Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23885/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 November 2014	**On 3 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE E B GRANT

Between

MERCY CHARLES RHUPPIAH
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Sellwood of Counsel
For the Respondent: Ms J Isherwood, Senior Presenting Officer

DECISION AND REASONS

The Background to this Appeal

1. The appellant who was born on 26 October 1973 is a citizen of Tanzania and is female. She entered the United Kingdom with entry clearance as a student in 1997.

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She remained as a student renewing her visa at various periods until her student leave expired on 30 November 2009. Throughout the period as a student her leave was not continuous, however on 28 November 2009 she submitted an application for indefinite leave to remain on the basis of length of residence which was refused in February 2010 and the appeal was appeal rights exhausted by October 2010. In June 2013 a decision was made to refuse her application for leave to remain and to give directions for her removal from the United Kingdom. The appellant appealed that decision and her appeal was heard by First-tier Tribunal Judge Blundell and in a decision promulgated on 19 August 2014 he dismissed her appeal on Article 8 grounds.

2. The appellant issued an application for permission to appeal in time and the substance of grounds is as set out in paragraphs 11 to 18 of the grounds of appeal which I set out in full below:

> *"11. The IJ dismissed the appeal. He did however make positive findings and accepted the evidence of the appellant and her witnesses [para 22-36]. The findings made by the IJ are set out below;*
>
> *i) The appellant cannot meet the Immigration Rules (which was never in dispute). [37]*
>
> *ii) The error in the application form submitted at the beginning of July 2012 closed down the fourteen year route (again not disputed). [38]*
>
> *iii) Based on the ties set out at [22-36] the appellant has accrued a protracted private life [42] Article 8 is engaged. [43]*
>
> *iv) The IJ considered the best interests of the appellant's niece McKenya in line with **EV (Philippines)** and that the best interest of McKenya favour the appellant remaining marginally. [47]*
>
> *v) The IJ accepted that there would be a very real impact on Miss Charles, who is emotionally, and physically dependent on the appellant and has been for a number of years. That there is no family or friends able to take over the care of Miss Charles and that it would fall on the public purse to do so. Furthermore, Miss Charles' health would deteriorate and she would be unable to continue working for the Ministry of Defence and that 'her life would be turned upside down'. [49]*
>
> *vi) The IJ accepted the Pastor Amin's evidence that the appellant is a committed member of the church and committed to charitable work and that this is worthy of assessment in itself. [50]*
>
> *vii) These matters fall to be considered against a growing list of considerations on the respondent's side of proportionality scales and have now been codified by statute by s.14 of the Immigration Act 2014. [51]*
>
> *viii) In particular s.117B of the amended Act that is relevant. [52]*
>
> *ix) The public interest in s.117B(2) provides someone to be able to speak English. [54]*
>
> *x) The appellant's ability to speak English does not militate in her favour but rather is a neutral factor. [55]*

xi) The appellant is not financially independent as she worked part-time for most of her stay (in line with her visa), she is financially supported by her father and Miss Charles and that weighs against the appellant in assessment of proportionality. [57]

xii) S.117B(4) is relevant as she her lawful leave ended in 2010 but her private life had already been built up prior to that and the him attached little weight to his sub-Section. [58]

xiii) S.117B(5) requires little weight to be placed on private life if the immigration status is precarious. The appellant had student leave and her leave was thus precarious. The IJ further stated that the scope of the provision is not defined and will need to be resolved by the Upper Tribunal. The IJ found that the provision must include those with temporary admission and visitors. [59]

xiv) The appellant only ever had student leave and her stay was thus precarious she had no expectation that she could remain indefinitely. Accordingly s.117B(5) requires the IJ to apply little weight to the appellant's private life. [60]

xv) The IJ accepted the factual premise that the appellant narrowly missed the ten year ILR as a result of the college not making the applications on time and that she also missed the fourteen year Rule as a result of an invalid application at the start of 2014. [61]

xvi) These must be considered narrow misses and cannot be considered in the proportionality assessment. [62]

xvii) The IJ came to the reluctant conclusion that the appellant's removal is proportionate and that both the appellant and Miss Charles have been dealt with a succession of cruel hands and that the scales of proportionality would not have been loaded against her if her appeal had concluded before 28 July 2014 and that Miss Charles will be particularly badly affected. The IJ concluded that he was required by statute to attach little weight to those relationships, the fact that she cannot meet the Immigration Rules introduced by HC 194. The IJ concludes that ***'As a result of the legislative changes, and the current state of the authorities regarding the new Rules, I consider that I am bound to conclude that the harsh consequences which will flow from the appellant's removal are justified and proportionate to the legitimate aim pursued by the respondent'****. [63]*

12. *The grounds of appeal are twofold, the first is the construction of S.117B(5) and the construction of the and meaning of 'precarious' immigration status. The second it that the IJ clearly felt he had no discretion due to the legislative changes despite the factors that clearly militated in the appellant's favour and the fact that the IJ felt the consequences were unjustifiably harsh and that the appellant and Miss Charles would suffer badly.*

13. *S.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 wellbeing 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 the interests of the economic wellbeing 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.

14. *It is submitted that the interpretation by the IJ that the appellant's stay as a student was precarious and that her private life ought not to be given any weight. Whilst it is accepted that the periods in question were for short periods, she always complied with the immigration law and she built up a sufficiently long period to qualify for ILR. The ten year ILR route is precisely for build up of student leave and other leave (it would highly unlikely that a visitor would be able to amass that ten year lawful residence). The fact is that the appellant had studied here for a number of years, there was and still is ILR for those that remain in the UK lawfully, thus it cannot be said she had no expectation that she would be allowed to remain. Coupled with the IJ findings that had it not been for the ineptitude of the college in making the applications on behalf of the appellant she would have been granted ILR. Such a restrictive interpretation is not defined in the Rules.*

15. *The second ground, is that the IJ has stated that the legislative requirements have taken away any discretion the IJ may have had in balancing proportionality. This does not sit well with Strasbourg jurisprudence as it would simply beg the question why have appeals on Article 8 as all are doomed to failure. Furthermore this interpretation does not still well with* ***Nagre*** ***[2013] EWHC 720 (Admin)****.*

'As appears from the new guidance issued by the Secretary of State in relation to exercise of her residual discretion to grant leave to remain outside the Rules, as set out above, and as Mr Peckover makes clear in his witness statement, the new Rules contemplate that there will be some cases in which a right to remain based on Article 8 can be established, even though falling outside the new Rules. Therefore, the basic framework of analysis contemplated by Lord Bingham in Huang continues to apply, as was recognised by the Upper Tribunal in Izuazu.

30. I agree with the guidance given by the Upper Tribunal in Izuazu at paras. [40]-[43], as follows:

'40. We accordingly further endorse the Upper Tribunal's observation in [MF (Article 8 – new Rules) Nigeria [2012] UKUT 00393 (IAC)] that judges called on to make decisions about the application of Article 8 in cases to which the new Rules apply, should proceed by first considering whether a claimant is able to benefit under the applicable provisions of the Immigration Rules designed to address Article 8 claims. If he or she does, there will be no need to go on to consider Article 8 generally. The appeal can be allowed because the decision is not in accordance with the Rules.

41. Where the claimant does not meet the requirements of the Rules it will be necessary for the judge to go on to make an assessment of Article 8 applying the criteria established by law.

42. *When considering whether the immigration decision is a justified interference with the right to family and/or private life, the provisions of the Rules or other relevant statement of policy may again re-enter the debate but this time as part of the proportionality evaluation. Here the judge will be asking whether the interference was a proportionate means of achieving the legitimate aim in question and a fair balance as to the competing interests.*

43. *The weight to be attached to any reason for rejection of the human rights claim indicated by particular provisions of the Rules will depend both on the particular facts found by the judge in the case in hand and the extent that the Rules themselves reflect criteria approved in the previous case law of the Human Rights Court at Strasbourg and the higher courts in the United Kingdom'.*

33. *The Secretary of State does not contend that the new Rules completely cover every conceivable case in which a foreign national may have a good claim for leave to remain under Article 8. In relation to both Section EX.1 (family life) and paragraph 276ADE (private life) it is possible to envisage cases where they would not:*

i) *In relation to Section EX.1(b), for example, there may be individual cases in which, for some reason, there are particularly compelling reasons arising from the specific circumstances why leave to remain should be granted under Article 8, even though there may not be insurmountable barriers to family life continuing outside the United Kingdom, in the applicant's country of origin; and*

ii) ***In relation to paragraph 276ADE, for example, there may be individual cases of adults who have lived in the United Kingdom for less than 20 years and who do retain some ties to their country of origin, but in relation to whom the ties they have developed and the roots they have put down in the United Kingdom manifestly and strongly outweigh those ties, so that it would be disproportionate to remove them.***

34. *In cases where consideration of the new Rules does not fully dispose of a claim based on Article 8, the Secretary of State will be obliged to consider granting leave to remain outside the Rules. If she does not, where there is an appeal the First-Tier Tribunal will be obliged to consider allowing the appeal, and where there is no appeal, judicial review will lie.'*

16. *It is quite clear that the IJ fund that the removal of the appellant is unjustifiably harsh and that in particular Miss Charles will be badly affected, to such an extent that she may have to give up her work with the Ministry of Defence without the care from the appellant. The IJ further concluded that he had to 'reluctantly' find the appellant's removal was not disproportionate, despite the factors that militated towards a different decision.*

17. *Such a stark decision leaves the FTT with absolutely no discretion and that cannot sit comfortably with Strasbourg jurisprudence and established law by the Higher courts in this country.*

18. ***It is submitted that there is an important point of law and construction of the Immigration Act 2014 that permission ought to be given.***"

3. On 3 October 2014 First-tier Tribunal Judge Osborne granted permission to appeal in the following terms:

> *"1. The grounds seek permission to appeal a determination of First-tier Tribunal Judge Blundell who in a determination promulgated 22 August 2014 dismissed the appellant's appeal against the respondent's decision to refuse her application for settlement on the grounds of long residence under Article 8 ECHR.*
>
> *2. The grounds assert that the judge erred in law in his construction of Section 117B(5) Immigration Act 2014 and the meaning of 'precarious' immigration status. The judge's interpretation of the appellant's stay as a student was precarious and that her private life ought not to be given any weight is too restrictive. The judge found that the legislative requirements have taken away any discretion the judge may have in balancing proportionality. This interpretation is contrary to Strasbourg jurisprudence and **Nagre** **[2013] EWHC 720 (Admin)** [28, 30, 33, 34]. The judge concluded that he had to reluctantly find that the appellant's removal was not disproportionate despite the factors that militated towards a different decision. Such a stark decision leaves the First-tier Tribunal with absolutely no discretion. An important point of law and construction of the Immigration Act 2014 means permission should be given.*
>
> *3. In a detailed, careful, and well-reasoned determination the judge set out the pertinent issues, law and evidence, relating to the facts of the appeal. Despite the commendably forensic approach adopted by the judge, it is nevertheless arguable that the judge erred in law in his interpretation and construction of each of the sub-Sections of Section 117 of the amended Nationality, Immigration and Asylum Act 2002 following the enactment of Section 19 Immigration Act 2014. It is at least arguable that an appellant's ability to speak English (at Section 117B(2)) should amount to a positive finding in the proportionality assessment and not merely neutral as found by the judge. Similarly in relation to Section 117B(3) it is at least arguable that an appellant's financial independence should amount to a positive in the proportionality assessment rather than merely neutral. It is further arguable that the judge erred in his interpretation of 'precarious'. Finally, it is arguable that the judge erred in his assessment of proportionality.*
>
> *4. As these arguable errors of law have been identified all the issues raised in the grounds are arguable."*

4. Thus the matter came before me.

5. Mr Sellwood submitted at the outset that there were compelling circumstances in the appeal which amounted to an exceptional case but the First-tier Tribunal Judge had felt compelled by the changes brought about by the Immigration Act 2014 to dismiss the appeal notwithstanding those compelling circumstances. Mr Sellwood reiterated the grounds as summarised above and submitted that the judge fell into error by misapplying the law in particular the factors set out within Section 117 of the Immigration Act 2014. Counsel's submissions are fully set out in the skeleton argument and the relevant aspects of that skeleton argument in relation to the submissions made before me are paragraphs 4 to 17 which I set out below.

> *"4. There is a dispute as to the periods of 'out of time'. According to the SSHD there was a period of time btw 31 July 1999 and 9 September 1999 when her application was made. However, on the SSHD record, there is a letter dated 27 July 1999 and the notes clearly state 'I am satisfied that we will have to treat the letter of 27.07.99 as an in time application. Although the appellant never submitted a form we chose to treat the letter as an application. It would be unfair not wot inform the appellant she never made an application. Accordingly, the appellant was not out of time not that occasion. Arguably the 67 days without leave should in fact be 28 days. [see p13 first appeal bundle.]*
>
> *5. Furthermore, according to the SSHD notes the period between 01.08.98-03.08.98 might have been in time.*

6. *The periods of continuous leave being broken are*

   01.08.98 and 03.08.98 (three days) disputed.

   01.08.99 and 09.09.99 (39 days) disputed

   01.09.00 and 04.09.00 (four days)

   01.10.01 and 02.10.01 (two days)

   01.11.02 and 11.11.02 (eleven days)

   01.10.05 and 07.10.05 (seven days)

7. *The appellant has built up her private life here in the UK and has studied for most of that time (lawfully). She has created friendships and relationships with the Seventh Day Adventist Church. Her brother is in the UK and has a child with whom the appellant is very close the niece McKenya Claire Rhuppiah is now 4 years old. [WS p10]*

8. *The SSHD accepts that the appellant has built up a private life [p16 first bundle) and that she has been studying since her arrival in the UK.*

9. *Thus there are short gaps in her leave so that she does not fall within the ten years of continuous residence. The issue will be whether on the facts of this case considering the length of stay and the private life she has built up it would be disproportionate to remove her.*

10. *An immigration decision affecting private/family life will be in breach of Article 8 if:*

    a) *The decision must interfere with the right to respect for private/family life; and either*

    b) *The decision is not in accordance with the law; or*

    c) *The decision is not made in order to further one of the legitimate aims; or*

    d) *The extent of the interference cannot be justified as, necessary in the interests of democratic society' in order to fulfil a legitimate aim.*

11. *The burden of showing a) is on the appellant, and he has clearly shown that there is a right to private and family life, then the onus is on the state to show that none of the conditions in b), c) and d) apply. If the state cannot do this then there is a breach of Article 8.*

12. *However the Court of Appeal in Senthuran [2004] EWCA Civ 950:*

    > *15. We do not think that Advic is authority for the proposition that Article 8 of the Human Rights Convention can never be engaged when the family life which it is sought to establish is that between adult siblings living together …*

13. *The HL in **Huang**'*

14. *18 … It is unnecessary for present purposes to attempt to summarise the Convention jurisprudence on Article 8, save to record that the article imposes on member states not only a negative duty to refrain from unjustified interference with a person's right to respect for his or her family but also a positive duty to show respect for it. The reported cases are of value in showing where, in many different factual situations, the Strasbourg court, as the ultimate guardian of Convention rights, has drawn the line, thus guiding national authorities in making their own decisions. But the main importance of the case law is in illuminating the core value which Article 8 exists to protect.* ***This is not, perhaps, hard to recognise. Human beings are social***

animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant. *The Strasbourg court has repeatedly recognised the general right of states to control the entry and residence of non-nationals, and repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live. In most cases where the applicants complain of a violation of their Article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of Article 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved. Proportionality is a subject of such importance as to require separate treatment.*

15. *In* ***Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC)*** *the UT held:*

> (b) *after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R on the application of Nagre v Secretary of State for the Home Department [2013 EWHC 720 (Admin).*
>
> (c) *the term 'insurmountable obstacles' in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new Rules) Nigeria [2012] UKUT 393 (IAC); Izuazu (Article 8 – new Rules) [2013] UKUT 45 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.*

16. *Sales J in* ***Nagre [2013] EWHC 720 (Admin)*** *held;*

> 27. *There is, in my judgment, nothing untoward in the fact that the new Rules do not necessarily track absolutely precisely and provide in detail in advance for every nuance in the application of Article 8 in individual cases. I do not think it would be feasible, or even possible, to produce simple Immigration Rules capable of providing clear guidance to all the officials who have to operate them that did that. That was true of the Immigration Rules prior to their amendment, and it could not be suggested that they were unlawful as a result. As observed by Lord Bingham in Huang at [17], 'It is a premise of the statutory scheme enacted by Parliament that an applicant may fail to qualify under the Rules and yet may have a valid claim by virtue of Article 8'.*
>
> 28. *As appears from the new guidance issued by the Secretary of State in relation to exercise of her residual discretion to grant leave to remain outside the Rules, as set out above, and as Mr Peckover makes clear in his witness statement, the new Rules contemplate that there will be some cases in which a right to remain based on Article 8 can be established, even though falling outside the new Rules. Therefore, the basic framework of analysis contemplated by Lord Bingham in Huang continues to apply, as was recognised by the Upper Tribunal in Izuazu.*
>
> 29. *Nonetheless, the new Rules do provide better explicit coverage of the factors identified in case-law as relevant to analysis of claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision-makers applying the new Rules. It is only if, after doing that, there remains an*

arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new Rules to require the grant of such leave.

30. *I agree with the guidance given by the Upper Tribunal in Izuazu at paras. [40]-[43], as follows:*

> *'40. We accordingly further endorse the Upper Tribunal's observation in [MF (Article 8 – new Rules) Nigeria [2012] UKUT 00393 (IAC)] that judges called on to make decisions about the application of Article 8 in cases to which the new Rules apply, should proceed by first considering whether a claimant is able to benefit under the applicable provisions of the Immigration Rules designed to address Article 8 claims. If he or she does, there will be no need to go on to consider Article 8 generally. The appeal can be allowed because the decision is not in accordance with the Rules.*
>
> *41. Where the claimant does not meet the requirements of the Rules it will be necessary for the judge to go on to make an assessment of Article 8 applying the criteria established by law.*
>
> *42. When considering whether the immigration decision is a justified interference with the right to family and/or private life, the provisions of the Rules or other relevant statement of policy may again re-enter the debate but this time as part of the proportionality evaluation. Here the judge will be asking whether the interference was a proportionate means of achieving the legitimate aim in question and a fair balance as to the competing interests.*
>
> *43. The weight to be attached to any reason for rejection of the human rights claim indicated by particular provisions of the Rules will depend both on the particular facts found by the judge in the case in hand and the extent that the Rules themselves reflect criteria approved in the previous case law of the Human Rights Court at Strasbourg and the higher courts in the United Kingdom'.*

33. *The Secretary of State does not contend that the new Rules completely cover every conceivable case in which a foreign national may have a good claim for leave to remain under Article 8. In relation to both Section EX.1 (family life) and paragraph 276ADE (private life) it is possible to envisage cases where they would not:*

> *i) In relation to Section EX.1(b), for example, there may be individual cases in which, for some reason, there are particularly compelling reasons arising from the specific circumstances why leave to remain should be granted under Article 8, even though there may not be insurmountable barriers to family life continuing outside the United Kingdom, in the applicant's country of origin; and*
>
> *ii) In relation to paragraph 276ADE, for example, there may be individual cases of adults who have lived in the United Kingdom for less than 20 years and who do retain some ties to their country of origin, but in relation to whom the ties they have developed and the roots they have put down in the United Kingdom manifestly and strongly outweigh those ties, so that it would be disproportionate to remove them. (On the facts of the Claimant's case, as determined by the Secretary of State, he does not have an arguable case of this kind available to him).*

34. *In cases where consideration of the new Rules does not fully dispose of a claim based on Article 8, the Secretary of State will be obliged to consider granting leave to remain outside the Rules. If she does not, where there is an appeal the First-Tier Tribunal will be obliged to consider allowing the appeal, and where there is no appeal, judicial review will lie.*

17. The court is enjoined to allow the appeal."

6. In response, for the Secretary of State Ms Isherwood submitted there was no material error of law in the decision of the First-tier Tribunal Judge and the grounds amount to a mere disagreement and nothing more. The appellant entered the United Kingdom and remained in a temporary capacity as a student who was granted entry clearance based on an intention to leave when her studies were complete. She had made repeated out of time applications to extend leave. But in reliance of **Patel and Others v Secretary of State for the Home Department [2013] UKSC 72** there is no near miss applicable in this case. Article 8 is not there to provide a promising student with leave to remain and the intention of the appellant if she is granted further leave is to continue with her studies. At paragraph 34 of her witness statement she hopes to take a further course at Greenwich University followed by a Masters in Engineering Management followed by a PhD in the same area. There is no basis under the Immigration Rules for the appellant to remain in the United Kingdom as a student. She does not meet the requirements of the Immigration Rules.

7. Ms Isherwood submitted that the decision of the First-tier Tribunal is well reasoned taking into account the evidence and submissions before the judge. The judge accepted at paragraph 25 that the appellant was appeal rights exhausted in 2010.

8. When looking within the Immigration Rules and at Article 8 the First-tier Tribunal Judge did make positive findings as regards the appellant for example at paragraph 27 of the decision the judge noted that Miss Charles is heavily dependent on the appellant and at paragraph 29 the only criticism is that the appellant is not paid by Miss Charles but is a student and has worked part-time. Nevertheless he found Miss Charles heavily dependent upon her. He found that she helps Miss Charles out of friendship and habit and will continue to do so if allowed to remain.

9. At paragraph 32 he took into account her relationship with her brother and noted the school reports. At paragraph 33 he took into account her church activities. At paragraph 35 he took into account her professional life. The judge noted at paragraph 37 Counsel for the appellant before the First-tier Tribunal accepted that paragraph 276B was not available to the appellant.

10. The First-tier Tribunal Judge properly went through case law on how to approach the appellant's case. He weighed everything together. He noted there were compelling circumstances. He considered case law including **Gulshan [2013] UKUT 00640 (IAC)**, **Haleemudeen [2014] EWCA Civ 558**, **R (on the application of Nagre) v SSHD [2013] EWHC 720 (Admin)** and **MM [2014] EWCA Civ 985**. At paragraph 42 the First-tier Tribunal Judge disagreed with the appellant's submissions in respect of family life. Although she has close blood ties with her brother these are not more than the normal emotional family ties. She is close to her niece but has always lived apart by a coach journey. She has a close friendship with Miss Charles.

11. At paragraph 43 the judge found that Article 8 was engaged. On the issue before the judge was proportionality.

12. The judge took into account all the factors argued before him and he also dealt with the best interests of the appellant's niece. He considered the very real impact on Miss Charles if the appellant is removed but noted that alternative arrangements would have to be made for her care.

13. Having considered a large number of factors in the appellant's favour at paragraph 51 the judge found that these matters fell to be balanced against a growing list of considerations on the respondent's side of the proportionality scale. Many of those considerations outlined in authorities such as **Huang** and **FK and OK Botswana** have now been codified in statute with the enactment of Section 19 of the Immigration Act 2014 which had the effect of introducing a number of mandatory considerations into paragraph 5A of the Nationality, Immigration and Asylum Act 2002. Thereupon the judge deals with Section 117A to D of the amended Act.

14. Ms Isherwood submitted that the weight to be attached to the various factors was for the judge and he has properly weighed all the factors in the balance in concluding that the appellant's removal is not disproportionate. For these reasons there is no error of law in the determination.

Reply

15. In response Mr Sellwood indicated the question is not so much the findings reached by the judge as to the statutory interpretation applied by him. It is clear from the decision at paragraph 63 that the judge felt he had no choice. If he had not said he was required to attach little weight to the various relationships had he not made that error the outcome would have been different.

Decision

16. I cannot agree with the submissions which have been raised on behalf of the appellant before me or in the grounds of appeal. In a cogent and well reasoned decision the First-tier Tribunal Judge has given very careful consideration of all the factors weighing in the appellant's favour and those factors weighing in the respondent's favour and having weighed those factors in the balance he has been driven to the "reluctant conclusion that the appellant's removal is proportionate". The appellant's representative submits that the judge has misapplied the law as set out in Section 117 of the amended Act and that if he had not misapplied or misunderstood that legislation he would have gone on and allowed the appeal. I cannot accept that is what the judge did.

17. At paragraph 53 the judge sets out the relevant aspects of Section 117 which apply and at 117B he notes that the maintenance of immigration control is in the public interest something which has always been a matter to weigh in the scale of proportionality by judges of the First-tier Tribunal. As the judge rightly says Section 117B(1) adds nothing to the proportionality assessment already required by the authorities to which he had already referred. He goes on to consider other case law such as **SS Nigeria [2013] EWCA Civ 550** where it is not said by Parliament as it is in the case of foreign criminals that their removal is in the public interest. The principle

he had to apply is couched in more general terms which simply accord with the principles that have been established in the jurisprudence for many years. It is hard to disagree with that analysis of Section 117 as set out by the judge.

18. The judge goes on to look at Section 117B(2) at paragraph 54 noting that it is in the public interest that persons who seek to remain in the UK are able to speak English. It was submitted before the judge that the appellant's proficiency in English which was a matter which militated in her favour in the proportionality assessment in the light of the new provisions. The judge noted that guidance from the Upper Tribunal and higher courts would no doubt be given in due course, but for his part he did not consider the sub-Section to support that construction. It does not provide that the public interest is served by permitting those who speak English to remain in the UK. It provides that it is in the public interest for those seeking to remain in the UK to be able to speak English. The judge took the view that in an inability to speak English is a matter to be weighed against an individual whereas an ability to do so seemed to him to be a neutral factor. That was a matter properly for him to assess. There is no error of law in his reaching an assessment on the basis that he did.

19. The judge reached the same conclusion on the construction of Section 117B(3). This says it is in the public interest that those who seek to remain in the UK are financially independent but it does not say that it is in the public interest that financially independent persons are permitted to remain in the UK. The provision seems to take matters no further than authorities such as **Konstatinov v The Netherlands [2007] ECHR 336** as paragraph 50 or more recently **Nasim [2014] UKUT 25 (IAC)** at paragraphs 25 to 27.

20. But the judge went on to consider financial independence in relation to the appellant's case and found there was no basis upon which he could consider she was financially independent. That was a decision properly open to him on the evidence before him. Whilst she was a student she undertook part-time work and was otherwise supported by her father. The current position brought about by the fact that she was unable to work because of her immigration status was that she received board and lodging from Miss Charles and her father provided a further contribution to her maintenance. A finding that the appellant is not financially independent as she depends on others for all of her funds was a finding properly open to the judge on the evidence before him.

21. The judge went on to consider paragraph 117B(4) finding it of questionable relevance to the appellant which left him with sub-Section 117B(5) that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. It is on this issue that the appellant's representatives' grounds of appeal and submissions were most forceful, arguing that her status had not been precarious in the sense that for much of the time in the United Kingdom she had been here lawfully.

22. Those arguments were placed before the judge and those arguments in the grounds before me are merely a reiteration of arguments placed before the First-tier Tribunal

Judge upon which he made findings. As with all the grounds placed before me they amount to nothing more than an attempt to re-argue the appeal on matters which were all capably and well argued by Ms Fisher, Counsel, who appeared before the First-tier Tribunal Judge. Ms Fisher had submitted that the appellant's immigration status was not precarious from her entry to the UK until the latter half of 2010 and she submitted that precarious was to be given the same meaning as unlawful. The First-tier Tribunal Judge did not agree with that submission. Precariousness as such is not defined but the judge found that it must include those who were present in the United Kingdom as visitors and those with temporary admission. To find otherwise would be illogical and it must at the other end of the spectrum exclude those who have settled status albeit that they are not British citizens. Having reviewed case law including **Omoregie v Norway [2008] ECHR 761** and **Konstatinov** the judge went on to say

> *"Ultimately, however, I cannot see how the appellant's status since her arrival to the UK can be described as anything other than precarious. The only type of leave which the appellant has ever had was as a student. That fact led Ms Ahmed to ask the appellant, during cross-examination, whether she expected that she would have to leave the UK at some point. She replied in the affirmative. The fact is that the appellant has only ever held a type of leave granted under paragraphs 57 to 62 of the Immigration Rules which required her to demonstrate an intention to return. Her immigration status was precarious throughout; she had no expectation that she would be allowed to remain indefinitely and leave to remain as a student would not have been granted if she had suggested otherwise."*

The judge went on to find that Section 117B(5) required him to attach little weight to the private life established by the appellant.

23. If the judge had taken a different view of the private life established by the appellant, in other words if he had adopted the approach which was urged upon him by Counsel who appeared before him to attach some weight to the private life the appellant had established in the United Kingdom the judge properly noted at paragraph 63 that he was also required to weigh against her the fact that she cannot meet the new Immigration Rules introduced by HC 194. There is nothing new in the 2014 Act in relation to Article 8. For example, it is settled law that a student here on a temporary basis has no expectation of a right to remain in order to further ties and relationships formed whilst a student if the criteria of the Immigration Rules are not met following MM (Tier 1 PSW; Art 8; "private life") Zimbabwe [2009] UKAIT 00037. The appellant has always been in the United Kingdom as a student until her leave expired and she failed to depart. Whether the judge followed MM or applied section 117B (5), the outcome would be the same.

24. In the light of established case law the judge was entitled to conclude that the harsh consequences which would flow from the appellant's removal were justified and proportionate to the legitimate aim pursued by the respondent.

25. In a very careful, wide-ranging and sympathetic decision the judge has fully weighed in the appellant's favour everything that could be weighed in her favour save that he did not give weight to her private life. There can be no credible suggestion that the outcome would have been any different if he had given greater weight to this private life established whilst the appellant was in the United Kingdom on an entirely

temporary basis, and I am satisfied that the grounds amount in essence to an attempt to re-argue the appeal having disagreed with the well-founded conclusions reached by the First-tier Tribunal judge.

26. For all of these reasons I find the judge did not err in law in his determination and the determination of the First-tier Tribunal will stand.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the determination.

Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration tribunal Procedure Rules 2005.

Signed 2 December 2014

Deputy Upper Tribunal Judge E B Grant