**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: PA/00799/2020**

**THE IMMIGRATION ACTS**

| **Heard at Cardiff Civil Justice Centre** | **Decision & Reasons Promulgated** |
|---|---|
| **On 9 September 2021** | **On 23 September 2021** |

**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**NMS**
**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**
For the Appellant: Mr C Howells, Senior Home Office Presenting Officer
For the Respondent: Mr D Olawanle, Del & Co Solicitors

**DECISION AND REASONS**

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the respondent (NMS). This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

2. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

**Introduction**

3. The appellant is a citizen of India who was born on 16 August 1979. He entered the United Kingdom on 21 December 2004 with entry clearance as a student valid until 10 December 2005. That leave was extended until 31 May 2007. On 3 July 2007, the appellant was granted further leave as a student until 31 August 2008. On 4 September 2008, the appellant applied for further leave to remain as a student but this was refused on 16 December 2008 with no right of appeal. On 16 March 2016, the appellant applied for leave to remain outside the Rules on compassionate grounds. On 18 October 2016 he was granted leave on this basis valid until 18 April 2017.

4. On 27 January 2017, the appellant married a British citizen, Ms M whom he had met in 2014.

5. On 20 February 2017, the appellant applied for leave to remain based upon his marriage under the ten-year route in Appendix FM of the Immigration Rules (HC 395 as amended). On 22 May 2018, the Secretary of State refused the appellant's application. On 29 May 2018, the appellant lodged an appeal against the respondent's decision but, on 15 November 2018, the appellant's appeal was dismissed by Judge Fraser sitting in the First-tier Tribunal. Permission to appeal was subsequently refused by the First-tier Tribunal on 10 January 2019 and by the Upper Tribunal on 20 February 2019.

6. On 14 March 2019, the appellant made an application for asylum on the basis that he would be at risk of serious harm on return to India as a result of his inter-faith marriage to his wife.

7. On 10 January 2020, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under Art 8 of the ECHR.

**The Appeal to the First-tier Tribunal**

8. The appellant again appealed to the First-tier Tribunal.

9. In a decision sent on 15 January 2021, Judge Heaven dismissed the appellant's appeal on asylum and humanitarian protection grounds. The judge did not accept that the appellant would be at risk of serious harm or persecution on return to India.

10. However, the judge allowed the appellant's appeal under Art 8 of the ECHR. Although the judge found that the appellant could not succeed under the relevant "partner" provisions in Appendix FM, in particular the requirements of para EX.1. were not met on the basis that there were not "insurmountable obstacles" to the appellant's family life with his wife continuing in India, the judge nevertheless found

that the appellant's removal would be a disproportionate interference with his private and family life under Art 8 of the ECHR.

**The Appeal to the Upper Tribunal**

11. The appellant did not seek to challenge the judge's dismissal of his appeal on international protection grounds.

12. However, the Secretary of State sought permission to appeal against the judge's decision to allow the appellant's appeal under Art 8 of the ECHR. In brief, the grounds contended that the judge had failed to give adequate reasons in his decision for allowing the appeal, given Judge Fraser's earlier decision to dismiss the appellant's appeal under Art 8, in particular in applying the provisions in ss.117B(1), (2) and (4) of the Nationality, Immigration and Asylum Act 2002 ("the NIA Act 2002").

13. On 14 February 2021, the First-tier Tribunal (Judge Feeney) granted the Secretary of State permission to appeal. At para 3 of his reasons, the judge set out, based upon the grounds, what he considered to be the arguable error of law:

> "... the judge acknowledged that the previous decision was the starting point but Devaseelan is not a 'straitjacket' and he was entitled to assess the evidence before him in deciding the present appeal. The judge did not appear to attach weight to the fact that the appellant could speak English and was financially independent whereas these are said to be neutral factors. Further the judge said that the appellant had met his wife and married her when he was lawfully present in the UK whereas that does not appear to be the case as he was an overstayer at the time. The judge erred in these assessments and these arguably affected his proportionality assessment".

14. The appeal was listed for a substantive hearing before me at the Cardiff Civil Justice Centre on 9 September 2021. The Secretary of State was represented by Mr Howells and the appellant by Mr Olawanle.

15. Mr Howells relied upon the grounds of appeal which he supplemented in his oral submissions. I also heard oral submissions from Mr Olawanle.

**The Judge's Decision**

16. The appeal only concerns the judge's decision to allow the appellant's appeal under Art 8. The judge approached Art 8 by first considering whether the appellant could succeed under the Immigration Rules, in particular the rules concerning a "partner" in Appendix FM. At paras 27–28, the judge found that the appellant could not succeed under the Immigration Rules. Although it was accepted that the appellant had a genuine and subsisting relationship with his partner, in order to succeed under the Rules (as he was unlawfully in the UK), the appellant had to establish that para EX.1. applied, namely that there would be "insurmountable obstacles to family life" with his wife continuing outside the UK, in particular in India. At paras 27–28, the

judge made a finding that para EX.1. was not satisfied as there were not insurmountable obstacles. That finding is not challenged.

17. Thereafter, the judge went on to consider the appellant's claim under Art 8 outside the Rules. At para 29, the judge set out the competing arguments and the submissions made on behalf of the appellant that:

> "…considering the evidence in the round this was sufficient to show that the consequences of the decision will cause very substantial difficulties or exceptional circumstances or unjustifiable harshness and when balanced against the strength of the public interest in immigration control my decision must fall in the appellant's favour".

18. At para 30, Judge Heaven gave his reasons for finding in the appellant's favour under Art 8 outside the Rules. The judge said this:

> "Clearly the first parts of the Razgar tests are met and the issue for my determination is proportionality. When considering proportionality and that balancing exercise I must undertake I find that the appellant speaks English and [Ms M] is able to support him and so he is financially independent and not a burden on the taxpayer. These are relevant factors to the public interest considerations. I take into account that the appellant met and married [Ms M] when he had valid leave to remain in the UK. I accept that this relationship then developed when he was unlawfully present in the UK and I am required to afford this aspect of family life little weight. However, this does not mean no weight. There clearly is family life and the facts are different to when the matter was last considered by IJ Fraser. The couple have now been married for over three years and I accept that it is likely that the appellant will be granted a form of leave to enter. The appellant if required to leave to obtain entry clearance will be separated from [Ms M] and I accept that she has justifiable concerns about going to India based on the discrimination the respondent accepts the couple will face. She will be left in the UK unsupported and feeling at risk from the family. I must take this into account as it flows from the impact of the interference. Considering all these matters in the round I find that requiring the appellant to leave the UK would constitute an unlawful and disproportionate interference with his Article 8 rights".

19. At para 31, the judge added:

> "The Decision of the respondent breaches the appellant['s] human rights under Article 8 ECHR. Having taken all the above matters into consideration, I find that the maintenance of an effective immigration control is in the public interest. However, the Decision of the respondent in this particular case is inappropriate on the basis of the facts of this appeal. For these and for all the other reasons I have set out above, I consider the respondent's Decision is in all the circumstances [ ] not proportionate in a democratic society to the legitimate aim to be achieved".

20. As a consequence, the judge allowed the appellant's appeal under Art 8.

**The Submissions**

21. On behalf of the Secretary of State, relying upon the grounds, Mr Howells made a number of submissions which he contended established material errors of law in the judge's reasoning essentially in para 30 of his decision.

22. First, Mr Howells submitted that the judge had erred in law by taking into account, as relevant to the public interest, that the appellant was financially independent and spoke English. He submitted that this was not the effect of ss.117B(2) and (3) as explained by the Supreme Court in Rhuppiah v SSHD [2018] UKSC 58. Mr Howells submitted that it was a neutral factor that the appellant was financially independent and spoke English rather than, as the judge appeared to do in para 30, counted positively in the appellant's favour.

23. Secondly, Mr Howells submitted that the judge had erred in law in his approach to the weight that should be given to the appellant's family life. In applying, it would appear s.117B(4), the judge mistakenly took into account that when the appellant and Ms M met and, therefore began to form their relationship, the appellant was lawfully in the UK. Mr Howells pointed out that in 2014 when they met the appellant had no lawful leave to remain in the UK as he had been an overstayer since 2008. Mr Howells accepted that the appellant had leave to remain when he married in January 2017 but, again, the judge had misstated the period of his lawful leave in para 2 as being between 18 October 2016 and 18 October 2017 when, in fact, it was between 18 October 2016 and 18 April 2017. Mr Howells submitted that the judge had been wrong only to take into account that the appellant had been unlawfully in the UK as the relationship "developed".

24. Thirdly, Mr Howells submitted that the judge effectively applied the House of Lords' decision in Chikwamba v SSHD [2008] UKHL 40 when he took into account that, if the appellant were required to leave, "it is likely that the appellant will be granted a form of leave to enter". Mr Howells submitted that that, in itself, did not justify the judge's decision that the appellant's removal would be disproportionate without taking into account the public interest factors, in particular in s.117B of the NIA Act 2002 as required by the Upper Tribunal's decision in Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129 (IAC). Mr Howells submitted that the judge made no reference to the public interest factors, at least those weighing against the appellant, in para 30 before reaching his conclusion that the appellant's removal would be disproportionate. Mr Howells acknowledged that the judge made reference to the public interest in "effective immigration control" in para 31 but, he submitted, by that time the judge had already reached a finding in the appellant's favour in respect of proportionality in para 30.

25. Fourthly, Mr Howells submitted that the judge had failed to give adequate reasons for finding that the appellant succeeded outside the Rules given his finding in paras 27–28 that there were not insurmountable obstacles to the appellant's family life continuing in India. In para 30, the judge had taken into account that Ms M had concerns about going to India based upon discrimination but, in para 28, had

concluded that that discrimination did not present "very significant difficulties" or make it "impossible" for family life to continue in India. Further, the judge had also taken into account that, if the appellant were to return to India, Ms M would remain in the UK unsupported and with feelings of being at risk from her family. However, the judge had failed to engage with his own finding in para 27 that, although the couple had lived in fear of their family in the UK, there had been "no contact or problems from the family since the last asylum appeal".

26. Mr Howells submitted that the errors cumulatively rendered the proportionality finding unsafe and he invited me to set that part of the decision aside and remit it to the First-tier Tribunal to re-make the decision under Art 8 outside the Rules.

27. On behalf of the appellant, Mr Olawanle invited me to uphold the judge's finding under Art 8 of the ECHR.

28. First, Mr Olawanle submitted that the judge had properly taken into account the public interest both for and against the appellant. He submitted that the judge was entitled to take into account that the appellant spoke English and was financially independent as relevant to the public interest. He submitted that the judge had not in para 30 of his decision failed to take the public interest properly into account.

29. Secondly, Mr Olawanle submitted that the judge had been correct in applying the "little weight" provision in s.117B(4) in that the appellant had leave by the time of his marriage. However, the judge correctly applied the "little weight" provision, as not requiring him to give "no weight" to the family life – as it "developed" - when the appellant was unlawfully in the UK. He submitted that the circumstances of the appellant's relationship, in particular that he married when he had leave, increased the weight to be given to the relationship in the balancing exercise.

30. Thirdly, Mr Olawanle submitted that the judge had been correct to apply, in effect, the approach in Chikwamba.

31. Fourthly, Mr Olawanle submitted that the judge had been entitled to take into account the impact upon the appellant's wife both if they returned to India, and the discrimination they would face, and also her fear of her family in the UK if she remained in the UK.

32. Finally, Mr Olawanle submitted that the judge had been entitled to depart from IJ Fraser's decision applying Devaseelan and to find, on the material before him, that the appellant's removal would be disproportionate. Mr Olawanle reminded me that I should not set aside the decision simply because I disagreed with the outcome citing SSHD v Starkey [2021] EWCA Civ 421.

**Discussion**

33. I will deal with each of the points raised in the grounds and the submissions in turn.

*Sections 117B(2) and (3)*

34. As is well-known, s.117B of the NIA Act 2002 sets out a number of "public interest considerations" applicable in immigration appeals relevant to the "public interest question" and which must be taken into account by any court or Tribunal determining whether a breach of Art 8 is established (see s.117A of the NIA Act 2002).

35. Section 117B(2) states, in summary, that it is in the public interest that a person should be able to speak English as persons who can speak English are less likely to be a burden on taxpayers and are better able to integrate into society.

36. Section 117B(3) states that it is in the public interest that persons who seek to enter or remain in the UK are "financially independent" because, again, such persons are not a burden on taxpayers and are better able to integrate into society.

37. Plainly, when a person is unable to speak English or is not financially dependent, the public interest in their removal is engaged by these provisions. That is in addition to the more general public interest recognised in s.117B(1), namely that: "the maintenance of effective immigration controls is in the public interest".

38. In this appeal, in para 30 of his decision, the judge took into account that the appellant was both financially independent and able to speak English. I accept Mr Howells' submission that the way in which the judge took this into account as "relevant factors to the public interest considerations" can only be understood as if the effect was to diminish the public interest against the appellant or, putting it in another way, add positively to his claim to remain in the UK. That, in my judgment, is contrary to the proper understanding of the effect of ss.117B(2) and (3) as set out in the Supreme Court's decision in Rhuppiah. At [57], Lord Wilson (with whom the other Justices agreed) said this:

> "The further submission on [Ms Rhuppiah's] behalf is and has been that the effect of section 117B(2) and (3) is to cast her ability to speak English and her financial independence as factors which positively weigh in her favour in the inquiry under article 8. But the further submission is based on a misreading of the two subsections and was rightly rejected by Judge Blundell, upheld by the Court of Appeal, just as an analogous submission was rejected in para 18 of the decision in the *AM* case [*AM* (S117B) Malawi [2015] UKUT 260 (IAC)], cited at para 38 above. The subsections do not say that it is in the public interest that those who are able to speak English and are financially independent should remain in the UK. They say only that it is in the public interest that those who seek to remain in the UK should speak English and be financially independent; and the effect of the subsections is that, if claimants under article 8 do not speak English and/or are not financially independent, there is, for the two reasons given in almost identical terms in the subsections, a public interest which may help to justify the interference with their right to respect for their private or family life in the UK. In seeking to portray the strength of their private or family life by reference to all their circumstances, claimants may wish to highlight their ability to speak English and/or their financial independence; but the legitimate

> deployment of such factors in that context is to be contrasted with the erroneous further submission that the subsections propel a conclusion that, where those factors exist, there is a public interest in favour of the claims."

39. In my judgment, the judge illegitimately deployed the fact that the appellant spoke English and was financially independent in para 30 as counting positively in his favour when assessing the public interest. That amounted to an error of law.

*Section 117B(4)*

40. Section 117B(4) provides that:

> "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".

41. The terms of that provision are to be contrasted with s.117B(5) which states that "little weight" should be given to a "private life established" when a person's immigration status is "precarious".

42. Section 117B(4) applies to both "private life" and "family life" when a relationship formed with a qualifying partner is "established" at a time when the person was "unlawfully" in the UK.

43. By contrast s.117B(5) also applies to "private life" which is established at a time when a person's immigration status is "precarious".

44. In Rhuppiah, the Supreme Court concluded that s.117B(5) applied to situations where an individual had limited leave to remain in the UK but not where an individual was "unlawfully" in the UK. If the latter was the case, then only s.117B(4) could be relevant (see [46]).

45. It follows, therefore, that to the extent that the appellant was relying upon "family life" with his partner in the UK, the only provision that could apply to the appellant was s.117B(4). That would apply, such that "little weight" could be given to that family life if the relationship formed with his wife was *established* at a time when he was unlawfully in the UK.

46. The immigration status of the appellant was wrongly identified in one respect by the judge in para 30. The appellant was not in the UK with valid leave to remain when he met his wife and, it must be assumed, when their relationship began in 2014. He was, however, lawfully in the UK as that relationship continued between October 2016 and April 2017 (including their marriage in January 2017) but not beyond that date.

47. On one reading of s.117B(4), the "little weight" provision applied to the appellant because his "relationship" was "established" with his "qualifying partner" beginning in 2014 when they met and he was unlawfully in the UK. The term "established" in respect of the relationship means, on this interpretation, "started" or "began".

48. A different reading of s.117B(4) would entail recognising that a relationship with a qualifying partner is "established" not simply at the point at which a relationship "started" or "began" but at the point where it develops into a relationship between "partners".

49. In my judgment, the latter is the natural meaning of s.117B(4), and in my view the one more likely intended by Parliament, is to fix the application of s.117B(4) on a relationship which came into existence at a time and developed the quality of a "partner" relationship when the individual was unlawfully in the UK. There may be no clear 'bright line' when a relationship becomes one between "partners" – it is unlikely to be immediate on meeting - but that is what is required for such a relationship to be said to be "established" within the terms of s.117B(4).

50. The Upper Tribunal pointed out in Buci (Part 5A: "partner" [2020] UKUT 87 (IAC), the word "partner" is not defined in Part 5A of the NIA Act 2002 and is not governed by the definition of "partner" in GEN.1.2. Appendix FM of the Rules. Of course, a "partner" as defined in GEN.1.2., including a spouse or a person in a relationship akin to marriage who have lived together for at least two years, is highly indicative that the individual is in a relationship with a "qualifying partner" if the other individual is a British citizen or settled in the UK. But the concept of a "partner" may go broader as the UT recognised in [18] of its decision. In my judgment, it is the "partner" relationship and when it is "established" that engages s.117B(4) and the "little weight" provision it entails.

51. I do not accept Mr Olawanle's submission that s.117B(4) did not apply to the appellant because he had leave at the time of his marriage. Section 117B(4) looks to when the "relationship" was established with the qualifying partner even if that relationship changed, for example, from being an unmarried "partner" to being a married partner at some point. The relationship, despite the formal legal change, would already have been established prior to the marriage.

52. Although the appellant's relationship with his (now) spouse would no doubt have taken time to develop from their first meeting in 2014, it is not suggested that they were not "partners" by the time that the appellant was again granted leave to remain in October 2016. They, of course, married shortly afterwards. Consequently, s.117B(4) was engaged because between 2014 (when the appellant and his future wife met) and October 2016 (when the appellant was again granted leave), their relationship as "partners" was established.

53. In those circumstances, the judge should have considered that s.117B(4) applied because the appellant's relationship with Ms M was established at a time when he was unlawfully in the UK. Properly understood, that provision applied not because

the relationship (after their marriage) had "developed when he was unlawfully present in the UK" but rather because he was unlawfully in the UK when the relationship was earlier "established". It applied to the entirety of the appellant's "family life" with his partner/wife.

*The Public Interest Assessment*

54. A judicial decision-maker is required to make an assessment of all the relevant circumstances in carrying out the balancing exercise under Art 8.2 weighing for and against the public interest. The judge was required to determine what, if any, weight to give to the appellant's family life with his partner and taking into account the relevant public interest to determine whether there were "unjustifiably harsh consequences" so that the public interest was outweighed (see R (Agyarko) v SSHD [2017 [60] per Lord Reed and Lal v SSHD [2019] EWCA Civ 1925). In my judgment, in addition to the issue raised by his application of s.117B(4), the judge failed in a number of other respects properly to carry out that "fair balancing" exercise in para 30.

55. First, the judge's reliance upon the fact that, in his view, the appellant would be granted entry clearance if he were to leave the UK to return to join his wife relied upon the position set out in Chikwamba (and Agyarko at [51]) that there would ordinarily be no public interest in an individual's removal if he or she would be granted entry clearance. But, as the UT recognised in Younas the relevant public interest factors, including in Part 5A of the NIA Act 2002, must be taken into account and that reliance upon Chikwamba does not obviate the need to do this.

56. In para 30, to the extent that the judge considered it was disproportionate to require the appellant to seek entry clearance which, on the judge's premise he would be granted, the judge failed to consider the public interest that should be placed in the balance in deciding whether to require the appellant to do this was or was not proportionate. That was an error of law.

57. Of course, a judge's decision must be read as a whole. Nevertheless, I agree with Mr Howells that, although the judge referred to the public interest in the maintenance of effective immigration controls in para 31, it is plain that he had already unequivocally reached his conclusion that the appellant's removal was disproportionate in para 30 without reference to that public interest.

58. Second, carrying out the balancing exercise, and whether there were "unjustifiably harsh consequences" sufficient to outweigh the public interest, the judge was entitled to take into account the impact on the appellant's wife if she were to go to India or if she were to remain in the UK. Of course, the judge had already reached the conclusion that there were not insurmountable obstacles to the appellant and his wife continuing on their family life in India.

59. In para 30, the judge took into account discrimination which the appellant and his wife considered they would face in India and also, if she remained in the UK, her

feeling that she would be at risk from her family. Whilst neither of these matters was irrelevant to the judge's assessment, the judge had to take into account that he had concluded that the discrimination which they might face as a result of their mixed faith marriage did not create an insurmountable obstacle to them living in India.

60. Further, the judge had to take into account the evidence that he heard, and set out at para 27, that although the couple lived in fear of the family in the UK there had been "no contact or problems from the family" since the last asylum appeal.

61. In other words, not only did the judge have to take into account their subjective fears but also he had to determine objectively what, if any, fears or risks there were to them of, on the one hand, going to India (even if only to obtain entry clearance) or, on the other hand, of the appellant's wife remaining in the UK if only for a temporary period whilst the appellant applied for entry clearance to return.

62. In my judgment, the judge's reasons in para 30 do not satisfactorily engage with the "fair balancing" exercise and the public interest in reaching his finding that the appellant's removal would be disproportionate. For the above reasons, the judge failed to give adequate reasons for his conclusion that, despite the appellant not being able to succeed under the Immigration Rules (in particular para EX.1. was not satisfied), there were "unjustifiably harsh consequences" so that the public interest in the appellant's removal was outweighed by the impact upon him (and his wife) of his removal.

63. For these reasons, the judge materially erred in law in allowing the appellant's appeal under Art 8 outside the Rules. That decision cannot stand and is set aside.

## Decision

64. The decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 of the ECHR involved the making of an error of law. That decision cannot stand and is set aside.

65. The decision to dismiss the appellant's appeal on international protection grounds was not challenged and stands.

66. It was common ground between the parties that the proper disposal of the appeal, if the error of law was established, was to remit the appeal to the First-tier Tribunal in order to re-make the decision under Art 8 of the ECHR.

67. Given the nature and extent of fact-finding required, and that oral evidence is likely to be given, applying para 7.2 of the Senior President's Practice Statement, I agree that the proper disposal of this appeal is to remit it to the First-tier Tribunal in order to re-make the decision in relation to Art 8.

68. However, as the judge's findings in relation to the Immigration Rules set out at paras 27–28 of his determination are not challenged, those findings shall stand, in

particular that the appellant cannot succeed under the 'partner' Rules in Appendix FM as he does not satisfy the requirement in para EX.1.

69. The appeal will, therefore, be remitted to the First-tier Tribunal to re-make the decision on that basis to be heard by a judge other than Judge Heaven (or Judge Fraser).

Signed

*Andrew Grubb*

Judge of the Upper Tribunal
21 September 2021