Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/41536/2013**

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 7 January 2015	**On 28 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TIJANA DJORDJEVIC

Respondent

Representation:
For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: Ms K Cronin, instructed by Sturtivant & Co Solicitors

DETERMINATION AND REASONS

1. Whilst this is an appeal by the Secretary of State for the Home Department for convenience I will refer to the parties in the determination as they appeared before the First-tier Tribunal.
2. The appellant, a national of Serbia, appealed to the First-tier Tribunal against the decision of the Secretary of State of 14 September 2013 to refuse her application for leave to remain on the basis of her private life in the UK and to remove her from the UK. First-tier Tribunal Judge Cary allowed the appeal and the Secretary of State now appeals with permission to this Tribunal.

Background

3. The background to this matter is not in dispute. The appellant originally came to the UK in 1986 when she was around 4 years old with her family who lived in London for about 1 year. The family returned to Serbia and the appellant came back to the UK in 1996 when she was 13 years old to attend school. She returned to Serbia during school holidays and she subsequently attended Theatre school and was granted successive periods of leave to enter and remain as a student until February 2006 when she decided to leave the UK to look after her ill mother in Serbia. She returned to the UK briefly in September 2006 and travelled between the UK and Serbia until she resumed her studies in February 2007. After her graduation she obtained leave to remain as a Tier 1 (Post Study Work) Migrant from 25 November 2010 until 25 November 2012. In March 2012 her then representatives applied on her behalf for leave to remain under the Immigration Rules on the basis of her 10 years lawful residence in the UK. This application was refused on 23 December 2012 on the basis that her 10 years continuous lawful residence had been broken between 3 December 2002 (when she withdrew her application for leave to remain as a spouse because the relationship had broken down) and 9 December 2002 (when she left the UK to apply for a student visa). Also, she had not passed the 'Life in the UK' test, although she subsequently did so on 6 November 2012. The appellant had no right of appeal against this decision. She subsequently made an application for leave to remain on the basis of her private life, the refusal of that application is the subject of this appeal.

4. The First-tier Tribunal Judge heard oral evidence from the appellant, her mother, two friends, and the appellant's partner (Mr Wong, a British citizen). The respondent's representatives accepted that no criticism could be made of the appellant in terms of her immigration history and that she had established a 'very significant private life' in the UK. The First-tier Tribunal Judge considered the provisions of paragraph 276ADE of the Immigration Rules and found that the appellant could not meet the requirements of that provision because she had not lived in the UK for 20 years and she still has ties with Serbia. The Judge went on to consider the appeal under Article 8 of the European Convention on Human Rights and found that she had established a private life and some form of family life with Mr Wong, with whom she has been in a relationship since May 2014. The Judge found that the proposed removal would interfere with that private life and in considering the proportionality of that decision he considered section 117B of the Nationality, Immigration and Asylum Act 2002. The Judge found that the decision to remove the appellant would not be a proportionate interference with her private and family life and allowed the appeal under Article 8, dismissing it under the Immigration Rules. There is no challenge to the Judge's decision under the Immigration Rules.

Error of Law

5. In her grounds of appeal to the Upper Tribunal the Secretary of State contends that, having found that the appellant could not meet the provisions of paragraph 276ADE of the Immigration Rules, the First-tier Tribunal Judge erred in going on to consider the appeal under Article 8 in light of the guidance in R (Nagre) v SSHD [2013] EWHC 720 (Admin). Mr Avery accepted that case law has moved on since the grounds were drafted. He accepted that the decision in R (on the application of Esther Ebun Oludoyi

& Ors) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC) indicated that there is no threshold test. However he submitted that the First-tier Tribunal Judge was still required to be satisfied that there was something in the appellant's case which was not covered by the Immigration Rules and that he had failed to do so. However I am satisfied from the decision as a whole and paragraph 39 in particular that the Judge did consider whether the appellant's circumstances are covered by the Immigration Rules and the respondent's policies [34]. He considered the very significant private life established by the appellant along with her recently established family life and decided to go on to consider Article 8. I find that this course of action was open to the First-tier Tribunal Judge who gave adequate reasons for so doing.

6. The Secretary of State in the grounds of appeal, relying on the decision in Nasim and others (Article 8) [2014] UKUT 00025 (IAC), contends that Article 8 has limited use for private life cases which did not interfere with a person's physical and moral integrity. The Tribunal's findings in Nasim are summarised in the head note as follows;

> "The judgments of the Supreme Court in Patel and Others v Secretary of State for the Home Department [2013] UKSC 72 serve to re-focus attention on the nature and purpose of Article 8 of the ECHR and, in particular, to recognise that Article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity.
>
> A person's human rights are not enhanced by not committing criminal offences or not relying on public funds. The only significance of such matters in cases concerning proposed or hypothetical removal from the United Kingdom is to preclude the Secretary of State from pointing to any public interest justifying removal, over and above the basic importance of maintaining a firm and coherent system of immigration control."

7. Mr Avery submitted that the appellant was in the UK as a student. He submitted that there are clear differences between private life and family life which the Judge failed to consider. Ms Cronin submitted that all of the Judge's evaluation of the appellant's private life flowed from the concession made by the presenting officer that the appellant had developed a very significant private life. She submitted that none of the oral evidence was challenged. She submitted that the First-tier Tribunal Judge had an unchallenged report from an independent social worker, Diane Jackson, from December 2012 which describes the distress the appellant would suffer if required to leave the UK. She submitted that the Judge made a 'text book' decision reciting all of the evidence, the relevant law and case law, and setting out all of his reasons for the decision.

8. Ms Cronin submitted that the Judge properly consider the factors set out in section 117B which look at whether a person makes a positive contribution to the UK. In her submission the Judge considered the evidence and concluded that the appellant contributes to the economic well-being of the UK. She relied on the decision in UE (Nigeria) v SSHD [2010] EWCA Civ 975 and submitted that the contribution made by an individual to the UK is a relevant consideration in assessing the public interest. Mr Avery submitted that the factors set out in section 117B cannot be positive factors in an appellant's favour. He submitted that the section does not say that people should be allowed to stay if they can demonstrate those factors. He submitted that these are

negative or neutral matters. Ms Cronin disagreed submitting that these factors were set out by Parliament and must be given weight when considering the public interest.

9. Sections 117A, 117B and 117B were inserted into the Nationality, Immigration and Asylum Act 2002 by the Immigration Act 2014. The relevant provisions in relation to this appeal are sections 117A and 117B which provide as follows;

> ***117A Application of this Part***
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
> (a) breaches a person's right to respect for private and family life under Article 8, and
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
> (a) in all cases, to the considerations listed in section 117B, and
> (b)in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> ***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.

10. Section 117A makes clear that the Tribunal must have regard to the factors set out in section 117B. The Judge would therefore have erred had he not considered the matters set out in section 117B in considering the proportionality of the decision to interfere with the appellant's private life. In this case the Judge took into account, as he was

required to do, the fact that the appellant speaks English, is financially independent, has throughout had lawful residence in the UK (apart from the 6 days in 2002 referred to above) and the fact that her immigration status was never precarious. The Judge weighed these factors in the appellant's favour. There is nothing in section 117A or 117B to suggest that these considerations are not capable of being weighed in an appellant's favour or to suggest that they can only be weighed against an appellant where s/he does not meet them. I accept Ms Cronin's submission that section 117B (2) and (3) are matters which should be taken into account as decreasing the 'pressing social need'. The Judge did not therefore err in his consideration of these factors. It is also clear from the determination that the Judge did not rely only on these factors in weighing the appellant's private life against the public interest. He also weighed all of the other evidence before him in relation to the nature and extent of the appellant's private life.

11. Mr Avery submitted that the Judge erred in failing to weigh against the appellant the fact that she did not meet paragraph 276ADE of the Immigration Rules in circumstances where the Immigration Rules appear to cover this situation. However the Judge gave full consideration to paragraph 276ADE at paragraphs 37 and 38 of the determination. He was well aware of the extent of the ties the appellant still has with Serbia and the fact that as a result she could not meet the requirements of paragraph 276ADE. In considering Article 8 the Judge was aware that Article 8 cannot be used to deal with a 'near miss' [44]. I am satisfied, reading the determination as a whole, that the Judge was clearly aware of the requirements of the Immigration Rules and that this was clearly a matter to which he attached weight in assessing the proportionality of the decision to remove the appellant.

12. The grounds of appeal further contend that the Judge erred in attaching weight to the appellant's relationship with her boyfriend as they have been in a relationship for only a few months and this does not constitute family life. Ms Cronin submitted that the Judge accepted that the appellant is in a relationship and the Judge did not err in giving that relationship some weight. She submitted that Article 8 does protect developing relationships. The Judge made clear at paragraph 48 that he did not attach 'much weight' to the relationship. The Judge did not attach significant weight to the appellant's limited family life with Mr Wong instead considering this as a factor with limited weight in his overall assessment of her private life. There is noting irrational or perverse in this finding which was open to the Judge on the evidence.

13. I find that on the facts found by the Judge he was entitled to take the view that the private life established by the appellant in this case is significant. It is clear that on the Judge's findings the private life established in this case is not so far down the continuum described by the Upper Tribunal in Nasim [14~15] that it is *'so far removed from the "core" of Article 8 as to be readily defeasible by state interests, such as the importance of maintaining a credible and coherent system of immigration control'*. The Tribunal said that *'At this point on the continuum the essential elements of the private life relied upon will normally be transposable, in the sense of being capable of replication in their essential respects, following a person's return to their home country'*. I accept Ms Cronin's submission that the facts in this case are distinguishable from those of the appellants in Nasim. It is abundantly clear from the First-tier Tribunal Judge's findings in this case that he did not

consider that this appellant's private life was so far from the core of Article 8 as not to be capable of outweighing the public interest.

14. I have considered the First-tier Tribunal Judge's decision as a whole and I find that the decision to allow the appeal was one which was open to him on the basis of the evidence before him.

Conclusion:

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

The decision of the First-tier Tribunal shall stand.

Signed Date: 27 January 2015

A Grimes
Deputy Judge of the Upper Tribunal