Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/21314/2014
IA/12478/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 April 2015	**On 5 May 2015**

Before

UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS RAZIA MARZIA (FIRST RESPONDENT)
MR MOHAMAD YASIN NUJEEBUN (SECOND RESPONDENT)
(NO ANONYMITY DIRECTION)

Respondents

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondents: Mr S Symes, Counsel

DECISION AND REASONS

1. The respondent Miss Razia Marzia is a citizen of Bangladesh and her date of birth is 25 July 1982. She is married to the respondent Mohamad Yasin Nujeebun who is a

citizen of Mauritius and his date of birth is 28 December 1982. I shall refer to the respondents as the appellants as they were before the First-tier Tribunal.

2. Mr Nujeebun arrived lawfully in the country on 2 March 2003 as a student. He made an application on 2 September 2013 for ILR on the basis of ten years' residence in the UK. This application was refused by the Secretary of State in a decision of 17 February 2014. It was refused because Mr Nujeebun did not have continuous residence between 17 February 2007 and 31 May 2007 and thus was without leave for 104 days. Miss Marzia came to the UK lawfully in 2002 as a student. On 14 November 2012 she was granted limited leave to enter the UK until 2 September 2013 as a Tier 1 post-study partner. She made an application on 2 September 2013 for leave to remain. Her application was refused by the Secretary of State in a decision of 29 April 2014 under the Immigration Rules and Article 8. Removal directions pursuant to Section 47 of the 2006 Act were made against both appellants. The decision maker considered whether or not the application contained any exceptional circumstances and decided that it did not. Mr Nujeebun's application was refused under the long residence Rules and the Immigration Rules relating to private and family life. It was considered by the decision maker that there were no "factors of sufficiently compelling or compassionate nature to warrant granting you any period of leave to remain in the United Kingdom exceptionally outside the Immigration Rules".

3. The appellants appealed against the decisions and their appeals were allowed by Judge of the First-tier Tribunal Trevaskis in a decision that was promulgated on 26 November 2014 following a hearing on 19 November 2014. Permission to appeal was granted by First-tier Tribunal Judge Shimmin on 12 January 2015. Thus the matter came before me.

The Decision of the First-tier Tribunal

4. Judge Trevaskis heard evidence from the appellants and he found them both to be credible. He found that neither appellant satisfied the requirements of the Immigration Rules in relation to family or private life.

5. He made the following findings:

> "34. Regarding the second appellant [Mr Nujeebun], his evidence is that he has family members living in Mauritius with whom he maintains contact, and he still speaks French and Creole. He has not claimed that it would be impossible for him to relocate to Mauritius, and I do not find any evidence that it would be impossible.
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> 35. Both appellants have claimed that it would be impossible for them to relocate in either country as a couple; those claims are based upon alleged disapproval of their marriage by their respective families, and neither has suggested that their partner would be unable to obtain leave to enter their

country as their spouse. I am not satisfied that the length of time that they have each spent away from their country of origin is sufficient to demonstrate that no ties to that country remain, bearing in mind the number and duration of return visits that each appellant has made to their respective countries during that period, and the level of maintained contact with family members there.

37. I have gone on to consider whether the appeal requires to be considered according to the provisions of Article 8 of the European Convention on Human Rights. In MM and SSHD [2014] EWCA Civ 985 the Court of Appeal has stated 'if the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision maker.' There must be a good reason to consider Article 8 directly, meaning either one that is compelling or because there are exceptional circumstances. There is no test of exceptionality; there does not have to be anything extreme to move to Article 8 directly. A good reason may be present if the Immigration Rules do not provide discretion to examine whether the immigration decision is proportionate in light of all the appellants' circumstances, but only if the consequences of the immigration decision are likely to have a significant impact on the private or family life continuing.

38. I find that the immigration decisions are likely to have a significant impact on the private or family life continuing. The appellants came to the United Kingdom as students; they came from different countries, and formed their relationship after they met in the United Kingdom; should they be required to leave, it is likely that, at least initially, they will have to return to their respective countries, and one of them will have to seek leave to enter the other's country if they are able to resume living together.

39. I find that the Immigration Rules do not provide discretion to examine whether the immigration decision is proportionate in light of all the appellants' circumstances. The decisions made by the respondent have been based simply on the second appellant not having completed ten years' continuous lawful residence, neither appellant having a partner who is a British citizen, settled in the United Kingdom or here with refugee leave or humanitarian protection, and neither appellant having shown that they have no ties to their home countries. Since neither of them qualifies for consideration under EX.1, there has been no consideration of obstacles to their private and family life continuing outside the United Kingdom".

6. The First-tier Tribunal went on to consider Article 8 in accordance with R (Razgar) and SSHD [2004] UKHL 27 and stated as follows:-

"43. Regarding the second question, I find that the interference will have consequences of such gravity as potentially to engage the operation of Article 8; it will involve the appellants in relocating to Bangladesh and Mauritius respectively, where they will be potentially homeless and without means of support".

The judge went on to find that the decision was not proportionate after having conducted a balancing exercise at paragraphs 47-50. The Judge found as follows:-

"47. The factors in favour of the interference are: the appellants came to the United Kingdom as students, with limited leave granted on that basis; they entered into a relationship knowing that their immigration status has been precarious; regarding Section 117A and B of the Nationality, Immigration and Asylum Act 2002, their private life should only be given little weight as it has been established while their status was precarious.

48. The factors against the interference are: the appellants have been living in the United Kingdom since 2002 and 2003; they have not committed any crime; they have lived industrious lives, successfully pursuing their studies and working in accordance with their leave; they have registered their own company to enhance their earning capability, and have paid income tax and national insurance appropriate to their respective incomes; they have established a large circle of friends whilst in the United Kingdom; they have become integrated within a strong community in mosques in London and Northampton; they have contributed to the welfare of their community by improving themselves in charitable activities; they have become financially self-sufficient as a result of their efforts; they have acquired and maintained several addresses during their time in the United Kingdom; they have established a strong personal relationship, which they have acknowledged by marriage, and which has existed for over ten years, and which it is unlikely that they will be able to sustain if they are required to leave the United Kingdom; they both speak English to the extent necessary to minimise the extent of any burden on taxpayers, and to enable them better to integrate into society; they have come to the United Kingdom to embark upon a path towards settlement based upon long residence, and therefore their immigration status during that qualifying period cannot truly be said to be as precarious as the status of migrants who are not pursuing such a path towards settlement; the private and family life which they have established during their presence in the United Kingdom should therefore be given appropriate weight, and not little weight.

49. I have undertaken a balancing exercise in respect of these competing factors, in order to assess the proportionality of the respondent's decision. I find that the factors supporting the refusal decisions are outweighed by those against them. At the date of this hearing, both appellants have been

living, studying and working in the United Kingdom for twelve years and eleven years respectively, and have shown their intention to settle here and contribute positively to the economy and to the community of the United Kingdom. The technical deficiency in the application of the second appellant [Mr Nujeebun], relating to the lack of leave while confusion regarding his application was resolved, is a minimal period of time, having regard to the overall length of residence. He remained in contact with the respondent throughout that period, and did not seek to disengage from the official process for renewing leave; his leave was indeed renewed once the relevant paperwork had been sorted out, and his presence has been lawful throughout the subsequent period. Having regard to the various family problems which he was experiencing at or about the time when the application was first submitted, it is understandable that he encountered difficulties regarding the payment of the fee and the correct form of application to submit; however, this was not a first application for further leave, and it was clear from past information held by the respondent that the second appellant was a genuine applicant.

50. It has not been suggested by the respondent that the relationship of the appellants is anything other than a genuine and subsisting relationship, and I am satisfied that it is. Although either party is free to return to their own country of origin, it is by no means clear that their spouse will be able to accompany them, or, if they can, that there will be an adequate support system available to them in that country, to assist them in finding accommodation and employment as a means to self-sufficiency. I am satisfied that, in those circumstances, they will be prevented from maintaining their family life together in whichever country they chose. On the contrary, in this country they have a home, employment .. .. a social context for their lives, and I find no good reason, nor any strong public interest, for depriving them of these advantages in the interests of the economic wellbeing of the United Kingdom. The maintenance of effective immigration control requires the proper application of the law, including the provisions of Article 8, and not simply a literal application of the Rules."

The Ground Seeking Permission and Oral Submissions

7. The grounds seeking permission to appeal maintain that the judge was wrong at [39] when he found that the Immigration Rules do not provide discretion to examine whether the immigration decision is proportionate in all the appellants' circumstances. It is contrary to Nagre [2013] EWHC 720 (Admin), specifically at [42] which reads as follows:

> "In order to show that, despite the practical possibility of relocation (i.e. the absence of insurmountable obstacles to it), removal in such a case would

nonetheless be disproportionate, one would need to identify other nonstandard and particular features of the case of a compelling nature to show that removal would be unjustifiably harsh".

8. The grounds maintain that the judge failed to direct himself in relation to the test in Nagre and conducted a "freewheeling Article 8 analysis, unencumbered by the Rules" of the kind referred to by Cranston J in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC).

9. The grounds refer to [50] of the determination and attach significant weight to the finding that "although either party is free to return to their own country of origin it is by no means clear that their spouse would be able to accompany them". The burden of proof is on the appellants to show that their relocation would be impossible or that removal would be unjustifiably harsh and it was insufficient for the judge to speculate that it might be impossible.

10. I heard oral submissions from both Mr Tufan and Mr Symes. Mr Tufan referred me to the case of Singh and SSHD [2015] EWCA Civ 74 with specific reference to [61], [64] and [67]. It was submitted that the finding at [43] of the Judge's determination was not grounded in the evidence. There was no clear evidential basis for the findings at [50] which in any event contradicts those at [35]. The judge considered Section 117 of the 2002 Act and agreed that little weight should be given to the appellants' private lives, but then did not apply the direction.

11. Mr Symes relied on the Rule 24 response and made submissions in the context of it. He maintained that the grounds of appeal are not made out, the judge properly directed himself and understood the relationship between appeals inside and outside of the Immigration Rules in accordance with MM and Ors [2014] EWCA Civ 985. The judge's reference to discretion at [37] and [39] is in the context of determining whether there is a meaningful inquiry to be conducted outside the Rules and does not amount to an error of law.

12. The judge carried out a balancing exercise and considered the appellants' private and family life here, the lengthy residence and the difficulties as a result of them being from different countries neither having a connection with the country of the other. In relation to proportionality the judge properly considered part 5A of the Nationality, Immigration and Asylum Act 2002 taking into account the small break in Mr Nujeebun's leave and the uncertainty in relation to the ability to enter the other one's country where they would face difficulties in making lives together. The judge was principally concerned with the strength of the connections that the appellants have to the UK as opposed to the relatively sparse lives that awaited them abroad.

13. Mr Symes argued that the decision is not irrational and that the grounds of appeal amount to a quarrel with the First-tier Tribunal's assessment of the evidence.

Conclusions

14. Permission to appeal was granted on the basis that it is arguable that the judge's approach to Article 8 is flawed but no reason for this is given by the judge granting permission.

15. The judge at [39] found that, in this case, in the appellants' circumstances, it was necessary to conduct a full examination of Article 8 outside of the Immigration Rules. This decision was well within the remit of the judge and it was a rational decision which was adequately reasoned. It was not contrary to the judgment in Singh and SSHD [2015] EWCA Civ 74 and generally consistent with case law (see R (Oludoyi) v SSHD (Article 8 –MM (Lebanon) and Nagre) [2014] UKUT 00539) on this particular issue (in relation to article 8 and the interplay with the rules).

16. The grounds at [6] challenge the assessment of proportionality with specific reference to [50] of the determination. In my view, the judge conducted a holistic assessment of the appellants' circumstances in concluding that it would not be proportionate to remove them (to Bangladesh or Mauritius). The decision is reasoned. He found that the appellants were credible and accepted their evidence in relation to the difficulties that they would face in relation to return to their respective countries. The judge found at [43] that the appellants would be potentially homeless and without the means of support in Bangladesh or Mauritius, but he explained this in more detail at [50]. I am satisfied that the findings are grounded in the evidence of the appellants which the judge accepted. It is clear that the overall assessment of proportionality was made on the basis that the appellants would be returning together to Mauritius or Bangladesh and not on the basis that relocation would be impossible. It is obvious in this case that the judge attached considerable weight to the period of time the parties had been here and he was entitled to.

17. In oral submissions before me Mr Tufan raised section 117B(5) which states that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. It was not a matter that was raised in the permission application, but it relates to the proportionality assessment which is challenged. However there is no merit in the assertion. The judge properly had regard to section 117B (5) at [47] and again at [48]. He explained at [49] why he found, on the facts of this particular case, that "the factors supporting the refusal decisions are outweighed by those against them." The judge had regard to section 117B of the 2002 Act (Dube (ss 117A-117D) [2015] UKUT 00090 (IAC) in regard to the precarious nature of each of the appellant's status here in the context of private life and he and weighed this against the period of time they had been here and other factors which he considered to relevant in conducting the balancing exercise.

18. Whilst the decision was generous, it was by no means irrational. It has not been made out that he took into account irrelevant evidence or failed to take into account relevant evidence. The balancing exercise conducted by the judge was adequately

reasoned, rational and lawful. The findings are grounded in the evidence and regard was has to article 8 jurisprudence and section 117 of the 2002 Act.

19. The application by the Secretary of State is dismissed and the decision of the First-tier Tribunal to allow the appeals under Article 8 of the 1950 Convention on Human Rights is maintained.

20. No anonymity direction is made.

Signed Joanna McWilliam Date 1 May 2015

Deputy Upper Tribunal Judge McWilliam