Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50311/2013

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent	**Determination Promulgated**
On 18th July 2014	**On 24th July 2014**

Before

The President, The Hon. Mr Justice McCloskey

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FATMIR MURATAJ

Respondent

Representation:

Appellant: Ms Johnstone, Senior Home Office Presenting Officer
Respondent: Mr J Neville (of Counsel), instructed by Obiter Legal Solicitors

DETERMINATION AND REASONS

1. By a decision dated 15 November 2013 made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*") the Appellant herein, the application of the Respondent, Fatmir Murataj, of Albanian nationality and aged 24 years, for leave to remain in the United Kingdom

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on the basis of his relationship with a UK national was refused. The ensuing appeal was allowed by the First-tier Tribunal (the "*FtT*").

2. In granting permission to appeal, the Judge considered it arguable that the FtT's Article 8 ECHR analysis was "*inadequate*". The grounds of the Secretary of State's appeal, which are two fold, were considered arguable. The first contends that the FtT Judge "*.... misdirected himself in law by failing to consider whether there existed good grounds to find that there are compelling circumstances not sufficiently recognised under the new Rules to require the grant of such leave.*" The second ground embodies a complaint that the Judge did not identify the public interest in firm immigration control and, further, did not conduct a so-called "*macro level*" assessment.

3. At the conclusion of the hearing, I gave an *ex tempore* judgment dismissing the Secretary of State's appeal, for the following reasons, in summary:

(a) The specific complaint articulated in the first ground of appeal is that the Judge failed to consider what is described as the "*test*" in Nagre – v – SOSHD [2013] EWHC 720 (Admin), at [29], which purports to impose the requirement of "*an arguable case*" in favour of granting permission to remain outside the Rules in Article 8 cases at the intermediate stage of having ruled that the particular case does not satisfy the Rules and then deciding whether there exist sufficiently compelling circumstances for an "extra Rules" Article 8 case to succeed. In MM – v – Secretary of State for the Home Department [2014] EWCA Civ. 985, the Court of Appeal at [128], confirmed the view consistently expressed by this Tribunal that this intermediate step, or exercise, is not required, in a context where the process is a simple two stage one. Aitkens LJ, having referred to the statement in Nagre that " *... if a particular person is outside the Rule then he has to demonstrate, as a preliminary to a consideration outside the Rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the Rules*", stated:

> "*I cannot see much utility in imposing this further, intermediary test. If the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision maker.*"

This disposes of the first ground of appeal.

(b) I would add that insofar as there is a further discrete complaint that the FtT failed to identify sufficiently compelling factors, I consider this to have no merit. The Judge made a value judgment which in my view was open to him on the evidence adduced and the findings made that the impact of the impugned decision would, from the relevant perspectives of the likely consequential scenarios, be

"*extremely harsh*" and "*unduly harsh*": [9]. The determination must be read as a whole and I refer to, in their totality, [6], [7], [8], [9] and [10]. The question of whether this Tribunal, exercising an error of law appellate jurisdiction, would have made the same decision is legally irrelevant. I conclude that the Judge did not lapse into any identifiable error of law in the exercise performed.

(c) The centrepiece of the second ground of appeal is an assertion that "*at no point in the determination did the Judge refer to the public interest in firm immigration control*". This is erroneous. The Judge specifically identified the legitimate aim/public interest in [4] and [5] of the Determination. Having done so, he embarked upon the balancing exercise. I consider that the decision in Shahzad [2014] UKUT 85 does not promote this ground of appeal. As appears from [105] of the decision in that case, properly analysed, the Upper Tribunal considered that the factors in the "*balance sheet*" in favour of the immigrant were manifestly insufficient to satisfy the compelling circumstances case. Furthermore, the finding in Shahzad that the FtT failed to take into account the "macro" level is a case specific one which I consider does not arise in the present instance as I am satisfied from a consideration of the Determination as a whole that the Judge was not guilty of a similar failure. Having correctly plotted the co-ordinates, the question of weight and balance was one for the FtT and not this appellate tribunal, particularly absent any complaint of irrationality, unsurprising in the context of a well reasoned determination.

DECISION

4. For the reasons elaborated above, I dismiss the Secretary of State's appeal.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE
UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Dated: 19 July 2014