Upper Tribunal
(Immigration and Asylum Chamber)

Buci (Part 5A: “partner”) [2020] UKUT 00087 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 February 2020	**…………………………………………**

Before

THE HON. MR JUSTICE LANE, PRESIDENT

UPPER TRIBUNAL JUDGE MANDALIA

Between

PELLUMB BUCI

(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the appellant: Mr Z Malik, Counsel, instructed by Fisherwright Solicitors

For the respondent: Mr T Lindsay, Senior Home Office Presenting Officer

(1) The word “partner” is not defined in Part 5A of the Nationality, Immigration and Asylum Act 2002. The definition of “partner” in GEN 1.2 of Appendix FM to the Immigration Rules does not govern the way in which “partner” is to be interpreted in Part 5A.

(2) A person who satisfies the definition in GEN 1.2 should, as a general matter, be regarded as being a partner for the purposes of Part 5A, Where, however, a person does not fall within that definition, the judge will need to undertake a broad evaluative assessment of the relationship, bearing in mind that a “partner” is a person to whom one has a genuine emotional attachment, of the same basic kind as one sees between spouses and civil partners, albeit not necessarily characterised by present cohabitation. A “partner” is not the same as a friend; nor is an adolescent’s or other young person’s boyfriend or girlfriend necessarily a “partner”.

(3) The fact that, in the absence of a statutory definition, judges may reach different conclusions as to whether an individual has been shown to be another person’s partner is unlikely to pose significant difficulties, since the fundamental question in section 117C(5) is the effect of deportation on the

partner. A relationship which is categorised as that of partners, where the parties have only recently met and are not cohabiting is, in general, far less likely to generate unduly harsh consequences for the remaining partner, if the foreign criminal is deported, compared with where a relationship is longstanding and there has been significant co-habitation.

(4) Where, conversely, a relationship is not categorised as that of partners, it will still be necessary to consider the effect of deportation on the other person, by reference to section 117C(6). In the light of NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662, it is the substance of the relationship that needs to be examined and, in this type of case, it will be productive of error to draw too bright a line between section 117C(5) and (6).

DECISION AND REASONS

A. WHO IS A "PARTNER" FOR THE PURPOSES OF PART 5A OF THE NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002?

1.
This case concerns the meaning of the word "partner" in Part 5 A of the Nationality, Immigration and Asylum Act 2002. As is by now very well-known, Part 5 A requires a court or tribunal to have regard to the considerations listed in section 117B and, in the case of the deportation of foreign criminals, the considerations listed in section 117C, when considering whether an interference with a person's right to respect for private and family life is justified under Article 8(2) of the ECHR.

2.
Section 117D (Interpretation of this part) provides that:-

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who—

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who—

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971—see section 33(2A) of that Act)."

3.
Section 117B(4) provides that:-

"(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."

4.
Section 117C(1) declares that the deportation of foreign criminals is in the public interest. Subsection (2) says that the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of th at criminal.

5.
In respect of a foreign criminal who has not been sentenced to a period of imprisonment of four years or more, section 117C(3) states that the public interest requires the criminal’s deportation unless Exception 1 or Exception 2 applies.

6.
Section 117C(5) and (6) provide:-

“ (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.”

B. DOES THE DEFINITION IN GEN. 1.2 OF APPENDIX FM APPLY TO PART 5A?

7.
The respondent’s primary position, which was accepted by the First-tier Tribunal Judge in the present case, is that the definition of “partner” in Part 5A of the 2002 Act is supplied by the definition in GEN. 1.2. of Appendix FM (Family members). GEN.1.2. reads as follows:-

“ **GEN.1.2** . For the purposes of this Appendix “partner” means-

(i) the applicant’s spouse;

(ii) the applicant’s civil partner;

(iii) the applicant’s fiancé(e) or proposed civil partner; or

(iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, unless a different meaning of partner applies elsewhere in this Appendix. ”

8.
In support of her primary position, the respondent draws attention to the statement in paragraph 25 of El Gazzaz v Secretary of State for the Home Department [2018] EWCA Civ 532 by Sales LJ that:-

“25. The statutory provisions in Part 5A of the 2002 Act mirror the Immigration Rules in relation to foreign criminals which were brought into effect at the same time as Part 5A: see paras. 398 to 399A of the Immigrat ion Rules as made in July 2014.”

9.
The respondent says that this finding is reflected in the Ministerial statement of the then Minister for Security and Immigration (James Brokenshire) who, on 10 July 2014, told the House of Commons that:-

“ My Rt Hon Friend the Home Secretary is today laying before the House a Statement of Changes in Immigration Rules … The changes also align the Immigration Rules on family and private life in Part 13, which relate to foreign criminals, with the public interest considerations in sections 117B and 117C of the 2002 Act. These considerations are inserted by section 19 of the Immigration Act 2014. ”

10.
The problem with th is aspect of the respondent's case is that there is no definition of "partner" in paragraph 6 (interpretation) or paragraphs 398 to 399A of the Immigration Rules. Accordingly, the fact that references in paragraphs 398 to 399A to "partner" should be interpreted in the same way as in Part 5A of the 2002 Act in no way advances the argument that the definition in GEN.1.2. should apply both to Part 5A and paragraphs 398 to 399A. Given their similarities, section 117C and paragraph s 398 to 399A should, we agree, share a common meaning of "partner" . W hether that definition should be the one found in GEN.1.2. of Appendix FM is, however, another matter.

11.
For the appellant, Mr Malik makes two characteristically pithy but important points. First, he draws attention to the opening words of GEN.1.2., where , as we can see, "partner" is defined "for the purposes of this A ppendix". If the definition were intended to have any wider scope, Mr Malik submits that GEN.1.2. would have said so.

12.
Secondly, Mr Malik submits that, as a matter of law, a definition in subordinate legislation or the Immigration Rules cannot govern the interpretation of an express ion found in primary legislation. As a general matter, we agree. In the absence of an express power in the p arent Act to bring about such a situation, it is not open to the Executive , through the medium of subordinate legislati on, to change the way in which the primary legislation operates. That would be the result if such subordinate provisions were to dictate the meaning of an expression in primary legislation . In particular, Mr Malik pointed out that any change to the definition in the subordinate provisions would, in effect, amend the primary legislation.

C. HOW TO INTERPRET "PARTNER" IN PART 5A

13.
There is, accordingly, no merit in the respondent's primary position. How, then, should the expression "partner" in Part 5A be interpreted? For the respondent, Mr Lindsay says that , unless the expression denotes a relationship of some substance and significance, the operation of Exception 2 in section 117C(5) will, in these cases, depend solely upon whether there is "a genuine and subsisting relationship" between the foreign criminal and another person. If that had been the intention of the legislature, Mr Lindsay says, there would have been no need to use the expression "partner".

14.
It is, we consider, evident that, in framing the definition of "partner" in GEN.1.2., the respondent is attempting, in paragraph (iv) , to identify a form of relationship, not amounting to actual or proposed marriage or civil partnership, which, as a general matter, is likely to deserve respect as a protected form of family life within Article 8 of the ECHR. The fact that paragraph (iv) is not the only way in which one can identify "partners" who are not actual or intended spouses or civil partners is recognised in the closing words of GEN.1.2., where the possibility of "a different meaning of partner" is contemplated "elsewhere in this A ppendix".

15.
Although the paradigm of family life, as enjoyed by partners, whether or married or in civil partnerships, or not, is cohabitation, we are not aware that the Strasbourg caselaw on Article 8 is so confined. It is possible for a couple, who are not married, in a civil partnership or formally intending to be so , to enjoy protected family life, even though they do not cohabit. Individuals may commit to each other, in a genuine and meaningful way , without full-time cohabitation.

16.
Interestingly, in the definition of "extended family member" in regulation 8 of the Immigration (European Economic Area) Regulations 2016, we find this:-

" (5) The condition in this paragraph is that the person is the partner (other than a civil partner) of, and in a durable relationship with, an EEA national … , and is able to prove this to the decision maker. "

17.
Th is definition suggests that, for the purposes of the 2016 R egulations, a person can be a "partner" of another , even if they are not in a durable relationship. To that extent , the 2016 R egulations push against the submission of Mr Lindsay , that "partner" must carry something more than that the person concerned is in a "genuine and subsisting relationship" with another person.

18.
Nevertheless, Mr Lindsay's basic point remains a good one. The expression "partner" means a person to whom one ha s a genuine emotional commitment, of the same basic kind as one sees between spouses and civil partners, albeit not necessarily characterised by present cohabitation. A "partner" is not the same as a friend, however strong the friendship may be. Nor is a n adolescen t 's or other young person's boyfriend or girlfriend necessarily a "partner" . The position may , however, change if the relationship becomes sufficiently serious and committed.

19.
With this in mind, we return to the question we posed in paragraph 12 above. The starting po sition, we find, is that anyone who satisfies the definition of "partner" in GEN.1.2. should, as a general matter, be regarded as being a "partner" for the purposes of Part 5A. Where a person does not fall within this definition, the judge will need to undertake a broad evaluative assessment of the relationship, having regard to the factors we have described .

D. DOES THE ABSENCE OF A STATUTORY DEFINITION MATTER?

20.
The fact that there is no statutory definition of "partner" in Part 5A, in contrast to the definition of "qualifying child" , means that, in a case of the kind with which we are concerned, different judges may reach different conclusions as to whether, on a particular set of facts, an individual has been shown to be another person's partner.

21.
In practice, we do not consider this is likely to pose any significant difficulties. Th is is because the fundamental question in section 117C(5) is the effect of deportation on the partner (or child) . The nature and strength of the relationship between the foreign criminal and that of a nother person, said to be a partner, will directly inform whether deportation of the foreign criminal would have consequences that are unduly harsh for that other person. Given that there is no material difference between paragraphs 398 to 399A of the Immigration Rules and section 117C(3) to (6) of the 2002 Act (see CI Nigeria v Secretary of State for the Department [2019] EWCA Civ 2027: Leggatt LJ at [20]), in order for Exception 2 to operate , it must be shown both that it would be unduly harsh for the alleged partner to leave the United Kingdom and that it would be unduly harsh for him/her to remain, without the physical presence of the foreign criminal. A relationship which is categorised as that of partner s , where the parties have only recently met and are not cohabiting is, in general, far less likely to

generate unduly harsh consequences, if the foreign criminal is deported, compared with where a relationship is longstanding and there has been significant co-habitation.

22.

If a relationship is not categorised by the judge as that of partners, in every case of criminal deportation, whether or not the sentence of imprisonment is four years or more, the judge must apply section 117C(6): see NA (Pakistan) v Secretary of State for the Home Department and Others [2016] EWCA Civ 662; Secretary of State for the Home Department v PF (Nigeria) [2019] EWCA Civ 1139. It is only by the operation of section 117C(6) that the judge ensures that Part 5A of the 2002 Act, produces, in every case of deportation of a foreign criminal, a result that is compatible with the United Kingdom’s obligations under Article 8.

23.

Accordingly, where a relationship, relied upon by the foreign criminal to defeat deportation, is not treated by the judge as falling with section 117C(5) because the other person is not categorised as the foreign criminal’s partner, it will nevertheless be necessary to consider the effect of deportation on that other person, in order to determine whether deportation would constitute a disproportionate interference with that other person’s Article 8 rights (as well as those of the foreign criminal).

24.

The fact that section 117C(6) speaks of “very compelling circumstances, over and above those described in Exceptions … 2” might, at first sight , be said to impose a higher burden on the foreign criminal than would be the case if the other person had been found to be his or her partner. That is not, however, necessarily the position.

25.

In NA (Pakistan) , Jackson LJ examined, in considerable detail, the interplay between section 117C(5) and (6). In particular, the following paragraph is of relevance:-

“32. Similarly, in the case of a medium offender, [that is to say, a person sentenced to imprisonment of at least twelve months, but not of four years or more] if all he could advance in support of his Article 8 claim was a "near miss" case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2". He would need to have a far stronger case than that by reference to the interests protected by Article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation. ”

26.

Accordingly, where a relationship is not considered to be one of partners, it will still be necessary to consider whether the effect of deportation on the other person would be so serious as to amount to a disproportionate interference with Article 8 rights. Of course, in reality it will not frequently be the case that a relationship , which is not that of a partner but which was “of a kind described in Exceptions 1 and 2” , would lead the foreign criminal to success under section 117C(6). But the important message to take from Jackson LJ’s judgment is that there can be situations where it will be

productive of error to draw too bright a line between subsections (5) and (6) , at least in cases of "medium offenders" that are not concerned with so-called near-misses but where the relevant matters are similar to, but not actually within, Exception 2 . What t h is means is that, in our particular type of case, the substance of the relationship between the foreign criminal and the other person needs to be examined under section 117C(6), whether or not that other person is judicially regarded as a partner.

27.
As we have seen, section 117B(4)(b) requires a judicial decision-maker to give little weight to a relationship formed with a qualifying partner, which is established by a person at a time when that person is in the United Kingdom unlawfully. Here, it matters not whether a person, in the circumstances with which we are concerned, is categorised as a partner. Where the broad evaluative examination which we have described results in the asserted partner not being regarded as such by the judge, it would clearly be wrong if that relationship was given more weight than it would have had , if the relationship had been categorised as that of a partner. In any event, the weight which would fall to be given to such a relationship would normally be limited, in its own terms.

E. THE APPELLANT'S CASE

28.
We can now turn to the facts of the appellant's case. The appellant is a citizen of Albania, born in 1999, who says he was brought to the United Kingdom at the age of 7. An asylum claim was made on his behalf in 2008 but, by September 2010, he had become appeal rights exhausted. After a period without leave, the appellant was granted limited leave to remain in 2014 , until 6 September 2016. Although the matter is not pellucid, it appears that the respondent has, thereafter, treated the appellant as someone in the United Kingdom with leave, albeit statutorily extended.

29.
In September 2016, the appellant received a sentence of ten months' detention and training for possession of a Class A drug with intent to supply. On 18 December 2017, he was convicted of conspiring to supply Class A drugs and was sentenced to three years' imprisonment. As a consequence, on 6 July 2018, the respondent made a deportation order in respect of the appellant. The appellant made a human rights claim, contending that his deportation would be contrary to Article 8 of the ECHR. That claim was refused by the respondent on 11 July 2018.

30.
The appellant appealed against the refusal of his human rights claim. Following a hearing on 24 July 2019, the First-tier Tribunal dismissed the appellant's appeal.

31.
The First-tier Tribunal Judge heard evidence from the appellant and from the appellant's cousin. The Presenting Officer told the judge that the officer had no cross-examination of any of the other witnesses. They were not called to give oral evidence.

32.
One of those witness was B . She is a British citizen, born in the United Kingdom. Her witness statement disclosed that she became good friends with the appellant around the beginning of 2016. Later, "we had stronger feelings for one another and our relationship developed". In April 2017, B described herself and the appellant beginning a "committed relationship, and we would always be together, going on dates and meeting up". Although they did not live together , they stayed at each other's homes. In June 2017, the appellant bought her a promise ring "to confirm his feelings for me" .

33.
On 12 July 2017, the appellant was remanded in custody. B “struggled to cope”. She visited him every week whilst he was on remand in Bristol and, later, Winchester. After the appellant’s imprisonment (which B says was for four years) , she again visited him every week. She would also write to him and they would try and speak on the telephone.

34.
B said that she and the appellant had discussed their future plans , including living together , marriage and starting a family. Describing the position after the appellant’s release, B said:-

“24. At the moment we live with our respective families, as I cannot afford to live separately with Pellumb on my wages alone and therefore we have put our plans to live together on hold until Pellumb’s immigration status is resolved and he can get a job as well.

25. We have discussed our future at great lengths, and I know Pellumb really wants to turn his life around. Pellumb wants to live an honest life without any trouble. Pellumb has spoken about pursing a career in plumbing and wants to be able to contribute positively to society.

…

33. Pellumb and I are excited about our future together and although we are still young, I want him to be the father of my children. I know that he will be a brilliant dad and would be conscious about teaching them right from wrong.

…

35. I love Pellumb and cannot imagine being apart from him. However, I would not be able to relocate to Albania with him as my life is here in the UK and its all I have ever known. Also, my mum is extremely unwell and is wheelchair b ound. I help my dad in looking after her and would not be able to leave them.

…”

35.
At paragraph 25 of his decision, the judge noted Mr Malik’s submissions regarding B. Mr Malik said that B was a “qualifying partner” within the meaning of section 117D of the 2002 Act and that the effect on her of the deportation of the appellant would be unduly harsh. Mr Malik said that there was no basis for treating the definition of “qualifying partner” under the 2002 Act as having the same definition as that set out in section GEN of Appendix FM. Mr Malik submitted that account needed to be taken of the fact that B’s mother was not well and required her care and support. The assessment needed to be made “independently of the gravity of his offending and independently of s.117C(6) of the 2002 Act”.

36.
Beginning at paragraph 32, the First-tier Tribunal Judge analysed the relationship of the appellant and B. He noted that they saw their future together in the United Kingdom and hoped to have a family . However, they had not set up home together. The judge also noted that it was not long after the appellant had committed his drugs offences that he had given B a promise ring. The appellant had made no mention of this ring. Although the judge was satisfied that this was “an indication of commitment … it does not amount to an engagement between young people which includes in conventional understanding a promise to marry, particularly when they are not living together”.

37.
At paragraph 33, the judge found that the appellant and B "are committed to some degree to each other but that such commitment does not, and perhaps rightly so in view of the history of their relationship and the amount of time during it when the appellant had been detained, make [B] the fiancée of the appellant".

38.
The judge then turned to the meaning of "partner". He observed that there was no definition of the term in the 2002 Act. The judge found that if B "were the appellant's qualifying partner , then having regard to her personal circumstances it would be unduly harsh for her to pursue her life in Albania". However, at paragraph 35, the judge held that, in the light of what he had earlier said, he did not find B was a partner of the appellant "for the purposes of s.177D or Appendix FM".

39.
The judge next considered whether there were very compelling circumstances, in terms of section 117C(6). The judge rejected five of the six such circumstances, including the matter of a claimed blood feud in Albania. No complaint is made about the judge's rejection of the se circumstances.

40.
The final circumstance concerned the relationship between the appellant and B. At paragraph 43, the judge found:-

"43. I accept [B's] claim that she will be devastated if he is deported to Albania. The relationship is still in a comparatively early stage and it is generally accepted that time will heal most broken hearts. I have sympathy for her and her prospective grief and unhappiness if her relationship with the Appellant is broken by his deportation.

44. I have considered the jurisprudence in MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 00122 (IAC) and have taken into account the positive aspects of the Appellant's case to which I have referred in the course of this decision including his comparative youth, length of absence from Albania, integration with his cousin's family and relationship with and the prospective hardship which will be imposed on [B] if the Appellant is deported. I have had regard to the remarks of the Crown Court sentencing judge at page J2 of the SSHD's bundle about the impact on society at large of those involved in the supply of illegal drugs and the public interest in the deportation of foreign criminals. I have come to the conclusion for the reasons already given that the public interest in the deportation of the Appellant for the legitimate public objective of the prevention of disorder or crime is not outweighed by the circumstances and those of his immediate circle when considered in the round. Consequently, the appeal is dismissed."

41.
The first issue is whether the First-tier Tribunal Judge did, in fact, apply the definition of "partner" in GEN.1.2. so as to exclude B from the scope of section 117C(5). It is possible that , in saying what he did at paragraph 35 about paragraphs 32 and 33, the judge was looking at the substance of the relationship between the appellant and B, before deciding that th e relationship did not make B the appellant's partner. In referring at paragraph 33 to B not being the fiancée of the appellant, the judge might have been doing no more than to exam ine the relationship by reference to th e definition in GEN.1.2, in the way that we have described above ; that is to say, to see if the relationship fell within the definition but not to regard a failure to do so as determinative of whether B was the appellant's partner . Overall, however, it seems to us that , by concentrating on whether B was the appellant's

fiancée, the judge did , in fact, fall into that trap . He treated the definition in GEN 1.2 as determinative .

42.
A dopting the broad evaluative approach which we have described earlier, we find the evidence disclosed, albeit by a narrow margin, a relationship of sufficient commitment as to make B the appellant's partner for the purposes of Part 5A. B had exhibited such a commitment to the appellant in standing by him , both whilst he was on remand and also during his imprisonment, following conviction. They had begun to discuss a future life together.

43.
Although the judge said he would have found it unduly harsh for B to go with the appellant to Albania, the judge failed to say whether he would have found it unduly harsh for B to remain in the United Kingdom, in the event of the appellant's deportation. It is, however, plain from the judge's decision that he would undoubtedly have reached the conclusion that such a scenario would not be unduly harsh on B. As the judge observed, the relationship was "still in a comparatively early stage". Whilst it would be unpleasant for B, as the judge acknowledged, there was no indication that her grief would be long - lasting or so severe as to affect her health.

44.
Any error that the judge may have committed in terms of having undue regard to the definition in GEN.1.2. is, accordingly, immaterial. The judge was entitled to his findings regarding the actual substance of the relationship . On the basis of those findings, the appellant's case fail ed , whether B is regarded as his partner, or not. Mr Malik's submission that there is always a different, h igher t hreshold to overcome under section 117C(6), compared with section 117C(5) , is not right, for the reasons we have given at paragraphs 2 4 to 2 6 above.

45.
B has made a new witness statement. Mr Malik rightly conceded that this could not affect the question of whether the First-tier Tribunal Judge erred in law. Mr Malik also informed us, on instruction, that B says she is now pregnant with the appellant's child. That also does not affect the findings of the First-tier Tribunal Judge, based on the evidence as it was before him. It will be for the appellant to decide whether to make representations to the respondent , by reference to these developments.

Decision

The decision of the First-tier Tribunal does not contain error on a point of law, such as to require that decision to be set aside. The appeal is accordingly dismissed.

No anonymity direction is made.

Signed Date

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber