; but that in itself cannot be decisive, since the jurisdiction of the Court of Appeal derives from primary legislation. The relevant statutory provisions are section 16 (1) of the Senior Courts Act 1981 and section 13 (1) and (2) of the 2007 Act. The former reads:

> "Subject [to various immaterial exceptions], the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court."

The latter read (so far as material):

> "(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the relevant appellate court on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision.
>
> (2) Any party to a case has a right of appeal, subject to subsection (14)."

(By sub-section (13) which is the "relevant appellate court" falls to be specified by the Upper Tribunal: in the present cases it is the Court of Appeal. "Excluded decisions" are defined in sub-section (8): TWM certification is not such a decision. Sub-section (14) contains nothing material.)

26. We will take the 1981 Act first. It is necessary for these purposes to eschew the shorthand of "TWM certification": what we are concerned with is, formally, the "recording" by the court, pursuant to rule 23.12 (a), of the "fact" that it considers that an application is totally without merit (see para. 4 above). Plainly that is not a "judgment" within the meaning of section 16 (1); but nor in our opinion is it an "order". The structure of rule 23.12 is that the court is recording its opinion as to the merits of the application as a precondition to its being entitled to make a civil restraint order; but it would be that order, if made, that would be appealable, not the recording of the precondition. The position is not quite so clear-cut as regards rule 54.12 (7). It could be argued that the fact that the "recording" of the Court's opinion automatically deprived the claimant of the right to a renewal hearing meant that it was, in substance, itself an order. But in our view part of the intended effect of the draftsman making rule 54.12 (7) parasitic on rule 23.12 is precisely that it avoids "TWM certification" constituting an order and thus being appealable. If it were otherwise it would undermine rule 52.15 (1A), the effect of which is that any appeal against a certificated refusal of permission can only be considered on paper: it cannot have been intended that the claimant could circumvent that restriction by appealing, separately, against the certification itself.

27. If that is the position under the 1981 Act it would be very surprising if the position were otherwise under the 2007 Act, even though the language is different. There is in our view no difficulty in construing the phrase "any point of law arising from a decision made by the Upper Tribunal" so that it does not cover the recording, under rule 30 (4A), of the fact that the Tribunal considers the application to be totally without merit.

28. In short, we do not believe that TWM certification is appealable as such. A claimant whose application for permission to apply for judicial review has been refused and so certified can only seek permission to appeal against the refusal. If permission to appeal is granted, what will be in issue at the hearing of the appeal will be whether the permission to apply for judicial review should have been granted – though in practice the Court would normally decide the substantive claim – and the TWM certification will be no more than an irrelevant part of the procedural history.

29. The consequences of that conclusion for these appeals should be spelt out. If the TWM certification is not appealable as such, nothing is left of the pleaded grounds of appeal in Mr Hossain's case and only (and only on a generous reading) a reasons challenge in Ms Wasif's. We do not understand how the correctness of the certification arises even on an "ancillary" basis. But the hearing before us proceeded on the basis that both Appellants should, as a fallback, be understood to be challenging the refusal to grant permission to apply for judicial review, and in the circumstances we are content to permit them to do so. That has the added advantage that we can express a view, by way of illustration of the general points made earlier, on whether we regard either claim as one where TWM certification was appropriate and, if so, whether adequate reasons were given.

WASIF

30. Ms Wasif is a national of Pakistan. She was born on 15 October 1978. She came to the UK as a student in September 2008 on a visa which was subsequently extended to 30 July 2012. She paid a visit to her family in Pakistan from late January to early March 2012. Although prior to the expiry of her leave she filed an application for a further extension she subsequently withdrew it, and she remained in the UK thereafter without leave. On 5 April 2013 she and her boy-friend, Gurdeep Singh, who is an Indian national, applied for leave to remain on a basis the details of which are not clear from the papers but which is described as having been "under human rights provisions". That application was refused.

31. On 28 April 2014 Ms Wasif was detained by immigration officials. On 7 May she claimed asylum, on the basis that during her visit to Pakistan in 2012 she had been the victim of serious assaults by her father and brother, who disapproved of her relationship with Mr Singh. She said that she was beaten and kicked, locked in a room and burnt with hot cooking oil. Her claim was refused.

32. Ms Wasif appealed against that refusal. Her appeal was heard under the Asylum and Immigration (Fast Track Procedure) Rules 2005. The hearing took place before FTTJ Grant on 12 June 2014. In the course of the hearing she claimed for the first time also that her brother had tried to rape her when she was 16 or 17 and had in fact raped her in the course of her visit in February 2012. She said that she had been too embarrassed to tell anyone before. She had wanted to do so and had come close to telling the Home Office interviewing officer but had wanted to speak to her solicitor first. She referred to the fact that she had a male solicitor.

33. By a decision promulgated on 16 June 2014 the FTT dismissed the appeal. The FTTJ disbelieved Ms Wasif's evidence about both the violence and the rape. Among his reasons for disbelieving the rape claim was that it had only been made in the course of the hearing. He gave detailed reasons for not accepting her explanation that she was too embarrassed: he pointed out that the Home Office interviewing officer was a woman and that she was being represented at the hearing by a female lawyer, who had worked closely with her and helped draft her witness statement in the immediate run-up to the

hearing. He accordingly found that she was at no risk of violence from her family if she returned to them. But he also found that even if she were at such risk she could relocate to another part of Pakistan. She was an educated woman with experience of earning her living as a teacher, and she could live independently without encountering her family at all.

34. Ms Wasif sought permission to appeal from the FTT but when that was refused, she did not seek permission from the Upper Tribunal.

35. On 3 July 2014 the Respondent set removal directions for the evening of 15 July. Ms Wasif applied to the Upper Tribunal for judicial review of that decision and a stay, but on 11 July permission was refused.

36. On 15 July 2014 Ms Wasif made a further application to the Upper Tribunal for permission to apply for judicial review of the removal decision, coupled with an application for a stay. That is formally the application with which we are concerned on this appeal, though as will appear things have moved on since that date. The legal basis of the application is not entirely clear, but reliance was placed on a report from Dr Katy Robjant, a clinical psychologist at the Helen Bamber Foundation. Dr Robjant had only had the opportunity to speak to Ms Wasif on the telephone but she said that it was likely that she was suffering from post-traumatic stress disorder ("PTSD") as a result of her treatment by her family and said that removal should be postponed pending a full psychiatric or psychological assessment.

37. The application for a stay was refused, but in fact removal did not proceed on 15 July 2014 because Ms Wasif took an overdose of naproxen when she was about to be taken to the airport and had to be admitted to hospital. The dose was not life-threatening, and she was discharged the following day.

38. Further directions were set for 5 August 2014. On 31 July Ms Wasif's solicitors, Duncan Lewis, served on the Respondent a report from Dr Tahira George, a consultant psychiatrist who had examined her on 27 July. Dr George expressed the opinion that Ms Wasif was suffering from PTSD. She also addressed a number of other questions raised by Duncan Lewis. So far as relevant for our purposes, her answers can be summarised as follows:

    (1) In answer to a question about the overdose that Ms Wasif had taken, she says:

> "I acknowledge that I only have Miss Wasif's report that she was raped, yet I see no reason to doubt her veracity. She has nothing to gain from telling this story, and her distress in speaking about it seems entirely genuine; I am not surprised to learn that this lady has many of the symptoms of PTSD; the rape meets the entry criteria for a traumatic event. … Her suicide attempts are genuine because she has a wish to forget all her traumatic experiences. However, the amount of tablets she took as an overdose could not have resulted in fatality but that does not mean the next time she won't take a larger dose."

(2) She recommends treatment by cognitive behavioural therapy by a therapist with appropriate experience, observing that this is available on the NHS but that there can be long waiting times.

(3) She expresses the view that Ms Wasif's mental health is likely to deteriorate, and that she is at "high risk of committing suicide" if she is removed to Pakistan.

(4) She had been asked why Ms Wasif might not have mentioned the rape earlier than she did. She says:

> "Miss Wasif is a victim of rape by her brother and that is a humiliating and shameful experience which leads to avoidance behaviour and she deliberately avoids speaking about the traumatic experience of the past. She finds it difficult to disclose such an horrific experience especially at the hand of a sibling because she believes that no-one will understand her."

Duncan Lewis's letter accompanying the report draws attention to those points and asks for removal to be stayed "to allow her access to the medical assistance she requires". There are no clearly formulated legal submissions.

39. Ms Wasif was not removed pending the Respondent's consideration of Duncan Lewis's letter and Dr George's report. That consideration was contained in a letter dated 28 August 2014. The Respondent treated Duncan Lewis's letter as seeking to raise a fresh claim but she declined to treat it as satisfying the requirements of paragraph 353 of the Immigration Rules. She gave her reasons in a very full "Consideration of Submissions" document. This made essentially two points:

(1) Treatment for PTSD is said to be available in Pakistan. Considerable detail is given about how such treatment may be accessed. The point is made that Dr George does not address the question of availability of treatment in Pakistan.

(2) Ms Wasif's case is said to fall outside very limited circumstances in which the removal of a person suffering from serious illness, including a mental condition giving rise to the risk of suicide, would constitute a breach of article 3 of the ECHR. Reference is made to, among other authorities, *J v Secretary of State for the Home Department*, [2005] EWCA Civ 629, *Y (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 362 and *GS (India) v Secretary of State for the Home Department*, [2015] EWCA Civ 40, [2015] 1 WLR 3312. Six particular points are made. We need not go through them all, since the only one which is disputed is the fifth, in which it is said that Ms Wasif "does not have a well founded fear of return to Pakistan", observing that "this decision has been upheld by the courts": this appears to be a reference to the rejection by the FTT of her account that she had been assaulted and raped by her family there. This is also said to distinguish her case from that of the appellants in *Y (Sri Lanka)*.

40. Duncan Lewis sought permission to amend the Claim Form to challenge that decision also. The "Further Amended Grounds" dated 19 September 2014 are, we have to say, rather discursive, and it is not altogether easy to extract hard-edged points of law from them. But the essential point is that the Respondent was wrong, in the second of the two points summarised above, to rely on the FTT's rejection of Ms Wasif's claim to have been raped. The case is put primarily on the basis that Dr George's opinion that her account was true constituted important evidence which was unavailable to the FTT, reinforced by her endorsement of the reasons given by Ms Wasif for not having reported the rape earlier. However, the grounds describe the FTT's decision as "problematic" in any event, partly on the basis that the Judge failed to give any weight to the well-recognised difficulty that many victims have of disclosing that they have been raped, and partly in reliance on observations made by Ouseley J in *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) to the effect that cases where an allegation of rape is made may be inappropriate for fast-track procedures. We should note that the grounds do not challenge the Respondent's statement that medical treatment for PTSD was available in Pakistan: indeed she is criticised for devoting so much attention to "a case that has not been put".

41. The permission application was considered on the papers by UTJ Eshun on 27 September 2014. She refused permission. I should set out her decision in full (omitting a passage dealing with costs):

> "The application for permission is hereby refused
>
> Reasons:
>
> Applicant seeks permission to amend her grounds of claim pursuant to the Respondent now making a decision dated 28 August 2014, served with her Acknowledgement of Service and Summary Grounds of Defence on 2 September 2014, to refuse her further submissions as amount to fresh claim for the purposes of paragraph 353 of the immigration rules.
>
> The grounds at paragraph 19 refer to Dr George's report dated 31 August 2014. There is not a report of this date on the file. There is however a report by Dr George dated 31 July 2014, which has been considered by the respondent. The issue of the applicant's claimed rape has been considered by a First-tier Judge who disbelieved it. The respondent gave anxious scrutiny to the further submissions and the various psychiatric reports. The respondent's decision that the further submissions did not amount to a fresh claim was within the range of reasonable responses open to her.
>
> …
>
> The application is considered to be totally without merit."

42. Ms Wasif applied for permission to appeal to this Court. It was refused by UTJ Eshun but granted by Underhill LJ. He expressed some doubt about whether Ms Wasif's underlying claim for judicial review was arguable, but he believed that permission should be granted on the basis of the grounds relating to TWM certification.

43. In their skeleton argument Mr Fordham and Mr Halim argued that the Appellant's claim was not "bound to fail" because for the reasons already summarised Dr George's report significantly undermined the finding of the FTT on which the Respondent had relied in her letter of 24 August 2014; and the same points were developed at the hearing before us in support of a submission that permission to apply for judicial review should have been granted (see para. 28 above). Dr George's report constituted, in the words of paragraph 353, material which "had not already been previously considered" and which, "taken together with the previously considered material, created a realistic prospect of success". They emphasised the "somewhat modest" threshold posed by rule 353 (see *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495, at para. 7); the fact that the threshold for the grant of permission to apply for judicial review was likewise only whether the claim was arguable, coupled with the need for anxious scrutiny; and the risk of unfairness associated with the fast-track procedures. They repeated that Dr George's opinion was particularly important because the decision of the FTT was questionable in any event because of the failure to acknowledge the well-recognised reluctance of rape victims to reveal what they have suffered and because of the inappropriateness of the fast-track procedure.

44. We do not believe that the submission of Dr George's report even arguably required the Respondent to treat Ms Wasif as having made a fresh claim. It is important to identify the nature of the claim being made. It was not an attempt to revive the claim based on the risk of violence from her family, and whether she had suffered that violence, including the rape, was thus not as such the determinative question. Rather, it was a claim based on what Dr George judged to be the "high" risk that if she were returned to Pakistan the PTSD from which she was suffering might lead her to commit suicide, and that to return her in those circumstances would constitute a breach of her rights under article 3 of the ECHR. It was not in fact explicitly put that way in Duncan Lewis's letter of 31 July 2014, but that is how the Respondent understood it, and it is how it was presented before us. It is well established that to remove a person who has no right to remain in the UK does not constitute a breach of article 3 only because there is a risk that they will commit suicide on return. We need not review the case-law, which includes the authorities identified by the Respondent in her decision (see para. 39 (2) above) but also the seminal decision of the European Court of Human Rights in *Bensaid v United Kingdom* (2001) 33 EHRR 10 and the decision of this Court in *AJ (Liberia) v Secretary of State for the Home Department* [2006] EWCA Civ 1736. It is clear from those authorities that such a claim will only succeed if there are "exceptional circumstances comparable in impact to those of the terminal patient in *D v United Kingdom* (1997) 24 EHRR 423": see para. 16 of the judgment of Hughes LJ in *AJ (Liberia)*. In *Y (Sri Lanka)*, the only reported case in which such a claim has succeeded, the appellants were Sri Lankan

Tamils who were suffering PTSD as a result of torture and rape by agents of the state; in addition their immediate family in Sri Lanka had been killed in the 2004 tsunami. The uncontroverted evidence was that they were "so traumatised by their experiences, and so subjectively terrified at the prospect of return to the scene of their torment, that they will not be capable of seeking the treatment they need". The Respondent, as we have seen, sought to distinguish *Y (Sri Lanka)* on the basis that it was accepted that the appellants in that case had suffered the abuse alleged, whereas the FTT in Ms Wasif's case had found otherwise. We are prepared to accept that it may be arguable that Dr George's report rendered that conclusion unsafe (though it is a matter of some concern that she proceeded on the basis that Ms Wasif had "nothing to gain" from saying that she had been abused by her family); in which case the distinction relied on by the Respondent would be unsound. But even if Ms Wasif's account is true the facts of the present case are still very different from those of *Y (Sri Lanka)*. Ms Wasif was not the victim of state violence: her return would not therefore put her in the power of the very authorities by whom she had previously been abused. Equally significantly, no challenge is advanced to the Respondent's conclusion that she would have access to treatment for her PTSD if she were returned, whereas the inability of the appellants in *Y (Sri Lanka)* to access such treatment was an important part of the reasoning of the Court. We see no realistic prospect that a tribunal would find, even giving full credence to Dr George's report, and applying the requisite anxious scrutiny, that to return Ms Wasif to Pakistan would be in breach of her rights under article 3.

45. We would accordingly uphold the decision of UTJ Eshun to refuse permission to apply for judicial review. But we have to say that we regard her reasons as too summary. She did not in fact decide the application for permission on the same basis as we have done above. If she had, it would not have been necessary for her to express herself as fully as we have done in the preceding paragraph, but she should at least have given the gist of the relevant reasoning. Purely by way of example, we would have regarded it as adequate to say something like the following:

> "I accept that in the light of Dr George's report the Respondent may arguably not have been entitled to treat the FTT's rejection of the claimant's account as determinative, or therefore to distinguish the decision in *Y (Sri Lanka)* on the basis that in that case the appellants' accounts of their ill-treatment were accepted. But the authorities such as *AJ (Liberia)* make it clear that it is only exceptionally that the risk that a person may commit suicide on return will give rise to a breach of article 3, and I do not believe there is a realistic chance that even on the basis of Dr George's report a tribunal would find a breach in the present case, where the claimant was not the victim of abuse by the authorities and where the Respondent has shown with some particularity that treatment for her condition is available in Pakistan."

Of course that was not her reasoning. Rather, she said (a) that the FTT had disbelieved Ms Wasif's account and (b) that "the respondent gave anxious scrutiny to the further submissions and the various psychiatric reports". However that does not engage with the essential point made in the grounds, namely that Dr George's report undermined the FTT's finding. Nor does it deal with the supporting points based on the FTT's alleged disregard of the recognised fact that rape victims often find it very difficult to disclose what they have experienced, and on what Ouseley J said in the *Detention Action* case. Proper reasons would have had to address those arguments and show, however succinctly, why the Judge thought they were unarguable. We do not wish to be too critical of the Judge; and it is her misfortune to be caught in the spotlight of a leading case. We are well aware of the pressure of work in the Upper Tribunal. In addition, Ms Wasif's pleaded grounds were, as we have said, rather discursive, and the Judge did not have the benefit, as we have done, of hearing them expounded orally. But the essence of the points being made was sufficiently clear; and if she was going not only to refuse permission but to certify the claim as TWM she needed to address them more specifically than she did.

46. It may also be useful, in view of the broader issues raised by this appeal, to consider whether Ms Wasif's application was appropriate for certification as TWM. We undertake the exercise with some reluctance because it is not easy for us fairly to reconstruct how the claim would or should have appeared to the Judge on the papers before her. Subject to that caveat, however, we must say that we are doubtful whether we would ourselves have certified it. Although, having had the opportunity to test her application against oral submissions, we are confident that it had no realistic prospect of success, the question was not entirely straightforward. Both Dr George's report and the Respondent's reasoning required careful scrutiny, and a number of authorities were referred to. The claim had evidently been put together in the face of some difficulties, and Ms Wasif had made a suicide attempt. We should not be taken to be suggesting that those features, either singly or together, made the case unsuitable for certification; but they provide part of the context. More substantially, the Respondent's reliance on the decision of the FTT may have been put in question by the evidence of Dr George, and we have eventually upheld the decision on rather different reasoning than appears in the decision letter.

HOSSAIN

47. Mr Hossain is a national of Bangladesh. He was born on 29 September 1982. He came to the UK on 27 October 2004 on a student visa. On 31 March 2009 he was granted a post-study work visa until 31 March 2011. In January 2011 he started a relationship with a Ms Fernando, a British citizen, which he says became a full sexual relationship in April that year. He overstayed: he says that he had hoped to apply for a further student visa but the college to which he had already paid £2,000 by way of fees lost its licence. On 3 December 2011 he made an application for leave to remain based on article 8 of the ECHR. That application was refused, with no right of appeal, on 20 November 2012.

48. Mr Hossain and Ms Fernando married in a Muslim ceremony in October 2012 – she had converted to Islam in order to marry him – and started to live together. Mr Hossain made a further application for leave to remain, again based on article 8, and specifically on his marriage to Ms Fernando, on 5 February 2013: at that stage Ms Fernando was pregnant, though sadly she suffered a miscarriage almost immediately thereafter. Although we do not have the terms of the application, it appears that he relied not only on his marriage but also on what he said was a risk of persecution on political grounds if he were returned to Bangladesh. His father was said to be a leading member of the opposition Freedom Party, who had had to go into hiding and had died as a result of the stress. Mr Hossain said that he himself had been an activist in the youth wing of the party before he came to the UK and had been attacked by the police.

49. That application was refused in April 2013, but following the issue of judicial review proceedings the Respondent agreed to reconsider. On 12 March 2014 the application was again refused. The decision letter considered the claim under article 8 first in accordance with the provisions relating to family life in Appendix FM of the Rules, by reference to the "partner route"; then under paragraph 276ADE, which relates to private life; and finally "outside the Rules". The reasoning as regards private life is not now challenged, and we need say nothing about it. As for Appendix FM, the determinative question was whether Mr Hossain could satisfy para. EX.1 (b) of Appendix FM, which applies where the applicant is in a genuine and subsisting relationship with a British citizen "and there are insurmountable obstacles to family life with [the] partner continuing outside the UK". The Respondent dealt with the issue of "insurmountable obstacles" as follows:

> "We have reconsidered all the evidence that you have presented and there is nothing to show that there are any insurmountable obstacles that would prevent you and your spouse from relocating to your home country. You are both healthy and young people. There are no physical impediments to you both relocating to Bangladesh.
>
> You have stated that your spouse has converted to Islam in order that you could marry. Therefore although she may not be fully conversant with life in Bangladesh her recent conversion to the Islamic belief will help her assimilate, with your help, into the life and culture of Bangladesh."

As regards the risk of political persecution, the Respondent acknowledged that there was "a degree of political turmoil in Bangladesh" but said that no evidence whatever had been supplied to substantiate the alleged risk to Mr Hossain. As regards the claim outside the Rules, the Respondent said that no exceptional circumstances had been shown: she rejected the claim that he would be at risk of persecution if returned for the same reasons as she had already given in the context of the "insurmountable obstacles" issue.

50. The present judicial review proceedings were issued on 23 April 2014 seeking to challenge that decision. Mr Hossain was unrepresented and his grounds are

not professionally drafted (though some legal input is detectable). They set out the facts in summary form and then proceed to identify the grounds of challenge under six heads. We need not set them out because they are in very general terms. In essence, they assert separately in relation to the issues of "insurmountable obstacles", private life and "exceptional reasons" that the Respondent's decision is "totally unreasonable under the Wednesbury principles" and contrary to his and his wife's rights under article 8.

51. A witness statement from Mr Hossain was lodged with the Claim Form. It mixes facts and submissions. The relevant parts for our purposes are para. 8, headed "Insurmountable Obstacle", and para. 10, headed "Leave outside the Rules and Exceptional Circumstances". We take them in turn. Para 8 starts by explaining the alleged risk of persecution if Mr Hossain were returned to Bangladesh. It does so in exceedingly summary terms which add virtually nothing to what we have set out at para. 48 above. He then says that he has no family and friends to return to and no land, property or job in Bangladesh. He continues:

> "My wife is British, she has never been to Bangladesh, she does not speak Bengali, she has no family or friends of Bangladesh, she does not know the Bengali culture. She will never be able to adjust herself. More than me she will suffer insurmountable obstacles. My wife has all her family and friends in UK, her culture and upbringing is British; she is well established in UK. It is highly wrong and unfair to expect her to uproot her life in the UK to go and try and settle in a totally strange country. As a British [*sic*] she is fully entitled to enjoy the benefits of a country, which is UK. She is entitled to have a husband live with her in the UK."

Finally he mentions two miscarriages which Ms Fernando had suffered, attributing them to the uncertainty about his immigration status. Para. 10 makes essentially the same points, with no greater detail. But we should note that the concluding point made (at sub-para. (vii)) is that "there is no guarantee that if I leave … I will be granted visa to return and join my wife in the UK".

52. The Respondent lodged an Acknowledgement of Service attaching Summary Grounds of Defence. These were in fairly unspecific terms seeking to support the reasoning in the decision letter. It appears that Mr Hossain lodged a response to the Summary Grounds, but we do not have a copy.

53. The application for permission was considered on the papers by UTJ Macleman on 22 December 2014. He refused permission. His decision reads (again, omitting a passage relating to costs):

> "The application for permission is hereby refused
>
> Reasons:
>
> The grounds simply re-assert (and the reply to the summary of grounds of defence further exaggerates) the alleged political difficulties the applicant might encounter in Bangladesh, and the alleged 'exceptional circumstances' such that his wife should not be expected to relocate there.
>
> The grounds are no more than insistence and disagreement. They do not show that the respondent's decision dated 12 March 2014 may arguably be found to be an unlawful one.
>
> …"

54. On 30 March 2015 UTJ Macleman refused permission to appeal to this Court; but permission to appeal was given by Underhill LJ, again principally because of the issue raised about TWM certification.

55. We have already set out the grounds of appeal. Mr Malik's skeleton argument picks up the points made by Mr Hossain in his witness statement but focuses in particular on the position of Ms Fernando, pointing out that she is a British citizen but is being "required to walk out of her marriage" or move to Bangladesh permanently to live with her husband.

56. We should start by addressing Mr Hossain's case based on the risk of political persecution if he were returned to Bangladesh. We do not believe that this stands any realistic chance of success. He has never claimed asylum. He had in 2014 been absent from Bangladesh for about ten years, and there was no evidence that he had been politically active in that time. No details were given of his father's alleged persecution. The evidence was at the highest level of generality, without any documentary material to support it.

57. The case based on insurmountable obstacles is rather less straightforward. Both parties' cases – with the passing exception of para. 10 (vii) of Mr Hossain's witness statement (see para. 51 above) – proceeded on the basis that the issue was whether there would be insurmountable obstacles to Ms Fernando moving permanently to Bangladesh. We are unclear how realistic this is. If Mr Hossain returned to Bangladesh he would be entitled to make an application for leave to enter as Ms Fernando's husband. The relevant part of Appendix FM specifies various conditions for the grant of leave in such a case: it may be that the only one that might pose a real difficulty would be the minimum income condition, but since the point was not explored below we do not know. If Mr Hossain were able to return after a short separation the question of permanent relocation would not arise.

58. However, we must, as Mr Malik contended, consider the reasonableness of the Respondent's actual reasoning. It is not difficult to appreciate the difficulties that would be faced by Ms Fernando in adapting to life in Bangladesh. But the question is whether they would be "insurmountable".

59. In *Agyarko v Secretary of State for the Home Department* [2015] EWCA Civ 440, [2016] 1 WLR 390, this Court was concerned with two cases which were essentially similar to this. The two appellants, Ms Agyarko and Ms Ikuga, were foreign nationals who married British citizens while overstaying in this country: in neither case did the husband have any links to his wife's home country – in the one case Ghana, in the other Nigeria. In both cases the Upper Tribunal refused permission to apply for judicial review of the Respondent's refusal to grant leave to remain, holding that there were no insurmountable obstacles to their married life continuing in those countries; and this Court upheld those decisions. The following passages from the judgment of Sales LJ, with whom the other members of the Court agreed, are pertinent. So far as the overall approach is concerned, he said:

> "21. The phrase "insurmountable obstacles" as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom.
>
> 22. This interpretation is in line with the relevant Strasbourg jurisprudence. ... The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by *Jeunesse v Netherlands* [(2015) 60 EHRR 17)] (see para. [117]: there were no insurmountable obstacles to the family settling in Suriname, even though the applicant and her family would experience hardship if forced to do so).

Sales LJ then made two further points by way of clarification, one being that although the test is stringent it is intended to be interpreted "in a sensible and practical rather than a purely literal way", referring to both *Jeunesse* and the observations of Lord Dyson MR in this Court in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192, [2014] 1 WLR 544, at para. 49. Turning to the facts of Mrs Agyarko's case, he observed, at para. 26, that there was no witness statement from her or her husband, Mr Benette, to explain what obstacles might exist. He continued:

> "The mere facts that Mr Benette is a British citizen, has lived all his life in the United Kingdom and has a job here – and hence might find it difficult and might be reluctant to re-locate to Ghana to continue their family life there - could not constitute insurmountable obstacles to his doing so."

A similarly stringent approach was taken in Mrs Ikuga's case.

60. The well-known decision of Sales J in *Nagre v Secretary of State for the Home Department* [2015] EWHC 720 (Admin) is of the same kind. The claimant was an Indian national who had formed a relationship with a British national,

Ms Palmer, who apparently had no previous links with India. The Respondent in refusing permission to remain observed that Ms Palmer would be able to learn the relevant regional language and adapt to Indian life and had not shown that she would be unable to adapt to Indian life and culture. Sales J observed (at para. 50) that the difficulties that Ms Palmer might encounter fell far short of constituting an insurmountable obstacle to their relocating to India.

61. Mr Hossain's case is not of course precisely identical to those cases. For one thing, he did, unlike Mrs Agyarko, make a witness statement – though it is in very general terms and is unsupported by anything from Ms Fernando herself. But what *Agyarko* establishes, and the facts of the case illustrate, is the stringency of the test of "insurmountable obstacles". In our view the Respondent was entitled to regard the obstacles facing Ms Fernando in having to move to Bangladesh, and adjust to its culture and way of life, in order to pursue married life with Mr Hossain as falling short of insurmountability. Certainly no special features about her circumstances or background that might take the case out of the ordinary were identified.

62. It is true that Mr Hossain also relied on article 8 "outside the Rules"; and it is explicitly recognised in *Agyarko* (and *Nagre*) that there may in principle be cases where the refusal of leave to remain in circumstances where that would interfere with a relationship with a partner in the U.K. would breach an applicant's article 8 rights even in the absence of insurmountable obstacles to relocation. However, Mr Malik candidly but realistically accepted that in the circumstances of the present case it would be very difficult for Mr Hossain to succeed under article 8 outside the Rules. There are no other features of the case which might render it disproportionate to remove him. On the contrary, although he and Ms Fernando met a few weeks before his visa expired, they knew within weeks that he had no right to remain, and that had been the case for well over a year before they married and moved in together. It is well-established that where family life is created in the knowledge that the immigration status of one of the partners is precarious it is only very exceptionally that removal of the non-national family member will be a breach of article 8 – see the passage from the judgment of the Strasbourg Court in *Rodrigues da Silva v The Netherlands* (2007) 44 EHRR 34 quoted at para. 39 of the judgment in *Nagre*.

63. Mr Malik sought to argue that the decision whether the refusal of leave to remain would constitute a breach of Mr Hossain's article 8 rights was not reviewable only on *Wednesbury* grounds but required to be taken by the Tribunal itself. He referred to the judgments of Beatson LJ in *Haleemudeen v Secretary of State for the Home Department* [2014] EWCA Civ 558, at para. 67, and Underhill LJ in *Singh and Khalid Secretary of State for the Home Department* [2015] EWCA Civ 74, at para. 70. Part of the significance of that was that it was, he argued, legitimate to take into account the contents of Mr Hossain's witness statement even though it was not before the Respondent when she took her decision. We need not consider this submission because in our view the Respondent's decision is unimpeachable whether or not the contents of Mr Hossain's witness statement are taken into account.

64. Mr Malik informed us that the Supreme Court has recently given permission to appeal in *Agyarko*, but he did not suggest that we should adjourn the appeal on that account. He also informed us that Mr Hossain and Ms Fernando have now had a child. He did not suggest that that was relevant to our decision, though of course it might be relevant in the case of any fresh application or appeal against a removal decision.

65. For those reasons we would in this case also uphold the refusal of the Upper Tribunal to grant permission to apply for judicial review. We do not express a view either way about the decision to certify the application as TWM. We can understand why UTJ Macleman may have regarded the jurisprudence in this area as now firmly established and Mr Hossain's evidence as entirely inadequate.

66. We fear, however, that we must again be critical of adequacy of the Judge's expressed reasoning; and indeed Ms Rhee did not seek to defend it. That reasoning was, in effect, that Mr Hossain's grounds do no more than "assert" his case on insurmountable obstacles (including because of the alleged risk of political persecution), with a degree of exaggeration, and disagree with the Respondent's decision. That is not enough. A claimant necessarily asserts his or her case and disagrees with the decision challenged. But Mr Hossain gave reasons for doing so, and it was necessary for the Judge to say why those reasons had no realistic prospect of success, all the more so where the application was being said to be totally without merit. In our view, as regards the alleged risk of political persecution the Judge should have said at least something to the same effect as we have said at para. 56 above: it might also have been appropriate for him to say a little more in order to address the response referred to at para. 52, but we cannot say since we have not been shown it. As regards the obstacles faced by, in particular, Ms Fernando in moving to Bangladesh, it should have been pointed out that the hurdle posed by the phrase "insurmountable obstacles" was a high one; that the rules in that respect conformed with the requirements of article 8 as interpreted in the Strasbourg court; and that the very general statement of the difficulties that Ms Fernando would face did not even arguably get over that hurdle. It would have been appropriate to identify the relevant case-law – which at that date consisted essentially of *Nagre* and the Strasbourg cases referred to in it (though we do not suggest that it would have been necessarily to spell those out individually). Anything less does not appear to us to meet the *Flannery* standard.

DISPOSAL

67. We would dismiss both appeals.