Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/49855/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 December 2014	**On 9 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Whitwell (Home Office Presenting Officer)
For the Respondent: Mr Burnett (Counsel)

DECISION AND REASONS

1. The appellant ('the SSHD') appeals against a decision of First-tier Tribunal Judge Seifert dated 12 September 2014 in which the respondent's appeal was allowed under Article 8 of the ECHR.

Procedural history

2. In a decision dated 27 October 2014 Judge Baird granted permission to appeal on the basis that it was arguable that the Judge failed to apply the current law and guidance on Article 8 and in addition reached an untenable finding at [53].

3. The matter now comes before me to decide whether or not the determination contains an error of law.

Hearing

4. At the hearing Mr Whitwell focused his criticism of the decision on two issues. First, he submitted that the Judge failed to direct himself to the important fact that the respondent did not meet the Immigration Rules. Second, he submitted that the Judge's findings at [53] are inconsistent with the correct approach under section 117B(4) of the Nationality, Immigration and Asylum Act 2002 (as amended).

5. Mr Burnett argued that it was implicit from **MM (Lebanon) v SSHD** [2014] EWCA Civ 985 that there was no requirement to consider whether the appropriate threshold to consider Article 8 was met in a non-deportation case and in addition, the Judge was entitled to the findings reached at [53].

6. I reserved my decision at the end of the hearing which I now provide with reasons.

Discussion

7. Consistent with Mr Whitwell's submissions I have considered the two matters said to demonstrate an error of law in the decision.

(1) The significance of the Rules not being met when determining Article 8

8. This is a case in which the parties were in clear agreement that the only issue in dispute was whether or not the respondent's appeal should be allowed pursuant to Article 8 outside the Rules, it having been accepted that the Rules could not be met. It is clear from the decision that the respondent accepted the SSHD's position that he could not meet the Immigration Rules and only relied upon Article 8 [40]. It is to be regretted that the Judge has not even summarised his approach to the relevant Article 8 legal framework prior to making findings. The Judge has however summarised the parties' submissions [41-49] and it is implicit from reading the determination as a whole that the

Judge accepted that it was necessary to approach Article 8 in light of the guidance regarding the public interest considerations in sections 117A-B of the 2002 Act (as amended).

9. Mr Whitwell submitted that the Judge should have expressly acknowledged that the Immigration Rules could not be met and in failing to do so the Judge committed an error of law. Mr Whitwell relied upon **Haleemudeen v SSHD** [2014] EWCA Civ 558 as applied in **R (Ganesabalan) v SSHD** [2014] EWCA Civ 558 to support his submission. Both of these cases required the court to consider the correct approach to Article 8 where a consideration of the Rules remained an issue to be determined first.

10. In the instant case all parties approached the case on the basis that the Rules were not met. This included the more general Rules and the part of the Rules said to reflect Article 8. The Judge therefore had one issue to determine – Article 8 outside of the Rules. In my judgment it was clear to all including the Judge that the Immigration Rules could not be met and this must have been in mind when the Judge went on to consider Article 8 outside of the Rules. The Judge cannot be criticised for taking this approach. This is not a deportation case and therefore proportionality 'was more at large' – see **MM (Lebanon) v SSHD** [2014] EWCA Civ 985 and needed to be assessed albeit by reference to the s117B public interest considerations. Indeed, both representatives approached the case and made submissions on the basis that it was appropriate for the Judge to consider Article 8 and as such it was not necessary for the Judge to consider any threshold question regarding Article 8 or remind himself that the Rules could not be met.

11. The Judge's findings may be generous but I am not satisfied that in failing to expressly remind himself of that which was obvious – the respondent cannot meet the Rules – he has not erred in law.

(2) Section 117B(4)

12. I now turn to Mr Whitwell's second and final submission based upon section 117B(4) of the 2002 Act. This states that '*little weight should be given to-…(b) a relationship formed with a qualifying partner, that is established at a time when the person is in the UK unlawfully*'.

13. The Judge was clearly aware that the relationship was first established in 2005 when the respondent did not have leave [16]. That relationship broke down in late 2009 but as the Judge put it the SSHD '*has already acknowledged the*

relationship between the couple, by the grant of leave to remain to [the respondent] from 2009 to 2012' [53]. The Judge took into account that the relationship was re-established in 2014 when the respondent was again unlawfully in the UK (his discretionary leave having expired in 2012 and the application to extend it being unsuccessful because of the breakdown in the relationship). The Judge has not identified with precision what weight he attached to the relationship in light of when it was first established or when it was recognised by the SSHD or indeed, when it was re-established. The Judge however was plainly aware of section 117B(4) and reminded himself of the SSHD's submission. The legislation does not address the more unusual scenario that exists in this case – what weight should be given to a relationship that was established when an applicant was in the UK unlawfully but since then the SSHD has given the applicant leave based upon the same relationship? A person might have established their relationship when they were in the UK unlawfully 10 years ago but shortly after this was granted leave to remain and currently has a genuine and subsisting relationship of a very lengthy duration. Does the legislation really mean that little weight should be given in every single case to such a relationship? Section 117A(2) requires the Tribunal to 'have regard' to the considerations in section 117B. The Judge has had regard to all the relevant considerations including section 117B(4), and in my judgment has not committed any material error of law.

14. Whilst the Judge's decision is a generous one, Mr Whitwell has not demonstrated that it contains an error of law.

Decision

15. The decision of the First-tier Tribunal does not contain an error of law and I do not set it aside.

Signed:

Ms M. Plimmer
Deputy Judge of the Upper Tribunal

Date:
4 December 2014