Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU / 03861 / 2020

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams On 18 January 2022	**Decision & Reasons Promulgated On 1 February 2022**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Mr Mirza Mohammad Sohail Sarwar Appellant
(ANONYMITY ORDER NOT MADE)

And

The Secretary of State for the Home Department Respondent

Representation:
For the Appellant: Mr G Mavrantonis, of Counsel, instructed by House of Immigration Solicitors.
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant, a national of Pakistan born on 27 April 1981, appeals against a decision of Judge of the First-tier Tribunal Shepherd (hereafter the "judge") promulgated on 2 March 2021 following a remote hearing held via CVP on 18 February 2021, by which the judge dismissed his appeal on human rights grounds against a decision of the respondent of 24 January 2020 to refuse his application of 20 August 2019 for leave to remain in the United Kingdom on the basis of his private life and his family life with his partner, Mehwish Altaf (hereafter the "sponsor").

2. The sponsor is a national of Pakistan. At the time of the hearing before the judge, the sponsor had settled status in the United Kingdom and was awaiting a decision on her application for naturalisation which she had made three months before the hearing that took place before the judge (para 41 of the judge's decision) although the judge

appeared to assume (see para 82(viii) quoted at my para 17 below) that she would be naturalised as a British citizen. Nothing turns on this.

3. The appellant and the sponsor began to live together on 27 January 2019 when they entered into an Islamic marriage. She suffers from idiopathic intracranial hypertension (IIH), mobility problems, bilateral visual blurring, chronic back pain, memory loss and depression. At the time of the hearing before the judge, she was in receipt of universal credit.

4. Before the judge, the respondent's representative accepted that the appellant and the sponsor were in a genuine and subsisting relationship which, as at the date of the hearing, had involved cohabitation for over two years, that the fact that the appellant and the sponsor had been living together for two years was not a "*new matter*" for the purposes of s.84(5)-(6) of the NIAA 2002 and that the respondent's decision will interfere significantly with the family and private life of the appellant (paras 22 and 74 of the judge's decision).

5. There are two grounds which are elaborated at paras 25 and 33 below and which I summarise briefly at this stage, as follows:

   (i) (Ground 1) The judge erred when she found (para 93) that the appellant could not be said to be financially independent for the purposes of s.117B(3) of the NIAA 2002.

   (ii) (Ground 2) In her assessment of the public interest considerations in s.117B of the NIAA 2002, the judge erred at paras 93 and 94 in her attempt to follow the "*balance sheet*" approach. In addition, she failed to indicate the weight she gave to various factors. She also took into account factors that were unrelated to s.117B.

Immigration history

6. The appellant entered the UK on 27 November 2006 with leave to enter as a student valid until 29 February 2008. Upon making an in-time application for extension of his leave as a student, his leave was extended until 31 March 2009.

7. On 22 November 2008, he applied for an EEA residence card (sponsored by Irena Balasauskaite) which was refused on 6 October 2009. He withdrew his appeal against the decision on 1 December 2009 and exhausted his appeal rights on the same date.

8. On 30 November 2009, the appellant applied for a permit as a family member of an A8 National on the Worker Registration Scheme. He was issued with such a permit valid until 25 October 2010. On 1 November 2010, he applied for an EEA resident card (sponsored by Irena Balasauskaite) which was refused on 9 February 2011. He withdrew his appeal against the decision on 18 April 2011 and exhausted his appeal rights on the same date.

9. On 5 June 2015, the appellant applied for a permanent residence card as confirmation of a permanent right to reside in the UK (sponsored by Irena Balasauskaite) which was refused on 4 November 2015 with a right of appeal. His appeal was dismissed on 10 May 2017 and his application for permission to appeal refused on 17 November 2017. He exhausted his appeal rights on 4 December 2017.

10. On 4 December 2017, the appellant applied under the 10-year private life route under Appendix FM, which was refused on 19 April 2018 and certified as clearly unfounded, with an out of country right of appeal which he did not exercise.

11. On 20 August 2019, the appellant applied for leave to remain under Appendix FM which was refused under para 353 of the Immigration Rules. On 25 November 2019, he submitted a Pre-action Protocol letter and the respondent agreed to reconsider the application of 20 August 2019. The respondent then made the decision of 24 January 2020 which was the subject of the appeal before the judge.

12. The judge noted (at para 78) that the appellant had therefore been in the United Kingdom unlawfully for over 10 years.

The judge's decision

13. The factual issues before the judge were as follows (para 70):

    (i) whether the appellant and the sponsor were living together in a relationship akin to marriage or civil partnership for at least two years prior to the date of application (GEN1.2 of Appendix FM);

    (ii) whether there were insurmountable obstacles to family life between the appellant and the sponsor continuing outside the United Kingdom (EX.1 and EX.2 of Appendix FM);

    (iii) whether there would be very significant obstacles to the appellant's reintegration in Pakistan (para 276ADE(1)(vi) of the Immigration Rules); and

    (iv) whether there are exceptional circumstances which would render the refusal decision a breach of Article 8 ECHR because it would result in unjustifiably harsh consequences for the appellant or the sponsor.

14. As will be seen from my brief summary of the grounds at para 5 above and elaboration thereof at paras 25 and 33 below, the grounds only challenged, in terms, the judge's finding that the appellant was not financially independent for the purposes of s117B(3) and her assessment of the proportionality balancing exercise at paras 93 and 94. However, I will quote other parts of the judge's decision at the appropriate junctures in view of para 48 below where I rely upon the judge's overall reasoning and findings.

15. The judge followed a structured approach in considering the issues before her.

16. In relation to GEN1.2, the judge found that the definition of "*partner*" was not satisfied because the appellant and the sponsor had not cohabited for a period of two years prior to the date of application (para 75) although she said (para 76) that she accepted that the fact that they satisfied this requirement as at the date of the hearing was a relevant factor in the Article 8 proportionality assessment. As the definition of "*partner*" was not satisfied, the requirement in R-LTRP.1.1(b) was also not satisfied because the appellant had not made a valid application for leave to remain as a partner. Furthermore, the eligibility requirement under E-LTRP2.2(b) was not satisfied because the appellant was in the United Kingdom in breach of immigration laws.

17. In relation to EX.1 and EX.2, the judge found that there were no insurmountable obstacles to family life being enjoyed between the appellant and the sponsor in Pakistan, for the reasons she gave at paras 82(i)-(viii) which read:

> "(i) they are both from Pakistan originally and they both still speak Urdu, a language of Pakistan. Ms Altaf came to the UK when she was 22 and the Appellant came when he was 25. They both came as adults having spent their formative years in Pakistan. They are both familiar with the culture and would have each other for support.
>
> (ii) Even if they did not have family support in Pakistan that *[sic]* this *[sic]* no different from their current position in the UK where they do not have it either.
>
> (iii) **There is evidence of financial support coming from friends but I have not seen sufficient evidence to suggest that this could not continue if the Appellant were to return to Pakistan.**
>
> (iv) I accept that Ms Altaf has some medical conditions, perhaps best summarised in the several letters from Thistlemoor Medical Centre appearing in the bundle. I also accept that when she is experiencing symptoms of these conditions, she feels unable to carry out daily tasks and is anxious about their impact on her, to the extent that she has felt it necessary to attend the emergency department. However, there is insufficient evidence from any specialist medical professional about the effect that these conditions would be expected to and do have on her life (aside from based on her own assertions), whether there would be available and accessible treatment for them in Pakistan and what the impact of being returned to Pakistan would be on Ms Altaf. The Appellant and Ms Altaf simply say that medication in Pakistan would be expensive. I note that the letter from Luton and Dunstable Hospital dated 16 May 2019 confirms Ms Altaf said that she had spinal surgery in Pakistan which seems to indicate that some medical provision is available. I note the Appellant's skeleton argument that Ms Altaf is unable to travel due to the pandemic as she is vulnerable. However, measures are and will be in place to address the risks of the pandemic, and at some point Ms Altaf will be offered a vaccination to protect against covid-19 which, if she chooses to have it, will reduce the risk posed by the virus. There is no evidence from a medical expert that she is currently unable to travel.
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> (v) As to Ms Altaf's mental health, I accept the Respondent's submission, and Ms Altaf and the Appellant's own evidence, that the presence of the Appellant helps to alleviate her anxiety and depression. This could continue if she chose to accompany him to Pakistan. It has not been proved on the balance of probabilities that counselling or other treatment would not be available in Pakistan.
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> (vi) The Appellant says he would struggle to find employment as he cannot remember the content of the studies he undertook both in Pakistan and in the UK. I find that, while this may be a reason why he cannot find employment in the particular area of computer science which he studied, this is not reason enough for him to be unable to find any employment at all. He appears fit and well and has gained at least one qualification and some command of English since he first came to the UK, both of which are things he did not have when he left Pakistan and mean he has more to offer to the employment market now than he did then. He has also been able to source accommodation and set up a life for himself here. There is also nothing to prevent him refreshing his memory as to his previous studies if he chose to do so. I accept he is older now than when he left but the Appellant has not demonstrated that his age would be a prohibitive factor in seeking employment.
>
> (vii) Ms Altaf has confirmed that she has worked since being in the UK in various roles. I find that, subject to securing treatment for her medical conditions (and I have been unable to make a finding that she would not be able to do so), due to these roles and her exposure to English life and language and having been able to forge a life for herself here, Ms Altaf is also in a better position to seek employment in Pakistan now than she was when she left.

(viii) Even if the Appellant and Ms Altaf were to struggle to find employment in Pakistan and were to be without benefits or family support, they are both familiar with the culture and they would have each other for support. They each grew up there. Ms Altaf would be giving up the benefits of British citizenship and their life may be a hard one, but that is not sufficient to meet the test."

(My emphasis)

18. In relation to para 276ADE(1)(vi), the judge reminded herself (para 83) of the guidance in Kamara [2016] EWCA Civ 813. She found that there would not be very significant obstacles to the appellant's reintegration in Pakistan for the reasons she gave at paras 84-85 which read:

"84. I find on the balance of probabilities that there would not be such very significant obstacles for the Appellant due to the facts founds at paragraph 82 above. In addition, the Appellant has not proved to the required standard that he has private life in the UK in terms of friends or community activities outside his relationship with Ms Altaf besides the receipt of money from friends which I have found could continue if he were to go to Pakistan. Modern means of communication could also be used to continue any friendships he currently has in the UK.

85. Although the Appellant would no doubt face difficulties in settling back into life in Pakistan given the above findings, I do not consider these to be of such a high degree as to amount to very significant obstacles for the purposes of the rule. This is because he spent his formative years there, left as an adult, is familiar with the culture and society and the language is his mother tongue."

19. The judge was satisfied that Article 8 was engaged. She reminded herself, inter alia (paras 87-92), that the question for GEN3.2 was whether there were exceptional circumstances because the decision would result in unjustifiably harsh consequences for the appellant or the sponsor, that she had to take into account whether family life had been established in 'precarious' circumstances and she reminded herself of the meaning of *'precarious'* as explained in Rhuppiah [2018] UKSC 58.

20. The judge's assessment of the factors for and against the appellant in the proportionality balancing exercise, which is the subject of ground 2, is set out at paras 93-94 which read:

"93. On the one hand of the balance are the following s.117B factors:

(i) that the maintenance of effective immigration controls is in the public interest. I have found that the Appellant does not qualify under the immigration rules. [H]e has also been in the UK unlawfully for over ten years, having been appeal rights exhausted on three occasions.

(ii) it is in the public interest that the Appellant is financially independent. The Appellant is unable to work due to his immigration status and relies wholly on Ms Altaf's benefits. I accept that they have suitable accommodation. Mr Mavrantonis submitted that Ms Altaf's benefits could be used to demonstrate the Appellant's financial independence. However, universal credit is not one of the permissible benefits in lieu of the minimum income threshold listed in ELTRP.3.3. In fact LTRP2.2(b) requires the applicant to provide evidence that their partner is able to maintain and accommodate themselves, the applicant and any dependants adequately in the UK without recourse to public funds. **Ms Altaf admitted that, without the financial assistance from friends currently receive, her benefits would not be enough to support both her and the Appellant. I therefore find that the Appellant is not financially independent.**

94. On the other side of the balance are:

(i) The Appellant has been here for 14 years having initially had leave to enter the UK and on one occasion thereafter. However, in light of the far greater length of time spent here unlawfully, I find this carries little weight in his favour

(ii) it is in the public interest that the Appellant can speak English. The Appellant's evidence confirms he has not passed the English language test, having been unable to take it due to his ID documents being with the Home Office, but says he can speak English. He spoke Urdu at the hearing. I find it likely that the Appellant can speak English given the amount of time he has lived in the UK, that he was a student here and that he was married to an EEA national with whom he presumably communicated using English as their common language.

(iii) The Appellant and Ms Altaf are in a genuine and subsisting relationship and have cohabited for over two years. However, I find they both entered into this relationship knowing that the Appellant's immigration status was precarious and they had no legitimate expectation of him being allowed to remain in the UK.

(iv) Ms Altaf is settled in the UK.

(v) It would undoubtedly be more difficult for the Appellant and Ms Altaf to continue their relationship if the Appellant were to be removed and Ms Altaf chose to stay in the UK, but this is her choice."

(my emphasis)

21. The judge then said, at para 95:

"95. I find that the balance is tipped **significantly in favour of the public interest** such that the public interest outweighs the Appellant and Sponsor's private and family life."

(my emphasis)

The grounds and submissions

22. Para 13 of the grounds contends that it is arguable that the judge failed to reach any credibility assessment on the evidence of the appellant and the sponsor.

23. At the hearing, Mr Mavrantonis confirmed that para 13 was not a ground that he relied upon.

24. I amplify on the grounds at paras 25 and 33 below. It is clear that the grounds did not, in terms, challenge the findings made by the judge that the appellant did not meet the requirements for leave to remain as a partner under the 10-year route (paras 75-79); that there were no insurmountable obstacles to family life being enjoyed in Pakistan (paras 80-82); and that there were no very significant obstacles to the appellant's reintegration in Pakistan (paras 83-85).

Ground 1 – as lodged

25. Ground 1 contends that financial independence means an absence of financial dependence upon the state, as per para 55 of the Supreme Court's judgment in Rhuppiah. It was accepted before the judge that the sponsor was in receipt of universal credit. Use by the sponsor of her universal credit to support the appellant could not be construed as financial dependence upon the state. It was accepted that the couple receive additional monetary assistance from friends. The appellant should therefore have been found to be "*financially independent*" for the purposes of s.117B(3). The judge therefore erred in law in finding otherwise, at para 93(ii) of her decision.

Ground 1 – oral submissions

26. Mr Mavrantonis confirmed that there was no evidence before the judge as to the frequency of any financial support received by the sponsor and the appellant from friends or the amount(s) that they received from friends. There was no evidence before the judge of the couple's financial outgoings.

27. However, Mr Mavrantonis drew my attention to the fact that the judge had accepted that there was some financial support from friends and also that the sponsor received universal credit. He submitted that the judge did not appreciate that universal credit is means-tested.

28. In addition, as para 65 of the judge's decision shows, the respondent's representative had argued before the judge that, as the sponsor received benefits and there was no one in the house working, the appellant was not financially independent of the state. Para 59 of the judge's decision shows that Mr Mavrantonis had disagreed with the respondent's submissions on this issue at the hearing before the judge.

29. Mr Mavrantonis relied upon Ruppiah and the wording of s.117B(3) and submitted that it is the appellant who must show that he is financially independent of the state. He submitted that reliance by the couple upon the sponsor's universal credit did not mean that the appellant was not financially independent. In his submission, the appellant was financially independent and the judge erred in finding otherwise at para 93(ii). The fact that the sponsor was in receipt of universal credit was irrelevant.

30. In relation to para 95 of the judge's decision, where she had said that the balance tipped *"significantly"* in favour of the public interest, Mr Mavrantonis relied upon the observation of Judge of the First-tier Tribunal Feeney (hereafter the "*permission judge*") in granting permission to appeal. The permission judge had said that the judge's finding that the appellant was not financially independent arguably influenced her overall conclusions because she had concluded that "*the public interest tipped the balance in the respondent's favour".*

31. Mr Mavrantonis submitted that, if the judge's balancing exercise at paras 93 and 94 was wrong, that called into question para 82(viii) of her decision although he accepted that the grounds had not challenged "*in terms*" the judge's findings in relation to the issues under the Immigration Rules, including her finding at para 82, that there were no insurmountable obstacles to family life being enjoyed in Pakistan for the reasons she gave at para 82(i)-(viii).

32. In relation to para 93(ii) of her decision where the judge had said that the minimum income threshold would require the appellant to provide evidence of accommodation, Mr Mavrantonis drew my attention to the fact that the respondent had not raised the accommodation and maintenance issues. He said that the sponsor was in receipt of Personal Independence Payment ("PIP") which would give the appellant "*an exemption from the financial independence issue"*.

Ground 2 – as lodged

33. Ground 2 contends that the judge's approach in attempting to follow the "*balance sheet*" approach was confusing as the average bystander would expect all positive factors to be placed together in one paragraph and all negative factors to be placed

together in a separate paragraph, which is not the approach the judge followed. In addition:

(i) Given that the appellant is entitled to know what weight was attached to each separate factor, the judge erred in that she failed to indicate the weight she gave to the two factors at para 93 and at para 94(iii) of her decision, whether the weight given was little or neutral. Para 23 of the grounds contends that the judge's summing at para 95 cannot negate the obligation to articulate the weight being attached to each factor.

(ii) The judge found at para 94(ii) that it was likely that the appellant speaks English but failed to attach any weight to this obligatory statutory consideration.

(iii) The factors that the judge referred to para 94(iv) and 94(v) were unarguably unrelated to s.117B.

Ground 2 – oral submissions

34. Mr Mavrantonis submitted that the judge used a confusing approach in attempting to follow the "*balance sheet*" approach. A judge's decision should have clarity. On a "*normal reading*" of the introductory words to paras 93 and 94 of the judge's decision, one would expect to see positive and negative factors to be set out in a clear way. There was no clear indication what weight the judge gave to the factor she considered at para 93, including the financial independence issue. There was no clear finding at para 94(ii) whether the appellant speaks English. It is not clear because she noted that the appellant had not passed any English language test. All one could say is that it appeared to be a positive finding. In any event, the judge did not indicate what weight she gave to it.

35. At para 94(iv), the judge said that the sponsor was settled in the United Kingdom. However, that is not a s.117B consideration and in any event it is not a negative factor, in the submission of Mr Mavrantonis. The factor considered by the judge at para 94(v) is neither positive nor negative.

36. Accordingly, in all of the circumstances, Mr Mavrantonis submitted that the judge's approach in following the balance sheet approach was confused.

37. I heard submissions from Ms Isherwood in response and Mr Mavrantonis responded briefly.

38. I then reserved my decision.

Assessment

39. I shall deal first with the submission advanced by Mr Mavrantonis towards the end of his oral submissions that the sponsor was in receipt of PIP which, he submitted, would give the appellant *"exemption from the financial independence issue"*. I assume he meant to refer instead to the maintenance issue for leave to remain under the Immigration Rules.

40. The fact is that there was no evidence before the judge that the sponsor was in receipt of PIP. The sponsor was specifically questioned about this at the hearing before the judge, as para 44 of the judge's decision's shows, the relevant part of which reads:

> "44. … At the moment she receives universal credit (she did not state whether this was because she was unfit to work or because she could not find a job). When asked why she had not applied for the personal independence payment instead, Ms Altaf said she did not know what that was."

41. Given that PIP is not the same as universal credit and given para 44 of the judge's decision, the submissions of Mr Mavrantonis in relation to PIP cannot demonstrate that the judge erred in law.

42. In addition, Mr Mavrantonis attempted to enlarge the ambit of ground 1 to call into question the judge's reasoning at para 82(viii). However, the fact is that the judge's reasoning at para 82(viii) was not challenged in the grounds. The appellant does not have permission to challenge any aspect of para 82(viii). In any event, there is no link between any error (if made) on the financial independence issue with the judge's reasoning at para 82(viii). In attempting to link the two, Mr Mavrantonis was attempting to circumvent the fact that his grounds did not challenge the judge's findings at para 82.

Ground 1

43. Para 65 of the judge's decision shows that the respondent's representative at the hearing before the judge appears to have incorrectly submitted that the mere fact that the sponsor was receiving universal credit means that the appellant cannot be regarded as being financially independent for the purposes of s.117B. The text I have underlined in the quote above (at my para 20) of para 93(ii) of the judge's decision shows that the judge considered whether the appellant would satisfy the accommodation and maintenance issues in an application for leave to remain as a spouse under the Immigration Rules in order to decide whether he was financially independent for the purposes of s.117B(3). The judge therefore appeared to have employed this reasoning in her consideration of the submission of the respondent's representative to the effect that the fact that the sponsor received universal credit of itself meant that the appellant was not financially independent for the purposes of s.117B(3).

44. As Mr Mavrantonis submitted, it is clear from the Supreme Court's judgment in Rhuppiah that the fact that the sponsor received universal credit does not, of itself, mean that the appellant is not financially independent. I therefore accept that the judge's reasoning in the text I have underlined in the quote of para 93(ii) at my para 20 above was wrong in law.

45. However, that is not determinative of ground 1. The concluding words of para 93(ii) of the judge's decision (which I have emboldened in the quote at my para 20 above) read:

> "… Ms Altaf admitted that, without the financial assistance from friends currently receive, her benefits would not be enough to support both her and the Appellant. I therefore find that the Appellant is not financially independent."

46. This was based on the sponsor's evidence as summarised at para 49 of the judge's decision which reads:

> "49. As to whether her benefits are enough to support the couple without the help they are receiving from friends, Ms Altaf said it was very difficult to survive as the rent, council tax and household expenses are very high. Because she is ill and the Appellant does not have a visa to work it is a dire situation."

47. The judge's conclusion at para 93(ii) that the sponsor had admitted that, without the financial assistance from friends that the couple had received her benefits would not be enough to support both her and the appellant, was not challenged in the grounds. Given this evidence and given that there was no evidence before the judge as to the regularity of the financial support that the couple received from friends or the amounts they received, it is inevitable, in my judgment, that she would have reached the same finding, that the appellant had not shown that he was financially independent for the purposes of s.117B(3), if she had not made the error I have identified above. This notwithstanding that she accepted that they received some financial support from friends.

48. However, even if I am wrong about this, any error of law on that account is not material, for the following reasons:

    (i) The judge did not err as contended in ground 2, for the reasons I give below in relation to ground 2.

    (ii) Even if the appellant should have been found by the judge to have been financially independent, it is clear from Rhuppiah that the fact that a person is financially independent of the state is a neutral factor in the balancing exercise.

    (iii) The judge made it clear at para 95 that "*the balance is tipped significantly in favour of the public interest*". Mr Mavrantonis was clearly aware of the possible significance of para 95 because he relied upon the observation of the permission judge in support of his submission that para 95 cannot save the judge's decision if she erred in law in finding that the appellant was not financially independent. However, the fact is that the permission judge was only considering arguability. Furthermore, the observation of the permission judge, that *"… [i]t was a factor that influenced the judge's overall conclusions. [sic] because she concluded that the public interest tipped the balance in the respondent's favour*", overlooked the word "*significantly*" in the first sentence of para 95 of the judge's decision.

    (iv) I appreciate that the judge would have been placed weight on her finding that the appellant was not financially independent. I also appreciate that she did not indicate the weight she gave to that finding. I have considered these points very carefully indeed before reaching my conclusion on materiality.

    (v) In reaching my conclusion on materiality, I also carefully considered the judge's findings and reasoning in relation to the issues that she considered under the Immigration Rules, including that there were no insurmountable obstacles to family life continuing in Pakistan and that they were no very significant obstacles to the appellant's reintegration in Pakistan. She found, for example, that it had not been shown that the sponsor would be unable to obtain treatment in Pakistan, that both the appellant and the sponsor were in a better position to find employment in Pakistan than when they had lived in Pakistan, that financial support from their friends could continue if they lived in Pakistan, that the appellant and the sponsor entered into their relationship in the knowledge that the appellant's immigration status was precarious, that they had no legitimate expectation that he would be allowed to remain in the United Kingdom, and that the appellant has lived in the United Kingdom unlawfully for far longer than with leave or permission.

(vi) Given the judge's findings and reasoning as explained at my sub-paragraph (v) above, that she found at para 95 of her decision that the balance was tipped significantly in favour of the public interest and that, even if the appellant should have been found to be financially independent, this was at most a neutral factor, I am completely satisfied that, if it is the case that she had erred in finding that the appellant was not financially independent, she would inevitably have reached the same conclusion as to the proportionality balancing exercise if she had not made that error, on any reasonable view. On the evidence before the judge and the judge's overall reasoning and findings (which I have summarised at sub-paragraph (v) above), this was quite simply not one of those "*exceptional cases*" that could succeed under Article 8 on any reasonable view, the meaning of "*exceptional*" being as explained in GEN 3.2 of Appendix FM, that is, whether the respondent's decision would result in unjustifiably harsh consequences for the appellant or the sponsor.

49. Ground 1 is therefore not established.

Ground 2

50. The submission in ground 2, that the judge's approach in following the "*balance sheet*" approach was confusing, in that, she had mixed up the positive and negative factors, is misconceived, in my view. There are some factors which, depending on the circumstances, clearly fall on one side of the scales or the other side of the scales. However, there are some factors which, depending on the circumstances, appear fall to fall on one side but where there are reasons which reduce or increase (depending on the circumstances) the impact/weight otherwise to be given to that factor.

51. So, for instance, in the instant case, the judge listed at para 93 the factors that were against the appellant. She then turned at para 94 to list the factors that were in the appellant's favour. However, it is evident from her reasoning that, in deciding the weight to be given, in his favour, to the fact that he had lived in the United Kingdom for 14 years, she took into account that he had spent a far greater length of time in the United Kingdom unlawfully and she therefore reduced the weight she gave to this factor in his favour.

52. Plainly, the judge applied the same process at para 93(iii). It was a factor in the appellant's favour that he and the sponsor were in a genuine and subsisting relationship and had cohabited for 2 years. However, the judge indicated in the next sentence that the weight to be given to this factor was reduced by the fact that they had both entered into the relationship in the knowledge that the appellant's immigration status was precarious and that they had no legitimate expectation that he would be allowed to remain in the United Kingdom.

53. Likewise, at para 94(v) of her decision, the judge took into account, in the appellant's favour, that it would be "*undoubtedly more difficult for the appellant and [the sponsor] to continue their relationship if the appellant were to be removed and [the sponsor] chose to stay*" but she considered that the weight to be given to this factor was reduced by the fact that it was the sponsor's choice if she decided to remain in the United Kingdom.

54. Accordingly, I reject the submission that the judge's approach in following the "*balance sheet*" approach in the proportionality balancing exercise was confusing.

55. I also reject the submission that the factors considered by the judge at paras 94(iv) and (v) were irrelevant to s.117B. Section 117B is not exhaustive. Whereas the introductory words to para 93 indicated that para 93 was the list of s.117B factors that went against the appellant, the introductory words to para 94 did not refer to s.117B. Thus, it is clear that the judge listed at para 94 the factors that ostensibly went in the appellant's favour whether or not they fell within the ambit of the public interest considerations set out in s.117B.

56. Secondly, the submission of Mr Mavrantonis that the fact that the sponsor was settled was neither positive nor negative is simply wrong. If the sponsor's presence in the United Kingdom had been unlawful, it would have been relevant to take that into account in assessing the factors that went against him. Thus, the judge was entitled, indeed obliged, to take into account in the appellant's favour the fact that the sponsor was settled in the United Kingdom.

57. Whilst it may be that the factor that the judge considered at para 94(v) is not one that is referred to in s.117B, the fact is that it was relevant for the judge to take into account the difficulty or otherwise of the appellant and the sponsor continuing their relationship if the appellant is removed.

58. I turn to the challenge to para 94(ii) of the judge's decision. Whereas para 23 of the grounds states that the judge at para 94(ii) "*… finds it likely that [the appellant] speaks English*…", Mr Mavrantonis submitted that the judge failed to make a clear finding whether the appellant speaks English.

59. I do not accept that the judge failed to make a finding as to whether or not the appellant speaks English. She noted that the appellant had not passed an English language. This was simply part of her assessment of the evidence before in considering the issue. She might have been criticised if she had not taken into account that the appellant had not passed an English language test in reaching a finding as to whether or not s.117B(2) applied. That she did so does not undermine her finding, which I am satisfied she implicitly made, that the appellant speaks English. She said so in terms, when she said: "*I find it likely that the appellant can speak English …".*

60. The judge did not err in failing to indicate the weight to be given to the fact that the appellant speaks English given that it is established that this is a neutral factor, from which it follows that no weight is to be given to the fact that he speaks English.

61. I therefore turn to the submission that the judge erred in failing to indicate the weight she gave to the two factors she considered at para 93 and to the factor she considered at para 94(iii).

62. Mr Mavrantonis submitted that the judge's failure to indicate the weight she gave to these factors cannot be saved by the fact that she said at para 95 that "*the balance is tipped significantly in favour of the public interest…*". In this regard, he relied upon the observation of the permission judge that it was arguable that the error in relation to whether the appellant was financially independent "*… was a factor that influenced the judge's overall conclusions because she concluded that the public interest tipped the balance in the respondent's favour*".

63. However, as I have said at para 48 above, the permission judge was only considering arguability. Furthermore, it is clear that the permission judge did not notice that the

judge had found that the "*balance is tipped significantly in favour of the public interest*", my emphasis.

64. I therefore reject the submission of Mr Mavrantonis, in effect, that para 95 of the judge's decision should not be taken into account in deciding whether she materially erred in law by failing to indicate the weight she gave to the various factors for and against the appellant.

65. Plainly, it would have been preferable if the judge had indicated the weight she gave to the factors she considered at para 93 and para 94(iii), as argued in the grounds and before me. Nevertheless, it is clear, when paras 93 and 94 are taken together with para 95, that, in reaching her conclusion as to proportionality, her mind *had* been directed to the weight to be given to all of the individual factors she had considered and that she had carried out a proper balancing exercise even if she did not state, in terms, the weight she gave to each of the factors. Accordingly, I am satisfied that there is no material error of law in this regard. Further and in any event, on the evidence before the judge, this was not one of those "*exceptional cases*" that could succeed under Article 8 on any reasonable view, for the reasons I have given at para 48 above.

66. The appellant's appeal to the Upper Tribunal is therefore dismissed.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of any error of law sufficient to require it to be set aside. The appellant's appeal to the Upper Tribunal is dismissed.

Signed
Upper Tribunal Judge Gill Date: 21 January 2022

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email.**