Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/20827/2013

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 14 April 2015	**On 19 May 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ENTRY CLEARANCE OFFICER – ISTANBUL

Appellant

and

GAMZE AKSAHIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Ms M Bayoumi instructed by Qualified Legal Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judges Suffield-Thompson and Page) allowing the appellant's appeal against a decision of the ECO dated 31 October 2013 refusing her entry clearance to join her husband, Mehmet Aksahin (the sponsor) in the United Kingdom under Appendix FM of the Immigration Rules (HC 395 as amended). The First-tier Tribunal dismissed the appeal under the Immigration Rules but allowed it under Art 8 of the ECHR.

2. For convenience, I will refer to the parties as they appeared before the First-tier Tribunal.

Background

3. The appellant is a citizen of Turkey who was born on 28 February 1995. The sponsor is also a citizen of Turkey and was born on 1 June 1983.

4. The sponsor came to the UK in 2003 and claimed asylum. On 23 March 2012, the sponsor was granted discretionary leave to remain in the UK until 22 December 2014.

5. The sponsor met the appellant in Turkey on 30 September 2012. They became engaged on 10 October 2012. The sponsor visited Turkey and they were married on 11 January 2013.

6. The appellant made her application for entry clearance as a spouse under Appendix FM on 24 July 2013. On 31 October 2013, the ECO refused the appellant's application on the basis that her sponsor only had limited leave to remain expiring on 22 December 2014 and therefore she could not meet the requirement in E-ECP2.1 of Appendix FM that her partner was a British citizen; or was present and settled in the UK; or was in the UK with leave as a refugee or on the basis of humanitarian protection.

7. The ECO's decision was upheld by the Entry Clearance Manager in a decision dated 24 April 2014.

8. The appellant appealed to the First-tier Tribunal. Before the First-tier Tribunal, it was common ground that the appellant could not succeed under the Immigration Rules (namely para ECP2.1), as the sponsor only had discretionary leave to remain in the UK. Nevertheless, the Tribunal concluded that the appellant's case was "exceptional" and allowed the appeal under Art 8 of the ECHR.

9. The ECO sought permission to appeal on a number of grounds. On 12 January 2015, the First-tier Tribunal (Judge Frankish) granted the ECO permission to appeal on the basis that the First-tier Tribunal had arguably erred in law by failing to take into account s.117B of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002") and in reaching its finding that, despite not qualifying under the Rules, there were "exceptional circumstances".

10. Thus, the appeal came before me.

The Approach to Art 8

11. The issues raised in the appeal require a consideration of the correct approach to Art 8, in particular the issue of proportionality, in the light of the "new" Immigration Rules and Part 5A of the NIA Act 2002. The Respondent's argument is that the First-tier Tribunal failed properly to apply Part 5A and reached an irrational conclusion that the public interest was outweighed by the appellant's circumstances such that the refusal of entry clearance was a breach of Art 8.

12. As this is an entry clearance case, where the appellant was seeking to join her husband in the UK, the First-tier Tribunal was required to consider whether the respondent's decision breached the UK's positive obligation under Art 8 to "respect" the private and family life of the appellant and sponsor. Although strictly Art 8.2 has no application when determining whether the "positive obligation" has been breached, the Strasbourg Court has adopted an analogous analysis to that undertaken in cases involving an "interference" with an individual's private and family life and thus directly engages Art 8.2 (see, e.g. Draon v France (2006) 42 EHRR 40). Central to that analysis is the issue of proportionality as it is when applying Art 8.2. It was also the central issue for the First-tier Tribunal to determine in the appeal, namely whether the Entry Clearance Officer's decision was a proportionate interference or disrespect for the appellant and sponsor's family life. There clearly was 'family life' established between them and the Entry Clearance Officer's decision would, at least, have some impact upon (or interference with) their ability to carry on that family life in the future. The decision was in accordance with the law, namely the Immigration Rules and made for the purpose of a legitimate aim, namely the economic well being of the country and the protection of the rights and freedoms of others (or, as it is often stated in this context effective immigration control) (see, Shahzad (Art 8: legitimate aim) [2014] UKUT 85 (IAC)).

13. In determining proportionality, there is a two-stage approach (see Singh and Khalid v SSHD [2015] EWCA Civ 74). First, a Tribunal is required to consider whether the appellant could succeed under the Immigration Rules. As I have already indicated, in this appeal it was common ground between the parties that she could not do so because the sponsor only had discretionary leave. Secondly, a Tribunal is then required to consider whether an appellant should succeed outside the Immigration Rules under Art 8 because the public interest, reflected in the fact that the appellant could not meet the requirements of the Rules, is outweighed by the individual circumstances.

14. The issue of proportionality involves, as Lord Bingham of Cornhill said in R (Razgar) v SSHD [2004] UKHL 27 at [20]:

> "… involves 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".

15. That decision has to be made in the context of the detailed Immigration Rules (introduced by HC 194 and numerous subsequent amendments from 9 July 2012) dealing with Art 8 which represent a particularised statement of policy balancing the interests of immigration control against the rights and interests of individuals wishing to enter or remain in the UK (see Haleemudeen v SSHD [2014] EWCA Civ 558 at [40] *per* Beatson LJ). Those Rules are to be found principally in Appendix FM (family life) and para 276ADE (private life). Paragraphs A398-400 deal with deportation and are not relevant to this appeal. The scope of the enquiry at the second stage will depend upon the circumstance of the particular case including whether the issues raised by the appellant have been addressed under the Rules (see Singh and Khalid at [64] *per* Underhill LJ).

16. The voluminous (and ever increasing) body of cases that has emerged both from the Upper Tribunal and the higher courts makes plain that in assessing proportionality, and in particular balancing the public interest against the rights of others, the public interest reflected in the Rules is entitled to significant weight. That is particularly so in deportation cases but, albeit to a lesser extent, is also important in removal and entry clearance cases. The assessment must be undertaken "through their lens" (see AJ (Angola) v SSHD [2014] EWCA Civ 1636 *per* Sales LJ at [40]). The case law identifies the need to establish "exceptional" or "compelling" circumstances not sufficiently recognised under the Rules in order to find that the public interest is outweighed (see, e.g. MF (Nigeria) v SSHD [2013] EWCA Civ 1192 (deportation); and R (Nagre) v SSHD [2013] EWHC 720 (Admin) (refusal of leave)). Whilst the test is not one of "exceptionality" (see Huang v SSHD [2007] UKHL 11; Cf SS (Congo) below), the importance and weight to be given to the public interest where an individual cannot satisfy the Immigration Rules, is reflected in the court's recognition that "compelling" circumstances are required to outweigh the public interest or, as it sometimes glossed, there must be "unjustifiably harsh consequences" before the public interest is outweighed (see Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)). In Chege (section 117D - Article 8 - approach) [2015] UKUT 165 (IAC) the word "compelling" was stated to mean:

> "having a powerful and irresistible effect; convincing".

17. The new Part 5A of the NIA Act 2002 (introduced by s.19 of the Immigration Act 2014 with effect from 28 July 2014) adds further legislative intervention to the exercise to be undertaken when assessing proportionality ("the public interest question" under art 8.2) (s.117A(1) and (3)). By virtue of s.117A(2)(a) in determining that issue a

> "… court or tribunal must (in particular) have regard –
>
> i. in all cases, to the considerations listed in section 117B, ….. "

(Section 117C sets out additional considerations in relation to deportation cases involving "foreign criminals" and is not relevant to this appeal.)

18. Section 117B of the NIA Act 2002 provides as follows:

> "117B Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English -
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek

to enter or remain in the United Kingdom are financially independent, because such persons -

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to -

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

19. The factors set out in s.117B are to be taken into account as part of the proportionality assessment (see Dube (ss117A-117D) [2015] UKUT 00090 (IAC) and Chege (section 117D - Article 8 - approach) [2015] UKUT 165 (IAC)). The tribunal need not necessarily refer specifically to s.117B (and 117C if relevant) providing that the factors are taken into account: what is important is 'substance' and not 'form' (see Dube).

20. In the recent decision of SSHD v SS (Congo) and others [2015] EWCA Civ 387 Richards, Underhill and Sales LJJ), the Court of Appeal considered the proper approach to Art 8 including, in particular, where an individual seeks entry clearance or leave to enter ("LTE"). The Court drew together the threads of the existing case law.

21. The cases concerned applications for entry clearance where the appellant could not establish that he or she satisfied the financial requirements in Appendix FM. Having considered the case law in some detail, the Court of Appeal concluded as follows at [39] of its judgment:

"39. In our judgment, the position under Article 8 in relation to an application for LTE on the basis of family life with a person already in the United Kingdom is as follows:

i) A person outside the United Kingdom may have a good claim under Article 8 to be allowed to enter the United Kingdom to join family members already here so as to continue or develop existing family life: see e.g. *Gül v Switzerland* (1996) 22 EHRR 93 and *Sen v Netherlands* (2001) 36 EHRR 7. Article 8 does not confer an automatic right of entry, however. Article 8 imposes no general obligation on a state to facilitate the choice made by a married couple to reside in it: *R (Quila)*

v Secretary of State for the Home Department [2011] UKSC 45; [2012] 1 AC 621, para. [42]; *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, [68]; *Gül v Switzerland*, [38]. The state is entitled to control immigration: *Huang*, para. [18].

ii) The approach to identifying positive obligations under Article 8(1) draws on Article 8(2) by analogy, but is not identical with analysis under Article 8(2): see, in the immigration context, *Abdulaziz, Cabales and Balkandali v United Kingdom*, paras. [67]-[68]; *Gül v Switzerland*, [38]; and *Sen v Netherlands* [31]-[32]. See also the general guidance on the applicable principles given by the Grand Chamber of the ECtHR in *Draon v France* (2006) 42 EHRR 40 at paras. [105]-[108], summarising the effect of the leading authorities as follows (omitting footnotes):

> "105. While the essential object of Art.8 is to protect the individual against arbitrary interference by the public authorities, it does not merely require the State to abstain from such interference: there may in addition be positive obligations inherent in effective "respect" for family life. The boundaries between the State's positive and negative obligations under the provision do not always lend themselves to precise definition; nonetheless, the applicable principles are similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in both contexts the State is recognised as enjoying a certain margin of appreciation. Furthermore, even in relation to the positive obligations flowing from the first paragraph, "in striking [the required] balance the aims mentioned in the second paragraph may be of a certain relevance".
>
> 106. "Respect" for family life ... implies an obligation for the State to act in a manner calculated to allow ties between close relatives to develop normally. The Court has held that a state is under this type of obligation where it has found a direct and immediate link between the measures requested by an applicant, on the one hand, and his private and/or family life on the other.
>
> 107. However, since the concept of respect is not precisely defined, states enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.

> 108. At the same time, the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight."

iii) In deciding whether to grant LTE to a family member outside the United Kingdom, the state authorities may have regard to a range of factors, including the pressure which admission of an applicant may place upon public resources, the desirability of promoting social integration and harmony and so forth. Refusal of LTE in cases where these interests may be undermined may be fair and proportionate to the legitimate interests identified in Article 8(2) of "the economic well-being of the country" and "the protection of the rights and freedoms of others" (taxpayers and members of society generally). A court will be slow to find an implied positive obligation which would involve imposing on the state significant additional expenditure, which will necessarily involve a diversion of resources from other activities of the state in the public interest, a matter which usually calls for consideration under democratic procedures.

iv) On the other hand, the fact that the interests of a child are in issue will be a countervailing factor which tends to reduce to some degree the width of the margin of appreciation which the state authorities would otherwise enjoy. Article 8 has to be interpreted and applied in the light of the UN Convention on the Rights of the Child (1989): see *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2012] AC 144, at [26]. However, the fact that the interests of a child are in issue does not simply provide a trump card so that a child applicant for positive action to be taken by the state in the field of Article 8(1) must always have their application acceded to; see *In re E (Children)* at [12] and *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166, at [25] (under Article 3(1) of the UN Convention on the Rights of the Child the interests of the child are *a* primary consideration – i.e. an important matter – not *the* primary consideration). It is a factor relevant to the fair balance between the individual and the general community which goes some way towards tempering the otherwise wide margin of appreciation available to the state authorities in deciding what to do. The age of the child, the closeness of their relationship with the other family member in the United Kingdom and whether the family could live together elsewhere are likely to be important factors which should be borne in mind.

v) If family life can be carried on elsewhere, it is unlikely that "a direct and immediate link" will exist between the measures requested by an applicant and his family life (*Draon*, para. [106]; *Botta v Italy* (1998) 26

> EHRR 241, para. [35]), such as to provide the basis for an implied obligation upon the state under Article 8(1) to grant LTE; see also *Gül v Switzerland*, [42]. "

22. The Court of Appeal then concluded at ([40]-[41]) that in LTE cases the correct test was "compelling circumstances" and contrasted that with "exceptionality" or "very compelling circumstances" in the case of precarious family relationships and deportation cases:

> "40. In the light of these authorities, we consider that the state has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contact with the position in relation to decisions regarding LTR for persons with a (non-precarious) family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding section EX.1 as a basis for grant of LTE, although it is available as a basis for grant of LTR. The LTE Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the Rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave.
>
> 41. This formulation is aligned to that proposed in *Nagre* at [29] in relation to the general position in respect of the new Rules for LTR, which was adopted in this court in *Haleemudeen* at [44]. It is a fairly demanding test, reflecting the reasonable relationship between the Rules themselves and the proper outcome of application of Article 8 in the usual run of cases. But, contrary to the submission of Mr Payne, it is not as demanding as the exceptionality or "very compelling circumstances" test applicable in the special contexts explained in *MF (Nigeria)* (precariousness of family relationship and deportation of foreigners convicted of serious crimes)".

23. The Court of Appeal did not consider the impact of Part 5A of the NIA Act 2002 (namely ss.117A-D) as the appeal decision predated those provisions coming into force on 28 July 2014. As I have already pointed out, those "considerations" become relevant when determining whether the individual circumstances are "compelling" or, if appropriate, "exceptional" or "very compelling" (the latter two applying in 'precarious family cases' and deportation appeals).

The First-tier Tribunal's Decision

24. With that law in mind, I now turn to the First-tier Tribunal's reasons for allowing the appeal under Art 8.

25. The basis of the appellant's case was set out by the First-tier Tribunal at para 11 of its determination as follows:

"11. The appellant's case is set out in her court bundle and also by virtue of the evidence given orally in court (via an interpreter) from her sponsor. She set out her claim as follows:

(a) The appellant married the sponsor on 11 January 2013, in Turkey.

(b) The sponsor was given Discretionary leave to stay in the UK on the 23 February 2012 (*sic* March 2012) until 22 December 2012 (*sic* 2014).

(c) The sponsor has his own business here in the UK. He is a hairdresser and is self-employed.

(d) The sponsor owns his own home subject to a mortgage of £66,000.

(e) Her sponsor has sufficient monies and accommodation for her to live in the UK without having recourse to the public purse.

(f) The sponsor has worked very hard to build a life and a business in the UK and wishes to remain here permanently.

(g) The sponsor earns in excess of the £18,600 the sum required under Appendix FM for the settlement under the Immigration rules".

26. Before the FtT, the respondent did not doubt the genuineness of the parties' relationship (see para 13 of the determination).

27. At paras 15-19, the First-tier Tribunal made a number of findings as follows:

"15. We find the sponsor to be a credible witness who wishes to remain in the UK and further that he is a hard working person who is contributing to both the economy and UK society. On this basis we do not find that it is viable for him to have a family life in Turkey as his thriving business and property are here and he has no immediate means of supporting himself or his wife if he leaves these behind.

16. We find that the appellant has an arguable claim under the ECHR, Article 8. The sponsor has been allowed to stay in the UK and build up a business which is contributing to the economy. He is in no way dependent on the state and has the funds to support the appellant and provide her with appropriate accommodation. It is highly unlikely he will be refused further leave in December as he has not committed any criminal offences nor behaved in a way that is contrary to the public good during his stay in the UK to date. We find that he has a reasonable expectation that he will be allowed to remain here for another 3 years and achieve indefinite leave to remain thereafter.

17. We have been assisted in our decision by case law. The case of **Beoku-Betts v SSHD [2008] UKHL 39** clarified that, notwithstanding the narrow wording of the ECHR, it should be construed widely and the family unit considered as a whole for Article 8 purpose. Baroness Hale (paragraph 4) said that a narrow approach is not only artificial and impracticable but "risks missing the central point about family life, which is that the whole is greater than the sum of its parts."

18. The House of Lords, in **Beoku-Betts**, upheld an argument that family members enjoy a single family life so when making a decision its effect upon all the family members has to be looked at. We must ask whether it is

proportionate to keep a couple apart in a situation where the appellant has to wait at least a further three years to join her husband and in the meantime spend significant amounts of time and money travelling to and from Turkey to maintain a genuine marriage? This Tribunal finds it is not.

19. Finally we find there is no public interest ground in keeping the appellant and the sponsor apart".

28. As can be seen, the First-tier Tribunal found that the sponsor was working in the UK and that neither he nor the appellant would be dependent on the state if the appellant lived in the UK. The Tribunal also found that there was a "reasonable expectation" that the sponsor's three year discretionary leave would be renewed for another three years and that he would achieve indefinite leave to remain thereafter.

29. At paras 20-26 under the heading "Conclusion" the First-tier Tribunal reached the following conclusions in relation to Art 8:

"20. After considering all of the evidence before us, including the evidence not specifically referred to in this determination, we have reached the following conclusions in this case.

21. The appellant does not meet the requirements of the Immigration Rules.

22. The appellant and the sponsor, as a married couple, have a right to enjoy their family life. This cannot be the case if he is to stay living and working, legally, in the UK for another three years and the appellant has to remain in Turkey. The ECtHR has ruled that "a lawful and genuine" marriage does amount to family life, even if the couple has not yet been able to establish a home together. (**Abdulaziz, Cabales and Balkandali v UK and Berrehab v Netherlands**).

23. We find her circumstances to be exceptional. It is a disproportionate response to the legitimate aims of the Immigrations rules to refuse her entry. The public interest effect of immigrations control is, in this claim, outweighed in these particular circumstances and we rely on Article 8 to make this finding.

24. The sponsor is being treated exceptionally outside the rules but the appellant herself is not. We were assisted by the case of **MF (Nigeria)** and Article 8 of the ECHR we find that this case fulfils the "exceptional criteria".

25. We dismiss the appeal under the Immigration Rules. Her appeal did not meet the criteria set out in them and her appeal under the rules is dismissed.

26. We allow the appeal under Article 8 of the ECHR".

The Submissions

30. Mr Richards submitted that the First-tier Tribunal had made a clear material error of law in para 19 when it had stated that there was "no public interest ground in keeping the appellant and the sponsor apart". He submitted that that was contrary to what was stated in s.117B(1) of the NIA Act 2002 that: "the maintenance of

effective immigration controls is in the public interest". Secondly, he submitted that the First-tier Tribunal had irrationally concluded that the appellant's circumstances were "exceptional". He submitted that the appellant and sponsor had married at a time when it was clear that his immigration status in the UK was "precarious" as he only had discretionary leave. Mr Richards submitted that there was nothing "exceptional" in the appellant's circumstances and that the First-tier Tribunal's finding was, in effect, that the Immigration Rules breached Art 8 because they did not contain a provision allowing a spouse to join a sponsor in the UK who only has discretionary leave. Mr Richards submitted that the First-tier Tribunal was not entitled to ride "rough shod" over the Immigration Rules in that way. He invited me to find that there was a material error of law and to reverse the decision so as to dismiss the appellant's appeal under Art 8.

31. On behalf of the appellant, Ms Bayoumi relied upon her helpful and detailed skeleton argument which she developed in her oral submissions.

32. First, she relied upon the Upper Tribunal's decision in Dube (ss.117A-117D) [2015] UKUT 00090 (IAC) that it was not necessary for a Tribunal to make specific reference to the "considerations" listed in s.117B providing that the relevant issues were, in substance, taken into account by the Tribunal. She submitted that the Tribunal had done so and had not, in para 19, wrongly concluded that there was "no public interest". She submitted that the Tribunal had specifically referred to the balancing exercise and the public interest in "immigration control" in para 23 of its determination.

33. Secondly, Ms Bayoumi submitted that the Tribunal was entitled to find that the appellant's circumstances were "exceptional". Its conclusion was not irrational on the basis of: (a) the sponsor's status and the Tribunal was entitled to take into account that his leave was likely to be renewed; and (b) the sponsor's circumstances, namely that he had built up a business and that he had no immediate means of supporting him and the appellant if he returned to Turkey to continue family life with her. There was no public interest in keeping the appellant and sponsor apart.

34. Ms Bayoumi submitted that the First-tier Tribunal's decision should stand. However, looking at all the circumstances, on the basis of the First-tier Tribunal's findings, any remaking of the decision should again result in the appeal being allowed.

Discussion

35. In my judgment, the First-tier Tribunal failed to apply the correct approach to Art 8 in both respects relied upon by Mr Richards.

36. First, it is clear that the Tribunal did misdirect itself in para 19 of its determination by stating that: "there is no public interest ground in keeping the appellant and sponsor apart". There clearly was a public interest engaged in relation to the appellant. S.117B makes plain that the "maintenance of effective immigration controls is in the public interest". Here, the appellant could not meet the requirements of the

Immigration Rules and in the light of that, the public interest in effective immigration control was engaged. I do not accept Ms Bayoumi's submission that para 19 when read with para 23 makes it clear that the Tribunal in para 19 was only stating a conclusion – in effect its assessment of the balance to be struck between the public interest and the appellant and sponsor's private and family life. The Tribunal's view in para 19 is expressed in its "findings" prior to it engaging, to the limited extent it did in paras 23 and 24, in a balancing exercise in determining the issue of proportionality under Art 8.

37. Secondly, and in any event, the First-tier Tribunal's conclusion that the appellant's circumstances were "exceptional" cannot withstand analysis. This was a case where the Secretary of State had, in the Rules, excluded individuals such as the appellant who wished to join a sponsor who had only limited or discretionary leave to remain in the UK. As a consequence, the Tribunal was required to find "compelling" circumstances. Ms Bayoumi relied upon the sponsor's immigration status and that it might be renewed and the appellant's circumstances, namely that he had established business in the UK and would not have any "immediate means" of supporting him and his wife in Turkey. In my judgment, those circumstances cannot amount to "compelling" circumstances.

38. The sponsor's immigration status was the very category of case which the Secretary of State had concluded should not lead to the grant of entry clearance to a spouse. It was simply not compelling that the sponsor's leave might in the future (whether he had a reasonable expectation of it or not) be extended.

39. Further, the fact that the sponsor had developed a "thriving business" and "had property" in the UK could not constitute "compelling" circumstances. Of course, his and the appellant's financial independence was a relevant factor (s.117B(3)). However, the sponsor only had leave to remain in the UK since March 2012. Previously, he was an unsuccessful asylum-seeker. His private life has been established largely at a time when he was not here lawfully and when he has been here lawfully his status has been "precarious". Section 117B(4) and (5) requires that "little weight" should be given to the sponsor's private life formed in those circumstances. The fact that, on the Tribunal's finding, he would not have the "immediate means" of supporting himself and his wife in Turkey, could also not constitute compelling circumstances. In fact, that finding is difficult, if not impossible, to square with the fact that he is a Turkish national and there is no reason or persuasive supporting evidence before the Tribunal for it to consider that he could not re-establish himself in his own country (personally and in business) where his parents continue to live even though he had been in the UK since 2003 and has family here also.

40. Also, the appellant and sponsor married at a time when the appellant and she knew his immigration status was "precarious". It is no less "precarious" because he will have an opportunity to apply to extend his leave. That is an application yet to be made or determined. They married, in other words, at a time when the appellant knew she had no right to come to the UK. Art 8 does not create a right for a married

couple to choose the state in which they wish to live. As the Strasbourg case law, and SS(Congo) above recognises, in 'precarious status' cases only exceptionally will a claim under Art 8 succeed.

41. In SS (Congo) the Court of Appeal in a similar context raised in one of the appeals considered by it said this (at [87]):

> "In fact, the marriage was entered into at a time when it was known that FA had no right to come to the United Kingdom; moreover, there is no impediment to the husband going to continue family life with her in Uganda. The fact that he would lose his job in the United Kingdom and hence would prefer to establish family life here does not constitute compelling circumstances requiring the grant of LTE outside the Rules: as the authorities make clear, Article 8 does not create a right for married couples to choose to live in a Contracting State".

42. In my judgment, those words, adjusted to cover the fact that the appellant and sponsor come from Turkey, are equally apt in this appeal.

43. This is also a case which more aptly can be said to engage the "positive obligation" (rather than the "negative obligation") of the UK under Art 8. The Strasbourg jurisprudence, accepted by the Court of Appeal in SS (Congo), recognises that in such cases the state has "a wider margin of appreciation" in determining the conditions for the grant of entry clearance for leave to enter. That was done in the Immigration Rules so as to exclude the appellant's circumstances because of her sponsor's immigration status.

44. Challenges based upon irrationality are frequently made but much less frequently succeed. That is because a finding of irrationality requires an appellate Tribunal to conclude that the finding is

> "… so outrageous in its defiance of logic ... that no sensible person who had applied his mind to the question to be decided could have arrived at it"

(see Council of Civil Service Unions v Minister for the Civil Service [1985] 1 AC 374 at page 410 *per* Lord Diplock.)

45. In my judgment, for the reasons I have given, the First-tier Tribunal's conclusion that there were "exceptional" circumstances to justify the grant of leave outside the Rules under Art 8 was irrational. In my judgment, the Tribunal was not entitled to conclude that "compelling circumstances exist[ed] (which are not sufficiently recognised under the new Rules) to require the grant of such leave" (see SS (Congo) at [40]).

46. For these reasons, therefore, the First-tier Tribunal materially erred in law in allowing the appellant's appeal under Art 8. I set that decision aside.

47. The only proper conclusion that the Tribunal could have reached on the basis of the appellant's circumstances was that she had not established "compelling" circumstances to justify the grant of leave outside the Rules under Art 8. The fact that the sponsor's leave has subsequently been renewed cannot be taken into account

as I can only consider the "circumstances appertaining at the time of decision" (see ss.85(5) and 85A(2), NIA Act 2002). Even if I could take it into account, it would not have made good the appellant's claim that there are "compelling" circumstances.

48. Consequently, I remake the decision dismissing the appellant's appeal both under the Immigration Rules and Art 8.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed I make no fee award.

Signed

A Grubb
Judge of the Upper Tribunal