Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/25144/2016 (V)**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 January 2021	**On 26 March 2021**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VP
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr E Nicholson, Counsel, instructed by JJ Law Chambers
For the Respondent: Mrs H Aboni, Home Office Presenting Officer

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008
Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

1. The Appellant is a citizen of India. Her date of birth is 24 June 1987.

2. In October 2008 the Appellant came to the UK as a student. She was granted periods of leave until 23 November 2011. She left the United Kingdom in December 2011. She was granted leave to enter the UK from 21 November 2012 to 30 March 2014 as the partner of a Tier 1 (General) Migrant, her husband, RG.

3. The Appellant made an application for leave to remain on private and family life grounds on 29 March 2014. This application was refused on 7 May 2015. The decision of 7 May 2015 was certified as clearly unfounded under Section 94 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The Appellant made further submissions under paragraph 353 of the Immigration Rules. However, these were refused by the Secretary of State on 4 November 2016. The Appellant was removed from the UK on 4 November 2016.She appealed against the decision dated 7 May 2015. On 15 August 2017, First-tier Tribunal Judge Lebasci allowed the Appellant's appeal under Article 8 ECHR. The First-tier Tribunal found that the decision to refuse the Appellant leave was a disproportionate interference with her family life she shares with her husband, RG.

4. On 19 September 2014, RG was sentenced to fifteen months' imprisonment following a conviction for an offence of dishonesty involving money laundering. His appeal against deportation on Article 8 ECHR grounds, was dismissed by First-tier Tribunal Judge Burnett on 8 October 2018. His application for permission to appeal was refused by Upper Tribunal Judge Hanson on 31 January 2019. However, he remains in the United Kingdom. He made an application to the High Court for permission to judicially review Judge Hanson's decision on 17 April 2019.[1] On 17 June 2019 the Court of Appeal stayed RG's application for permission pending the Supreme Court's decision in AM (Zimbabwe) v SSHD 2020 UKSC 17. He was granted a stay on removal by the UT on 27 August 2019. On 18 November 2020 the Court of Appeal refused the application. The decision of the Court of Appeal reads as follows:-

> RG then made an application to the Secretary of State for leave claiming that his"The applicant seeks permission to appeal against the decision of Sir Wyn Williams sitting as a High Court Judge dated 17 April 2019 refusing permission to judicially review the decision of the Upper Tribunal (Immigration and Asylum Chamber) (Upper Tribunal Judge Hanson) dated 30 January 2019 refusing permission to appeal against the determination of the First-tier Tribunal (Immigration and Asylum Chamber) (First-tier Tribunal Judge Burnett) promulgated on 8 October 2018 refusing his appeal against the decision of the Secretary of State dated 23 August 2017 to refuse his application for leave to remain on human rights grounds.
>
> Before Judge Burnett, the applicant only pursued a human rights appeal under Article 8 of the European Convention on Human Rights. He only appealed to the Upper Tribunal on Article 8 grounds. However, the judicial review was based on the proposition that the removal of the applicant would breach his Article 3 rights because of his medical conditions, as set out in Paposhvili v Belgium [2016]

[1] R (on the application of Cart) *v* The Upper Tribunal [2011] UKSC 28 ("a Cart JR")

ECHR 1113 and subsequently confirmed by the Supreme Court in AM (Zimbabwe) v Secretary of State for the Home Department[2020] UKSC 17.

I understand that this appeal was stayed pending the ultimate outcome of AM (Zimbabwe): but this is an appeal against the refusal of permission to proceed with the judicial review of the refusal of permission to appeal against Judge Burnett's determination. As Sir Wyn Williams said when refusing permission to proceed, there can be no doubt that Judge Hanson was correct to refuse permission to appeal. In those circumstances, Sir Wyn Williams was unquestionably right to refuse permission to proceed. The refusal of the appeal by Judge Burnett on Article 8 grounds is now uncontroversial; and that was the only ground upon which the appeal was pursued before him.

Permission to appeal is therefore refused.

Of course, that is not necessarily the end of matters; because, if the applicant considers he now has an Article 3 claim, he may apply for leave to remain on that basis. The Secretary of State would have to consider such an application on the evidence relied upon and the law as it now stands."

5. Following this decision, RG made a claim that his removal would breach the United Kingdom's obligations under Article 3. He is in poor health. He has tuberculosis, depression, microcytic anaemia, degenerative disc disease, undifferentiated inflammatory polyarthritis and ankylosing spondylitis.

6. The Secretary of State was granted permission to appeal against the decision of Judge Lebasci allowing the Appellant's appeal. The decision was set aside by Upper Tribunal Judge Finch following a hearing on 19 April 2018. Judge Finch's decision (the" Error of Law" decision) reads as follows:

> "9. The Home Office Presenting Officer did not seek to rely on evidence which related to the ability of the Respondent's husband to resume a family or private life in India. The issue between the parties was whether the findings made by First-tier Tribunal Judge Lebasci in relation to the Appellant's right to leave to remain was sustainable.
>
> 10. It was accepted by the Respondent's Counsel that the Respondent was not entitled to leave to remain under the Immigration Rules. Therefore, the appeal was restricted to the question of whether the First-tier Tribunal Judge was correct to find that refusal to grant her leave to remain amounted to a breach of Article 8 outside the Immigration Rules.
>
> 11. It was accepted that the Respondent was in a genuine and existing relationship with her husband and that, as he was still living in the United Kingdom, pending a decision on his own legal challenges, a breach of their right to enjoy a family life for the purposes of Article 8(1) of the European Convention on Human Rights was made out. But, as the First-tier Tribunal Judge correctly noted in paragraph 25 of the decision, the crucial issue was that of proportionality.
>
> 12. In that same paragraph the First-tier Tribunal purports to go through the factors contained in Section 117B of the Nationality, Immigration and Asylum Act 2002. It is said that 'a fair balance must be struck between the public interest and the right and interests of the Appellant and her

husband'. However, Section 117B(1) of the Nationality, Immigration and Asylum Act 2002, states, in particular, that 'the maintenance of effective immigration controls is in the public interest' but nowhere in the decision does the First-tier Tribunal Judge place any weight on the fact that the Appellant herself had no leave to remain when her application was refused and that at the time, her husband had no leave to remain and was subject to a deportation order. It appears to be (sic) that this is a Robinson obvious point to which I have to have regard.

13. In ground 2 of her grounds of appeal the Appellant submitted that 'in allowing the Appellant's appeal under Article 8 the FtT has misdirected herself in law as to the appropriate weight to be attached to the Appellant's relationship'. In paragraph 26 of the decision, the First-tier Tribunal Judge found that

> 'the effect of being apart is very difficult for both the Appellant' and her husband and that 'a significant additional feature is the complexity of [RG's] health and [that] he finds it difficult to manage without the Appellant. He describes having missed important medical appointments due to not having the assistance he needs'.

14. This put the Appellant's case at its highest [and the passage of time since 4 November 2016 rather puts in question her husband's inability to manage without her and missing medical appointments due to not having her assistance]. As a consequence, I find that it is arguable that the First-tier Tribunal Judge did not give appropriate weight to the relationship between the Respondent and her husband.

15. In her second ground of appeal the Appellant also submitted that the First-tier Tribunal Judge had made findings contrary to the statutory provisions of Section 117B(4)(b) of the Nationality, Immigration and Asylum Act 2002. This subSection states that:

> 'Little weight should be given to -
>
> (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.'

16. However, the Appellant's husband was not a qualifying partner as he is not a British citizen or settled in the United Kingdom. In addition, the First-tier Tribunal Judge did not seek to rely on this subSection.

17. However, when considering whether the Appellant was entitled to leave to remain outside the Immigration Rules the fact that the Appellant's status in the United Kingdom had been precarious was a factor that had to be taken into account. The First-tier Tribunal Judge did address this issue to some extent in paragraph 25 of her decision when she found that the Appellant had had lawful status in the United Kingdom when she had leave to remain as a student and then a dependant. However, she did not address the fact that throughout her time in the United Kingdom her status had been precarious.

18. This was an error which was picked up in ground 2 by the Appellant. Counsel for the Respondent submitted that the Appellant had erred in law by stating that 'the Appellant's immigration status had always been

precarious and that, as a consequence, that public interest is significant'. He explained that this could not be the case as it could not be said that her immigration status had been precarious during the time since she had been removed from the United Kingdom. However, the appeal that the Respondent is pursuing is an out of country appeal against a decision taken when she was in the United Kingdom and, therefore, at the date of decision her status had always been precarious.

19. It is clear from case law in the European Court of Human Rights and R (on the application of Agyarko) v Secretary of State for the Home Department [2017] UKSC 11 that whether or not a person's immigration status had been precarious was a relevant factor when considering whether they were entitled to leave on Article 8 grounds outside the Immigration Rules. In particular, it was found in Agyarkothat:

> 'In cases concerned with precarious family life, 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. That reflects the weight attached to the contracting states' right to control their borders, as an attribute of their sovereignty, and the limited weight which is generally attached to family life established in the full knowledge that its continuation in the contracting state is unlawful or precarious …'

20. There was no decision as to there being any exceptional circumstances in the First-tier Tribunal Judge's decision."

7. Judge Finch retained the matter in the Upper Tribunal for a rehearing. She made a number of directions. These included that the parties submit skeleton arguments within 28 days of receipt of her decision. It was directed that the skeleton arguments would address the following:-

   (1) The extent to which previous precarious immigration status is a factor which should be taken into account when an individual is exercising an out of country appeal;

   (2) the proper weight to give to a genuine relationship in an out of country appeal when the other partner is in the United Kingdom without any immigration status but awaiting a statutory appeal;

   (3) the extent to which it may be an abuse of process to consider the circumstances of a partner awaiting an appeal in the United Kingdom.

8. Further directions were issued by Upper Tribunal Judge Finch on 16 November 2018. The Appellant was directed to inform the Upper Tribunal within fourteen days of receipt of the directions as to any outcome of her husband's appeal to the First-tier Tribunal. The judge directed the parties to submit skeleton arguments.

9. The matter came before Judge Finch on 28 February 2019 when she adjourned the hearing until after the High Court had determined RG's Cart JR following the decision of Upper Tribunal Judge Hanson to refuse him permission to appeal against the decision of the First-tier Tribunal. The directions included the following:-

> "The Appellant do make an appropriate application to the High Court for their Cart JR to be expedited and within that application do identify the Upper Tribunal's observation that it would be in the interests of justice for the Cart JR to be expedited with a view to possibly linking the JR to these statutory proceedings, if permission were to be given."

10. On 31 March 2020 further directions were issued to the parties in the light of the spread of COVID-19. On 9 December 2020 the parties were issued with a notice of hearing.

11. On 8 January 2021 the Appellant's solicitors communicated with the Tribunal. They enclosed a decision of the Court of Appeal of 18 November 2020 relating to RG.

The decision of Judge Lebasci – August 2017

12. The First-tier Tribunal made a number of findings which are sustainable having heard evidence from RG, and submissions from the Appellant's representative, Mr Chelvan. The judge noted that much of the evidence was not challenged by the Home Office Presenting Officer, Ms Rawlings. The judge said that "many, if not most, of the facts in this appeal are not in dispute".

13. The judge found that the Appellant and her husband's evidence regarding their relationship "should be regarded as credible". The judge found that they gave a "coherent account of how they met and how their relationship. The judge was satisfied that the relationship was genuine and subsisting".

14. The judge found as follows at [24]: "For as long as [RG] remains in the UK I find that if the Appellant is unable to return to the UK to be with her husband this amounts to an interference with the exercise of their right to respect for their family life."

15. The judge at [25] identified the crucial issue as that of proportionality. The judge noted that the Appellant speaks English and would not be reliant on public funds, given her academic qualifications. The judge said:

> "I find that little weight should be given to the Appellant's private life established during those times when her immigration status was unlawful or precarious. However, I also take into account of the fact that the Appellant has spent several years in the UK lawfully."

16. The judge found that being apart was very difficult for the Appellant and her husband and that her husband's poor health was "a significant additional feature". The judge found that he found it difficult to manage without the Appellant.

The decision of Judge Burnett – October 2018

17. RG's appeal was heard on 27 July 2018. The Appellant appealed against the decision to deport him under Article 8 of ECHR at a time when his wife had already returned to India. The judge had before him medical evidence relating to RG's poor health. The judge stated at paragraph 61 the following:

> "Mr Bazini did not pursue an Article 3 claim before me. It is clear that it cannot be said that the Appellant will be at risk of a serious and rapid decline in his health in the near future if he is removed to India. A breach of Article 3 does not occur because the same high standard of care is not available in the receiving state. Article 3 does not impose an obligation on a removing state to ensure an absence of disparities between the health service provisions of the two countries."

18. The judge found that the Appellant would be able to engage in family life with his wife in India, something that he has been unable to do in the UK, and that she also had other family members there.

19. The judge found that should the Appellant return to India his wife could provide support for him and assist with his mobility and mood.

20. There was no witness statement from the Appellant's wife before Judge Burnett. I will return to the findings of Judge Burnett later.

The Appellant's skeleton argument

21. There is a skeleton argument of 18 May 2020 drafted by Mr Nicholson of Counsel on behalf of the Appellant.The submissions can be summarised.

22. There is no challenge to the First-tier Tribunal's findings of fact in relation to the Appellant. The following findings should be maintained.

    (i) The Appellant and RG are in a genuine and subsisting relationship and they share family life.

    (ii) RG suffers from a range of medical and psychiatric conditions including TB and agonising and debilitating pain due to ankylosing spondylitis. He is immobile and depends upon the Appellant for his care.

    (iii) The Appellant spent several years living with her husband in the UK with lawful leave as his spouse following her entry in that capacity in December of 2012.

    (iv) With regard to Section 117B(2) and (3) of the 2002 Act, she speaks English and is unlikely to be reliant on public funds, given her qualifications.

23. The issue before the Upper Tribunal is proportionality. RG cannot be removed from the UK unless and until his removal could be said to be lawful, proper consideration having been given to his human rights following the Supreme Court's judgment in AM. There is no issue as to whether the Appellant and RG can enjoy their family life together otherwise than in the UK.In any event, RG's condition prevents family life continuing in India. TB is a public health risk and there are no facilities to treat RG.

24. The Appellant and her husband were living lawfully in the UK and had been doing for four years prior to the Appellant's removal. The Appellant was removed in 2016. The couple have been deprived of four years of their life together and they need to be reunited urgently. The couple have been attempting, so far without success, to have

children. This is a fundamental element of family life which has been denied to them. The difficulties are exacerbated by RG's dependence upon the Appellant for his care and to ensure his mental health.The couple are unable to live together anywhere other than in the UK and this is a matter of significant weight. The Appellant does not have a history of failing to comply with conditions of immigration control.The issue of precariousness is not relevant to the Appellant's case. The couple married in India and the Appellant entered the UK as a spouse. Their marriage was not entered into when either of their immigration statuses was precarious.

25. The Appellant relies on CL v Secretary of State for the Home Department [2019] EWCA Civ 1925where the Court of Appeal decided that subSection 117B(4) of the 2002 Act does not require little weight to be given to a relationship with a qualifying partner when the person's immigration status is precarious as opposed to unlawful.

26. The Appellant relies on GM Sri Lanka v Secretary of State for the Home Department [2019] EWCA Civ 1630 [29] to support that the Appellant does not need to demonstrate that her case is exceptional. The decision granting permission to the Secretary of State is flawed because there is no requirement to find exceptional circumstances.

27. The Secretary of State has a positive obligation to facilitate family life and to desist from doing otherwise than is proportionate is no less pressing than the negative obligation not to interfere with family life. Mr Nicholson relied on Quila &another[2011]UKSC 45 specifically at [40] and Shamin Box [2002] UKIAT 02212 to support the argument that the question in an entry clearance case as opposed to an expulsion case is not whether there is an interference but instead whether a positive duty to facilitate family life has been observed. The Supreme Court drew attention to Tuquabo-Tekle v The Netherlands [2006] 1 FLR 798. At [40] Wilson JSC stated:

> "...Third, *Tuquabo-Tekle v The Netherlands* [2006] 1 FLR 798,a mother, father and their three sons were of Eritrean ethnicity but lived in the Netherlands and had acquired Dutch citizenship. When leaving Eritrea in 1989, the mother had left behind a daughter, then aged eight. When she was aged 15, an application was made for her to be allowed to enter the Netherlands in order to live with the family; but it was refused. The court held that, by the refusal, the state had violated the rights under article 8 of all six of its members. The court observed, at para 41 and para 42, that the asserted obligation of the state was positive, that "the boundaries between the state's positive and negative obligations under this provision do not lend themselves to precise definition" and that "the applicable principles are, nonetheless, similar". The minority view in *Gül* had become that of the majority. The court did not tarry to consider interference: it moved straight to justification."

28. RG and the Appellant were living lawfully together and had been doing for nearly four years before the Appellant was removed. They have been deprived of four years of life together. They have been attempting to have children which is a fundamental element of family life denied to them. The need to be reunited is urgent and exacerbated by RG's dependence upon the Appellant for his care and to ensure his

mental health. The inability of the family to live together anywhere other than the United Kingdom is axiomatically a matter of significant weight.

29. The Appellant has no history of failure to comply with conditions of immigration control. Should her husband's human rights eventually be deemed not to be breached by hisremoval there is no basis for any concern that she would not simply leave the UK with him.

Section 117B of the 2002 Act

30. Section 117B of the 2002 Act states as follows:

> "**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 well-being 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 in the interests of the economic well-being 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.
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

Oral submissions

31. Mrs Aboni relied on the refusal letter. The Appellant cannot succeed under the Immigration Rules. She has been separated from her husband since 4 December 2016. Her previous precarious immigration is relevant to the assessment of proportionality. The Appellant came to the United Kingdom as a dependant. Her application for leave to remain was refused because of her husband's criminality.

32. The Appellant came here as a student in 2008. She returned to India in 2011. She married RG in India on 26 June 2012. She returned to the United Kingdom on 3 December 2012 as a dependant on her husband who had leave to remain as a Tier 1 Migrant. They were here lawfully, but their leave was at all times precarious which is relevant when attaching weight to their relationship. RG became subject to a deportation order on 1 December 2014. The First-tier Tribunal found that deportation of RG did not breach his rights under Article 8. The First-tier Tribunal found at RG's hearing that there were no obstacles to him returning to India where he has family. The Respondent's case is that RG can leave the United Kingdom as a matter of choice. He is a foreign criminal. He did not rely on Article 3 health grounds at his appeal before the First-tier Tribunal, but Ms Aboni drew my attention to the judge's findings; namely that it was speculation that he would be at risk of contracting TB, that there would be health care available to him and that there was no evidence that his health would deteriorate on return. If RG is successful in his application (or appeal), the Appellant can make an application. The application is an abuse of process because RG does not have status on which it is legitimate to grant the Appellant leave. There are no sufficiently compelling circumstances to grant leave outside of the Rules.

33. Mr Nicholson relied on his skeleton argument. Although section 117B applies to all Article 8 appeals, it has not relevant here because the issue is not private life and RG is not a qualifying partner. The Appellant relies on family life.They did not meet when they were here unlawfully. They entered the United Kingdom lawfully. There is nothing in the statute to undermine their relationship.

34. Mr Nicholson said that he was bewildered about how the appeal could be described as an abuse of process. The Appellant was entitled to appeal. There is no possibility of family life in India. RG has a pending application on Article 3 grounds. He relied on the findings of the First-tier Tribunal at [24] – [27]. There has been no change in the position because the Appellant and RG are still separated. The Tribunal cannot prejudge the outcome of RG's application.

35. This is an unusual case where the spouse of a person subject to a deportation order had been removed. The Appellant and her husband who are trying to have a child are effectively being kept apart. It is a major hurdle for the Secretary of State to establish that keeping the Appellant and his wife separated is proportionate.

Findings and reasons

36. Neither party had addressed the issues identified by Judge Finch in a skeleton argument. The Secretary of State has not to my knowledge submitted a skeleton argument. Ms Aboni did not draw my attention to one. When I raised the issues identified by Judge Finch the parties seemed to be taken by surprise. There was no application to adjourn to address the issues. Considering the considerable delay to date in determining the Appellant's appeal, it was not in the interests of justice to adjourn to enable the parties to properly address the issues identified by Judge Finch. The Appellant had not submitted further evidence. RG did not attend the resumed hearing. The matter proceeded by way of submissions only.

37. The Secretary of State of State accepted that the issue is proportionality. There was no challenge to the findings of the First-tier Tribunal. Thus, the following findings are maintained: -

    1. The Appellant and RG are in a genuine and subsisting relationship and they share a family life.
    2. RG suffers from a range of medical and psychiatric conditions including TB and agonising and debilitating pain due to ankylosing spondylitis.
    3. The Appellant spent several years (nearly four years) living with her husband in the UK with lawful leave as RG's spouse following her entry into the UK in that capacity in December of 2012.
    4. The Appellant speaks English and is unlikely to be reliant on public funds given her educational qualifications.

38. In Quila the Supreme Court declined to follow Abdulaziz and United Kingdom (1985) 7 EHRR 471(where the court found that there was not even an interference with the rights under Article 8 of the three women in refusing to allow their husbands to join them or remain with them) in the light of more recent decisions. At [43] the Supreme Court explained; -

> … [T]he court in *Abdulaziz* was in particular exercised by the fact that the asserted obligation was positive. Since then, however, the ECtHR has recognised that the often elusive distinction between positive and negative obligations should not, in this context, generate a different outcome. The area of engagement of article 8 - in this limited context - is, or should be, wider now. In that in *Tuquabo-Tekle* the state's refusal to admit the 15-year-old daughter of the mother, in circumstances in which they had not seen each other for seven years, represented an interference with respect for their family life, the refusals of the Secretary of State in the present case to allow the foreign spouses to reside in the UK with the British citizens with whom they had so recently entered into a consensual marriage must a fortiori represent such an interference. The only sensible enquiry can be into whether the refusals were justified.

39. The engagement of Article 8 depends upon an affirmative answer to the first two Razgar questions (R (Razgar) v Home Secretary [2004] UKHL), namely whether there had been or would be an interference by a public authority with the exercise of a

person's right to respect for his private or family life and, if so, whether it had had, or would have, consequences of such gravity as potentially to engage the operation of the Article.[2]This is not an entry clearance case where it is the Secretary of State's position that there is no interference with family life. Whether the obligation is positive or negative is not material. The first two Razgar questions are not in issue. It is not the Appellant's case that questions 3 and 4 should be answered in the negative. The parties are agreed that the determinative issue is proportionality, questions 5. What was said in Quila by Wilson JSC does not add anything to this Appellant's case.

40. It is accepted that this Appellant cannot succeed under Article 8 as informed by the Rules. In assessing proportionality I have taken into account that the policy of the Secretary of State as expressed in the Rules is not to be ignored when a decision about Article 8 is to be made outside the Rules: TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109. The Court of Appeal in GM (Sri Lanka) [2019] EWCA Civ 1630 said that the test to be applied outside the Rules is whether a "*fair balance*" is struck between competing public and private interests (and not one of exceptionality). The decisions of GM and CL (India) [2019] EWCA Civ 1925 clarify that the little weight provisions in s117B do not apply to precarious family life. In CL, the Court of Appeal agreed with the Secretary of State of State that there is no rule of law which requires that little weight should not be given to a relationship formed with a British citizen at a time when and Applicant's immigration status is precarious and that what weight it is appropriate to give to such a relationship in the proportionality assessment depends on the particular circumstances, "which include the duration of the relationship and the details of the applicant's immigration history and particular immigration status when the relationship was formed (and when the application was made)" (see [64]).

41. I have no hesitation in concluding that any interference with this Appellant's Article 8 rights is justified and proportionate. Her appeal relies wholly on family life with RG. RG is not settled here and he is not a British citizen. While he has a pending application with the Home Office, he does not have status here. The Court of Appeal refused his application noting that the grounds advanced are "significantly different" to those before the UT and First-tier Tribunal. RG raised health grounds as a ground of appeal before Judge Burnett in the context of Article 8 only. FTTJ Burnett accepted that RG has a number of health problems. He found that it was speculative that the RG would contract Tuberculosis which he found to be the only potentially life-

[2] Lord Bingham's speech, which had the assent of Lord Steyn and Lord Carswell, and in large part too of Lord Walker and Baroness Hale notwithstanding their dissent as to the outcome, proposed at §17 the following questions as those which were likely to have to be answered by an adjudicator on an art. 8 appeal:
(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
(3) If so, is such interference in accordance with the law?
(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

threatening illness (see [55]). He said that Ankylosing Spondylitis is not life threatening but debilitating and affects his mobility. If it is not treated it causes severe pain and stiffness. The judge found that there was no evidence that treatment was not available in India. There was no evidence that he could not get analgesia in India. Judge Burnett noted at [56] that the Appellant was in India and said that it appeared that she has family members there and that she could provide support for RG and assist with his mobility and mood. The judge concluded that the decision to deport RG does not breach his rights under Article 8.

42. Both parties agreed that s117B factors apply equally to in-country and out of country appeals. This Appellant relies solely on family life with RG and not private life. Since the error of law decision, the Court of Appeal in CL has clarified the proper approach to s117B (4) of the 2002 Act. However, RG is neither a British citizen nor is he settled here, therefore s117B (4) has no application in any event. The Appellant has not formed a relationship with a qualified person when she was here in any capacity. The Appellant came to the United Kingdom as RG's partner, when his stay was precarious. The Appellant and RG's family life here was at all times before her removal precarious in the sense that neither has ever had permanent status here. I appreciate that the Appellant has not been in the United Kingdom unlawfully. However, taking into account all the circumstances, I attach little weight to the family life enjoyed here by the Appellant with RG before her removal. The Appellant does not rely on private life.

43. RG was imprisoned in 2014. I am told that the couple lived together on his release and before the Appellant was removed in November 2016. The Appellant and RG have not lived together since this time. The First-tier Tribunal hearing the Appellant's case in 2017 heard evidence from RG. There was no up to date evidence before the Upper Tribunal. RG did not attend the hearing before me. There was no evidence from the Appellant or RG about their relationship since the hearing before the First-tier Tribunal in 2017. There was no evidence drawn to my attention of communication between the couple since the Appellant's appeal over three years ago.

44. The Appellant and RG are represented by the same firm of solicitors. It is odd that while the Appellant claims that RG is dependent on her, there is no mention of this or the impact of separation on RG in the up to date medical report on which he relies to support his application on Article 3 grounds. The letter of instruction from the solicitors of 4 December 2020 does not ask the expert to comment this. While the First-tier Tribunal made positive findings about their relationship which have not been challenged, I must assess the relationship at the date of the hearing. The evidence before me points to a diminished family life.

45. This case concerns the Appellant's family life. It does not concern the United Kingdom's obligations under Article 3 as regards RG. I do not wish to speculate on the outcome of the pending application before the Secretary of State. However, the findings of First-tier Tribunal Judge Burnett about RG's health in 2018 are lawful. In respect of the up to date medical report which was not before the First-tier Tribunal

in 2018, RG now relies on having been diagnosed as having moderate to severe depression and recurrent suicidal ideation. The author of the report says that without treatment his prognosis is poor. Making a very broad evaluative assessment of the evidence before me, in order to assist with the proportionality assessment as regards the Appellant, I conclude that there is nothing before me that suggests that RG has a particularly strong case. In any event, the Secretary of State will in due course consider whether to send RG to India would breach the UK's obligations under Article 3.

46. Despite the directions of UTJ Finch there was no evidence before me that the Appellant's solicitors made efforts to ensure a speedy decision in respect of the Cart JR. In any event, as far as that matter is concerned, RG has now reached the end of the road. He does not have a pending appeal in the United Kingdom. His situation is even more tenuous than it was when the Appellant's appeal was heard in 2017. He has a recently made application before the Secretary of State. The outcome is far from certain. He may or may not have a right of appeal against a negative decision.

47. The Appellant did not advance an argument that there are insurmountable obstacles to family life in India which is the test when applying the Rules in the case of an Appellant who has a relationship with a settled person or British citizen. On the evidence before me, this is not made out, in any event. I do not seek to go behind the findings of the First-tier Tribunal. At that time, RG's appeal was pending and the judge found that it was not reasonable to expect family life to continue in India. As I understand this was not a challenged finding. There is no longer a pending appeal before the First-tier Tribunal. There is insufficient evidence before me to conclude that it is unreasonable to expect RG to return to India to resume family life with his wife. If I were to consider proportionality on the basis that family life could not reasonably continue in India, this appeal cannot succeed. I have taken into account what Lord Reed said in Agyarko v SSHD [2017] UKSC 11 paragraphs 59 and 60.[3]

[3] In Agyarko, Lord Reed stated:

> 59. As was explained in para 8 above, the case of *Huang* was decided at a time when the Rules had not been revised to reflect the requirements of article 8. Instead, the Secretary of State operated arrangements under which effect was given to article 8 outside the Rules. Lord Bingham, giving the opinion of the Committee, observed that the ultimate question for the appellate immigration authority was whether the refusal of leave to enter or remain, in circumstances where the life of the family could not reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudiced the family life of the applicant in a manner sufficiently serious to amount to a breach of article 8. If the answer to that question was affirmative, then the refusal was unlawful. He added:
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> > "It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar* [*R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368] , para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test." (para 20)
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> 60. It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of

When assessing proportionality, I have taken into account that once RG's application is resolved, the parties can resume family life in India (if the application is unsuccessful) or the Appellant can make another application on much stronger grounds (should RG be granted leave). A pending application in the circumstances of this case, does not amount to insurmountable obstacles to family life. One must not lose sight of the fact that this Appellant does not rely on family life in the UK with a British citizen or a settled person.

48. There are additional factors in this case that weigh heavily against the Appellant. The initial separation of this couple followed RG's criminality which resulted in a 15-month sentence of imprisonment and a deportation order. RG is still subject to a deportation order. He is a foreign criminal. It is in the public interest that he is deported. While the Appellant had been living with her husband lawfully in the United Kingdom before she was removed, to suggest that the decision of the Secretary of State to refuse her application on human rights grounds is at the root of the separation of this family wholly misrepresents the situation. The couple's separation came about as a result of RG's criminality and imprisonment that followed.The Appellant is not to blame for this. However, her case relies wholly on family life with RG who is a foreign criminal. She has no claim to be in the United Kingdom independently of that relationship. While the Appellant had lawful leave here, she was a dependant on RG. She did not have leave in her own right. Mr Nicholson was clear that her case rested on family life with her husband and not private life.

49. The maintenance of effective immigration control is in the public interest. Taking into account all the circumstances, the balance of the scales in this case weighs heavily in favour of the Secretary of State. The decision to refuse the Appellant's application on Article 8 grounds is proportionate.

50. Neither party was properly prepared to engage with the issues identified by Upper Tribunal Judge Finch. They had not complied with directions. I am able to properly address the first question (the extent to which previous precarious immigration status is a factor which should be taken into account when an individual is exercising an out of country appeal). S117B applies to in–country and out of country appeals under Article 8. What is always necessary is a fact sensitive assessment taking onto account all material matters. In respect of the second question (the proper weight to be given to a genuine relationship in an out of country appeal when the other person in in the United Kingdom without any immigration status but awaiting a statutory

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exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word "exceptional", as already explained, as meaning "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate". So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that "exceptional" does not mean "unusual" or "unique": see para 19 above.

appeal), it is obvious that it would be preferable for the appeals to be heard together, if possible. The issue is not relevant in this appeal because RG's appeal has already been determined and dismissed. However, whether there is a pending appeal or merely an application, the weight to attach to the relationship depends on all the circumstances.

51. In respect of the fourth question which is the extent to which it may be an abuse of process to consider the circumstances of a partner awaiting an appeal in the United Kingdom, the Secretary of State has not made out that there has been an abuse of process in this case. The Secretary of State has not advanced a coherent case establishing that the Appellant's application is frivolous. I accept that there are unanswered questions concerning the conduct of RG's appeal, such as why he did not rely on Article 3 before Judge Burnett and why my attention has not been drawn to evidence that the solicitors made any attempt to expedite RG's Cart JR in response to Judge Finch's directions. Furthermore the Cart JR application raises questions considering Shah ('Cart' judicial review: nature and consequences) [2018] UKUT 00051. (However, I am not aware of the evidence that was before the Court of Appeal which resulted in the staying of RG's case.) In addition, RG did not make an application under Article 3 until the decision of the Court of Appeal, whereas it has been open to him to make further representations under AM asking for expedition so that he and his wife can resume family life. Despite these potential avenues of discussion, there was no properly articulated argument developed by the Secretary of State on the issue.

Notice of Decision

The appeal is dismissed under Article 8 of ECHR.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Joanna McWilliam Date10 March 2021

Upper Tribunal Judge McWilliam