Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/31913/2014

THE IMMIGRATION ACTS

Heard at Field House
On 18 December 2015

Decision and Reasons Promulgated
On 7 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VINICIUS JORGE SCHMIDT

Respondent

Representation:
For the Appellant: Ms A Fijiwala, Senior Home Office Presenting Officer
For the Respondent: Mr A Vaughan (counsel)

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Perry,

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promulgated on 13 January 2015 which allowed the Appellant's appeal on article 8 ECHR grounds

Background

3. The Appellant was born on 28/10/1993 and is a national of Brazil. The appellant's mother entered the UK on 2nd October 2003. The appellant's stepfather entered the UK in October 2003. In March 2004 the appellant's mother and stepfather married in the UK. The appellant entered the UK on 10 July 2004. The respondent granted the appellant's mother and stepfather leave to remain in the UK until 31 July 2007.

4. On 12 December 2008 the appellant's mother submitted an application for leave to remain outside the rules on the basis of her article 8 ECHR rights. The appellant and his step father were listed his dependants on that application. The respondent refused that application initially on 3 August 2009. It was discovered that the decision was made in error because the appellants' then representatives had submitted an application which contained matters which did not relate to these appellants but, in fact, related to one of their other clients. When the mistake was discovered further representations were made leading to a refusal decision from the respondent dated 23rd of August 2013. In the face of a judicial review challenge from the appellants, the respondent reconsidered that decision and issued a fresh refusal decision on 24 July 2014.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Perry ("the Judge") The Judge allowed the appellant's appeal on article 8 ECHR grounds. At the same time, the Judge considered the appeals of the appellant's mother and stepfather, and dismissed their appeals (IA/31910/2014 & IA/31911/2014). The decisions in relation to the appellant's mother and stepfather are the subject matter of a separate appeal to the Upper Tribunal

6. Grounds of appeal were lodged and on 23 February 2015 Judge Parkes gave permission to appeal stating *inter alia*

> "2. The appellant had applied with his parents for LTR under article 8. The applications were refused. The appellant's parents' appeals were dismissed and they have sought permission to appeal. His appeal was allowed outside the rules under article 8.
>
> 3. The grounds argued that the judge erred in the proportionality assessment with regard to sections 117A and 117B and that the factors in section 117A(2) and 117B were not considered. It appears that the judge did not have regard to the precarious nature of the appellants LTR and accorded greater weight than it merited."

The Hearing

7. (a) Ms Fijiwala for the respondent told me that the decision does not contain any explicit reference to section 117B of the 2002 Act, nor other any findings in fact directed at the statutory provision. She argued that at [70] it is hard to see whether the Judge is

finding in favour of the appellant on the basis of family life or on the basis of private life. At [54] the Judge finds that family life exists between the appellant and his mother and stepfather, so, she argued, the findings at [70] must be findings in relation to private life. She argued (relying on AM (Malawi)) that the appellant's presence in the UK has been precarious. Subsections (4) & (5) of section 117B require little weight to be given to such private life when presence in the UK is precarious. The Judge failed to consider the precarious nature of the appellant's presence in the UK and, she said, attached to much weight to any private life established in the UK. Ms Fijiwala relied on the cases of Forman and Deelah.

8. Mr Vaughan, for the appellant, took me through the entire terms of section 117B of the 2002 Act, and argued that although the Judge did not use those provisions as a specific checklist, it was abundantly clear from the decision that he was mindful of the provisions of s117B, to which he clearly refers at [44], and which he clearly kept in mind in making his findings of fact. Mr Vaughan told me that a careful reading of the decision discloses that there is nothing which had not been considered by the Judge and that if the appellant were to make an application today he would succeed in terms of the rules because he has now spent more than half of life UK & is under the age of 25 years. He relied on the case of SS Congo and told me that the determination in relation to this appellant does not contain any errors of law material or otherwise.

Analysis

9. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the list of considerations contained in section 117B and section 117C of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") is not exhaustive. A court or tribunal is entitled to take into account additional considerations, provided that they are relevant in the sense that they properly bear on the public interest question; in cases where the provisions of sections 117B-117C of the 2002 Act arise, the decision of the Tribunal must demonstrate that they have been given full effect.

10. In Deelah and others (section 117B – ambit) [2015] UKUT 00515 (IAC) the Tribunal held that Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 are not confined to an appeal under section 84(1)(c). They apply also to appeals brought under section 84(1)(a) and (g).

11. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that the statutory duty to consider the matters set out in s 117B of the 2002 Act is satisfied if the Tribunal's decision shows that it has had regard to such parts of it as are relevant.

12. The Judge wrote a detailed and careful decision. The first two appellants appealed against that decision and, in a separate decision of the Upper Tribunal their appeals have been dismissed, and the decision allowed to stand.

13. Although there are no material errors of law in the decision insofar as it relates to the first and second appellants, the position of the third appellant alone is different and is drawn into focus at [70]. It is there that the Judge carries out a proportionality assessment of the third appellant's case and finds that article 8 ECHR is engaged and that the

respondent's decision is a disproportionate interference with both family and private life. Before reaching that conclusion an inadequate balancing exercise is carried out, and no reference (anywhere in the decision) is made to section 117 of the 2002 Act. From a careful reading the decision it is not clear that the factors set out in section 117 of the 2002 Act have been taken into account.

14. I therefore have to find that the decision is tainted by material errors of law because it races to a conclusion without sufficient explanation. As the decision contains material errors of law, I set it aside. There is sufficient evidence before me to enable me to remake the decision.

Findings of Fact

15. This appellant is a Brazilian national born on 28 of October 1993. The appellant's mother left Brazil & entered the UK in October 2003. The appellant entered the UK as the dependent of his mother of 10 January 2005. He has remained in the UK since then.

16. Throughout his time in the UK the appellant has lived with his mother and his step-father. It is reasonably foreseeable the appellant's mother and stepfather will be returning to Brazil as their appeals against the respondent's decision to refuse to grant leave to remain in the UK have been unsuccessful. The appellant has two adult siblings who are probably still in Brazil.

17. The appellant was seven years old when he arrived in the UK, he is now 22 years old. The appellant has lived in the UK for more than half of his life. Since March 2015 the appellant has had is a strong chance of success with an application for leave to remain under paragraph 276 ADE(v) of the rules.(he has not made a separate application)

18. The appellant is now a student at Brunel University. He has enjoyed a relationship for the last seven years with the same girlfriend. He would like to marry his girlfriend and start a family.

19. Although the date of application in this case was 12 December 2008, the decision against which this appeal is directed was not made until 24 July 2014. The appellant has not made his own independent application for leave to remain in the UK.

The Immigration Rules

20. It has always been the appellant's position that the respondent's decision in relation to the immigration rules is correct. It was not until March 2015 that the appellant could have submitted his own application for leave to remain and expected it to meet with success. At the date of application and at the date of decision the appellant could not meet the requirements of the immigration rules. In this appeal, it is not argued that the appellant can succeed under the immigration rules. As a single man, he cannot fulfil the requirements of appendix FM. Because of his age at the date of application, and the nature of the applications made in relation to this decision, he cannot fulfil the requirements of paragraph 276 ADE.

Article 8 ECHR

21. In SS (Congo) and Others [2015] EWCA Civ 387 Lord Justice Richards said at paragraph 33 "*In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ*".

22. In R (on the application of Esther Ebun Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC) it was held that there is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC) or Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. This is consistent with para 128 of R (MM & Others) v SSHD [2014] EWCA Civ 985, that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule. As is held in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations.

23. Section 117 of the 2002 Act is a factor to be taken into account in determining proportionality. I appreciate that as the public interest provisions are now contained in primary legislation they override existing case law, Section 117A(2) requires me to have regard to the considerations listed in Sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me the duty of carrying out a balancing exercise. In so doing I remind myself of the guidance contained within Razgar.

24. I must ask the following questions

(i) Does family life, private life, home or correspondence exist within the meaning of Article 8

(ii) If so, has the right to respect for this been interfered with

(iii) If so, was the interference in accordance with the law

(iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and

(v) If so, is the interference proportionate to the pursuit of the legitimate aim?

25. In Kugathas v SSHD [2003] INLR 170 the Court of Appeal said that, in order to establish family life, it is necessary to show that there is a real committed or effective support or relationship between the family members and the normal emotional ties between a mother and an adult son would not, without more, be enough. In Etti-Adegbola v SSHD [2009] EWCA Civ 1319 the Court of Appeal concentrated on the last part of that test and confirmed that the Tribunal had applied the right test in finding that a family's behaviour was "*no way exceptional or beyond the norm*". In JB (India) and Others v ECO, Bombay [2009] EWCA Civ 234 the Court of Appeal reiterated that the approach in Kugathas must be applied to the question of whether family life for the purposes of Article 8 subsists between parents and adult children.

26. Family life does not exist for this appellant in the UK. Although the appellant has lived with his mother and stepfather since arriving in the UK, he is now a 22-year-old adult whose seven-year long relationship with his girlfriend has led him to talk of moving from his parents & committing himself in marriage to his girlfriend. The appellant's own evidence is evidence of a desire to set up a new household, independent of his mother and stepfather.

27. Family life does not yet exist between the appellant and his girlfriend/fiancée. That family life may well be created at some point in the future but at today's date it does not exist. The appellant and his girlfriend do not live together. They are not married. They are not members of the same family. If they're not members of the same family, family life cannot exist in terms of article 8 ECHR.

28. The appellant has quite clearly established private life in the UK. The appellant was only seven years and three months old when he arrived in the UK. He spent less than 32% of his life in Brazil and more than 68% of his life in the UK. He was educated in the UK. He is now studying at university in the UK. He has developed a significant romantic relationship throughout the last seven years, and now has hopes for a career, for marriage and a family.

29. The impact of the respondent's decision would be to remove all of the component parts of private life listed at [28] (above) from the appellant; but I must consider section 117 the 2002 Act. Effective immigration control is in the public interest. It is also in the public interest that the appellant can speak English fluently and is financially independent. However, throughout the appellant's time in the UK's his immigration status has been precarious. I must therefore give little weight to the private life that the appellant has established.

30. I balance the respondent's interest in preserving fair and effective immigration control to protect this country's fragile economy. In Nasim and others (Article 8) [2014] UKUT 25 (IAC) it was held that the judgments of the Supreme Court in Patel and Others v Secretary of State for the Home Department [2013] UKSC 72 serve to re-focus attention on the nature and purpose of Article 8 of the ECHR and, in particular, to recognise that

Article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity.

31. The determinative factor in this case is that since March 2015 the appellant could have withdrawn from this appeal process and submitted his own independent application for leave to remain in the UK under paragraph 276 ADE. Because of the length of time the appellant has been in the UK and because of his age, he could realistically expect that application to be successful. Whilst the appellant derives no benefit from section 117 factors which weigh in his favour, the weight that tips the balance in the appellant's favour is that, at today's date, he fulfils the requirements of the immigration rules. The weight of reliable evidence indicates that article 8 private life is established. The appellant has certain factors set out in section 117 which weigh in his favour; because his immigration status is precarious those factors are neutral.

32. The appellant is a young man whose formative years were spent in the UK and his plans for the future are focused in the UK. My decision creates separation between the appellant and his mother and stepfather, but at 22 years of age, facing marriage and the establishment of his own home, that is a separation which is an inevitable step in life and not a consequence of the respondent's decision. The appellant could realistically expect to make his own successful application for leave to remain in terms of paragraph 276 ADE of the immigration rules. Carefully balancing all those factors, I can only find that the respondent's decision is a disproportionate breach to the appellant's right to respect for private life in terms of article 8 ECHR.

Conclusion

33. I therefore find that the Judge's decision is tainted by a material error of law. **I set aside the decision of the First-tier Tribunal because it contains a material error of law. I substitute the following decision.**

Decision

I dismiss the appeal under the Immigration Rules.

I allow the Appeal on Articles 8 ECHR grounds only.

Signed Date 2 January 2016
Deputy Upper Tribunal Judge Doyle