Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37961/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 3 November 2015	**On 20 November 2015**

Before
LORD TURNBULL
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

BHAGMATTIE RAMJIT

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A. Pipe, Counsel
For the Respondent: Mr P. Nath Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is Miss Bhagmattie Ramjit, a citizen of Guyana born 14 February 1988. This appeal is against the decision of the First-tier Tribunal to dismiss her appeal itself brought against the removal directions of 11 September 2014 made under section 10 of the immigration and Asylum Act 1999, her application for leave to remain on human rights grounds having been refused by the Respondent.

2. The appellant had an unhappy background in Guyana. Her mother and father separated when she was young and her mother was subsequently murdered by her new partner, leaving the appellant and her brother to live with their alcoholic father. Both the appellant and her brother suffered serious psychological effects as a consequence of their mother's death and lived in very harsh circumstances because of their father's alcoholism. In 2004 a Mrs Gurprashad, a British Citizen who was visiting Guyana, learned of the family circumstances and later made arrangements for the appellant and her brother to join her own family in the UK.

3. The appellant first came to the UK in May 2006 with leave to enter as a working holiday maker valid until 25 April 2008. In 2008 she returned to Guyana in order to make an application for entry clearance as a student. That application was granted and she re-entered the UK in October 2008 with leave to remain until 30 September 2009. In September 2009 she made an application for further leave to remain as a student, which was refused on 18 October 2009. She made a second such application which was again refused on 23 December 2009. A third such application was made in March 2010 which was also refused in May of that year. In July 2011 she made an application for leave to remain in the UK on human rights grounds outside the Immigration Rules which was refused in October 2012, with no right of appeal. Following a request for reconsideration a further assessment was made by the respondent and the application again refused on 3 December 2013 with, on this occasion, a right of appeal attached. A further reconsideration was required by the respondent after an appeal of this decision to the First-tier Tribunal and this led to the decision letter of 11 September 2014, which was the subject of appeal in this process.

4. Throughout her time in the United Kingdom the appellant has lived with Mr and Mrs Gurprashad and their own children. In 2007 the appellant's brother also came to live with the Gurprashad family and entered full-time education. After an appeal before the First-tier Tribunal in 2012 he was granted limited discretionary leave to remain in the UK until 2015. By the date of the hearing before First-tier Tribunal Judge Nicholls in the present case the appellant's brother was no longer pursuing his education but working in a local convenience store. The appellant also has an elder sister who remains living in Guyana with her child.

5. Before the First-tier Tribunal Judge evidence was led from which he concluded that, although the appellant was not related to Mrs Gurprashad, they had formed a family life together and that the appellant continued to have unusual emotional and physical needs which were met by Mrs Gurprashad and her own, now adult, children. Evidence was also placed before him of medical reports from two doctors showing that the appellant had suffered symptoms of anxiety and depression caused by the prospect of having to return to Guyana.

6. On the evidence led before him, the First-tier Tribunal Judge concluded that the Gurprashad family had substantial financial resources available to them which could enable them to continue to support the appellant if she were to return to Guyana, that her removal would not interfere with any course of study and that there was no reason to think that any medical condition which the appellant continued to suffer from could not adequately be catered for in Guyana. Having taken account of the terms of Rule 276ADE the First-tier Tribunal Judge found that it had not been shown that there would be very significant obstacles to the appellant's return to Guyana and concluded that the appellant had not shown that she met the requirements of the Rule.

7. The First-tier Tribunal Judge then considered the appeal outside the Immigration Rules and give consideration to the terms of section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). As he explains in paragraph 35 of his determination, he understood that subsection (4) required him to give little weight to a private life, or to a relationship formed with a qualifying partner, established by a person at a time when the person is in the United Kingdom unlawfully, and that subsection (5) required him to give little weight to a private life established by a person at a time when the person's immigration status is precarious. The First-tier Tribunal Judge took the view that the definition of "qualifying partner" was wider than something akin to a spouse. On this view he then concluded that the relationship which the appellant had with Mrs Gurprashad fell within the definition and proceeded upon the premise that he would therefore require to give little weight to what he called "the more recent aspects of the relationship".

8. In the end, having taken account of the weight to be given to the effective control of immigration to the United Kingdom and the appellant's whole circumstances, the First-tier Tribunal Judge concluded that the compassionate factors were not sufficient to outweigh the substantial weight which required to be given to immigration control and concluded that the appeal should be dismissed both under the Immigration Rules and on human rights grounds.

9. Before the Upper Tribunal the ground of appeal was restricted to the issue of how the First-tier Tribunal Judge had addressed the issue of human rights grounds arising outside of the Immigration Rules. It was contended that the First-tier Tribunal Judge had misdirected himself in his application of section 117B and that this had been a material misdirection given the other finely balanced circumstances of the case. On behalf of the respondent, whilst it was acknowledged that the First-tier Tribunal Judge may have fallen into error in his interpretation of the relevant provisions of section 117B, it was argued that any such error of law was of no materiality given the lengthy period of time during which the appellant had been in

precarious immigration circumstances. In short, any error which had occurred was said to have been one of form rather than substance.

10. Section 117B of the 2002 Act is headed: "Article 8: public interest considerations applicable in all cases." So far as is relevant it provides as follows:

> "(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."

11. Section 117D of the 2002 Act is headed: "Interpretation of this Part" and, so far as is relevant, provides as follows:

> "(1) In this Part –
>
> "qualifying partner" means a partner who –
>
> (a) is a British citizen"

12. We agree with the submission made on behalf of the appellant that the First-tier Tribunal Judge has misdirected himself in his application of these provisions. A "qualifying partner" is not simply a British citizen with whom the person has any form of family relationship. The relationship to which the statutory provision applies is restricted, in terms of the plain words of the section, to that which exists between partners. In a domestic context, which is what the provisions are directed to, the use of the term "a partner" in section 117D is clearly intended to define a relationship which is distinct from that of, for example, mother and daughter.

13. We also recognise, as was submitted on behalf of the appellant, that both subsections (4) and (5) of section 117B refer to private life, not family life, and agree that it was the latter which the First-tier Tribunal Judge concluded had been established, rather than the former. The contention was that the Judge wrongly gave little weight to family life thinking that this was caught by these provisions whereas only private life was mentioned.

14. We are not persuaded that the Judge misdirected himself in this regard. In paragraph 35 of his determination the First-tier Tribunal Judge mentions both subsections but goes on to explain that it was subsection (4) which he found applied to the appellant's circumstances. He explained that this was because of the relationship which the appellant had with Mrs Guprashad and because the appellant had been unlawfully in the United Kingdom since 18

October 2009. Thus, on his understanding of the definition of a qualifying partner, we consider it plain that the First-tier Tribunal Judge understood that subsection (4)(b) applied. He gave no other reason for considering that he required to give effect to the restriction provided for by section 117B and, in particular, made no mention of being bound to do so by virtue of family life or by virtue of private life formed whilst in a precarious immigration status.

15. Having acknowledged that the First-tier Tribunal Judge did misdirect himself to the extent mentioned, we are required to consider the materiality of that error. We recognise that the proportionality of the interference with the appellant's established family life which would result from her return to Guyana was the sole question for the First-tier Tribunal Judge in considering her appeal outside the Immigration Rules. It was though, of course, accepted that in this balancing exercise the First-tier Tribunal Judge did require to take account of the appellant's whole immigration history, which included her presence without lawful authority since October 2009.

16. It might fairly be said that the First-tier Tribunal Judge examined the question through the wrong lens. Rather than applying the section 117B statutory restriction upon the mistaken belief that the relationship between the appellant and Mrs Garprashad fell within the definition of a qualifying partner and was in that way caught by that provision, he ought to have focussed on the consequence of having concluded that the appellant had established a family life in the United Kingdom. He ought then to have given consideration to the circumstances in which that family life had been created. As was stated in the Grand Chamber judgement in Jeunesse v Netherlands at paragraph 108:

> "Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court's well-established case-law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8."

The First-tier Tribunal Judge ought to have had regard to this criterion in addressing the question of whether the interference with the appellant's right to respect for family life which would result from her requiring to return to Guyana was justified in terms of Article 8 (2).

17. In our view, it can however be seen that he did in fact give appropriate weight to the relevant considerations. In paragraph 36 of his determination he points out that the appellant has lived in the United Kingdom almost continuously for a period of nine years. He comments that weight must be given to that duration of residence. At paragraph 37 he takes account of the circumstances of the appellant's brother and at paragraph 39 he notes that removal of the

appellant would separate her from her brother but would also place her back in contact with her elder sister. The First-tier Tribunal Judge undertook a balancing exercise of the competing factors, but concluded that the compassionate factors were not sufficient to outweigh the substantial weight which must be given to immigration control. In performing this exercise he gave what he described as "some weight" to the life which the appellant had formed in the United Kingdom since returning in October 2008. It does not seem to us that the weight which the First-tier Tribunal Judge in fact gave to the competing considerations of immigration control on the one hand, and the length of time throughout which the appellant had built up a family life in in the knowledge of the precarious, and then unlawful nature of her immigration status on the other hand, was materially different to the weight which he would have attached to these considerations had he directed himself properly to the correct approach.

18. In these circumstances, we do not consider that the error of law which we have identified was material and we will uphold the decision of the First-tier Tribunal Judge.

Signed
Judge of the Upper Tribunal

Date