Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11530/2014

THE IMMIGRATION ACTS

Heard at Stoke on Trent	**Determination Promulgated**
On 31 October 2014	**On 3 November 2014**

Before

Deputy Upper Tribunal Judge Pickup
Between

Waqas Khan
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr A Hussain, counsel acting on direct access
For the respondent: Mr A McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Waqas Khan, date of birth 3.3.88, is a citizen of Pakistan.

2. This is his appeal against the determination of First-tier Tribunal Judge Chohan promulgated 6.6.14, dismissing his appeal against the decision of the respondent to refuse his application made on 23.1.14 for leave to remain in the United Kingdom on the basis of family life with a partner present and settled in the UK. The Judge heard the appeal on 22.5.14.

3. First-tier Tribunal Judge Hollingworth granted permission to appeal on 28.7.14.

4. Thus the matter came before me on 31.10.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Chohan should be set aside.

6. In a single line granting permission to appeal, Judge Hollingworth stated, "It is arguable that the proportionality exercise has not been carried out on a sufficient basis."

7. At the outset of the hearing before me, Mr Hussain, who did not represent the appellant at the First-tier Tribunal, sought leave to amend grounds of appeal to rely on Appendix FM of the Immigration Rules. For the reasons set out below I refused permission.

8. The refusal decision of the Secretary of State considered Appendix FM R-LTRP, but found that the appellant had failed to demonstrate that he had been living with Ms Green for at least 2 years prior to the date of application and that he had failed to provide sufficient evidence to show that he was in a genuine and subsisting relationship with a partner. In the circumstances, EX1 did not apply. The decision also considered paragraph 276ADE, but concluded that the appellant had not shown that he had lost all ties to his home country, including social, cultural and family.

9. The grounds of appeal to the First-tier Tribunal specifically state that, "this application was based upon the Article 8 ECHR Family Life Rights of the appellant, his partner and her son." The grounds contained no reference whatsoever to the Immigration Rules. The covering letter, dated 22.1.14, accompanying the application to the First-tier Tribunal makes no reference to Appendix FM or any other aspect of the Immigration Rules. Instead, it asserts an article 8 family life.

10. At the First-tier Tribunal appeal hearing the appellant was represented by Mr D Chalk of One Stop Immigration Service, who stated at the outset of the hearing that the appeal was in respect of article 8 family life only. That is recorded at §9 of the determination and I have seen the judge's handwritten record of proceedings to the exact same effect. Mr McVeety advised that the Presenting Officer's note of the hearing stated the same. I granted a brief adjournment to enable Mr Hussain to speak with Mr Chalk by telephone, but the latter was reportedly unable to recollect the hearing at all.

11. The skeleton argument drafted by Mr Chalk and presented to the First-tier Tribunal Judge stated that the issue in the appeal was "whether the decision of the Secretary of State constituted an unlawful and disproportionate interference with the article 8 ECHR family life rights of all those affected by the decision." The skeleton argument contains no reference to the Immigration Rules. In the circumstances, I am satisfied

that the appellant did not pursue any claim under the Immigration Rules at all, either in the grounds of appeal or at the hearing.

12. Furthermore, the grounds of appeal to the Upper Tribunal, also drafted by Mr Chalk, make no reference to or suggestion that the appellant could meet any of the Immigration Rules. The grounds takes issue only with article 8 and the proportionality assessment.

13. I am satisfied that throughout the appeal process this was and was intended to be an application made on the basis of family life outside the Immigration Rules, relying the right to respect for private and family life under article 8 ECHR. Prior to Mr Hussain's appearance before me, there was no application to amend the grounds of appeal or any suggestion that the appellant might meet Appendix FM of the Immigration Rules.

14. Mr Hussain asserts that the First-tier Tribunal Judge should have, of the judge's own volition, considered Appendix FM, and that, had he done so, the appeal should and would have been allowed under the Immigration Rules. Reliance is based on R-LTRP and the assertion that the appellant and his partner had lived together for two years prior to the date of application. The witness statement evidence does state that they met in June 2011 and a few months later began to live together. The witness statements dated 15.5.14 and 22.5.14 state that they have lived together as partners for two and a half years. At §2 of the determination it is also stated that the they have been together for two and a half years. The application was made on 23.1.14. The complaint of the Secretary of State in the refusal decision was that there was insufficient evidence that they had lived together for two years, as claimed, the requirement being to show that as at the date of application. However, the issue begs the question of what evidence there was other than the appellant's claim and that of his partner. The evidence in the appellant's bundle does not appear to address or assist with respect to this issue.

15. Mr Hussain next argued that had the judge realised that the appellant met the eligibility requirements he would have had to consider EX1 and whether there were insurmountable obstacles to family life continuing outside the UK, at which stage the appellant relies on his partner's relationship and contact with her child, who is resident with the child's father.

16. However, we do not in fact know for what reason neither the appellant nor his representative did not pursue the claim under the Immigration Rules. It is not necessarily the case that the two year cohabitation point was missed, it could, for example, have been a recognition that it was not possible to demonstrate insurmountable obstacles to continuing family life outside the UK.

17. What is clear is that none of these issues were raised before the First-tier Tribunal. The hearing, at the express invitation of the appellant's representative considered only the article 8 family life claim. In the circumstances of this case and as outlined above, I do not accept that this was a Robinson obvious point that should have been

identified and addressed by the First-tier Tribunal, despite the fact that nothing in the papers or the evidence or the submissions of the appellant's representative raised Appendix FM at all.

18. There is case authority for this approach. In Sarkar [2014] EWCA Civ 195, the Court of Appeal held that even when Article 8 is in the grounds of appeal, if no evidence is adduced and no submissions made the Appellant can be taken to have abandoned it as a ground of appeal and the Judge does not err in failing to deal with it. I see no particular reason why the same principle should not apply to Appendix FM.

19. In the circumstances, I consider any claim under Appendix FM can be taken to have been abandoned, if ever made, and conclude that it was far too late to raise Appendix FM at this late stage. I therefore refused permission to amend the grounds of appeal.

20. It remains open to the appellant to make a fresh application relying specifically on Appendix FM, if he now believes that he qualifies. This is, of course, highly relevant to any argument as to error of law in respect of article 8 proportionality. It can hardly be disproportionate to refuse to grant leave to remain on the basis of article 8 ECHR family life when the appellant is adamant that he can demonstrate he meets the requirements of Appendix FM for leave to remain.

21. In relation to the issue raised in the grounds of appeal to the Upper Tribunal and in respect of which permission to appeal was granted, I find as follows.

22. It is clear from the determination that Judge Chohan found no compelling circumstances in this case. It is debatable whether in the light of section 86 of the 2002 Act that was sufficient not to deal with article 8. However, the judge did go on to consider article 8 ECHR and applied the Razgar steps.

23. At §10 the judge found that the appellant had established family life with his partner in the UK. At §14 and §15 the judge found the decision potentially interfered with that family life so as to engage article 8, but that such interference was in accordance with the law, i.e. the legitimate and necessary aim of the state to protect the economic well-being of the UK by the application of immigration control.

24. Whilst the decision on proportionality is briefly set out in §15, it is clear that in conducting the proportionality balancing exercise between on the one hand the family life rights of the appellant and Ms Green and on the other the public interest in removal, the judge took into account that at the time of entering into a relationship with Ms Green he had no lawful basis for being in the UK. He came as a student and could have had no legitimate expectation of being able to stay except in accordance with the Immigration Rules. His leave expired on 25.11.11 but rather than go home he embarked on a relationship with Ms Green. They must be taken to have realised that any such relationship was precarious and that the appellant was in due course likely to be removed.

25. The judge took into account that the appellant has family in Pakistan and that following contact with them, they did not object to his relationship with a Christian

woman and thus the judge concluded that there would not be difficulties from his family on return to Pakistan. The judge took into account that Ms Green was reluctant to go to Pakistan, because of her son in the UK. The judge also bore in mind that there was no reason why the appellant could not return to Pakistan and make an application for settlement from there. There is no particular reason why the appellant should be excused compliance with the financial requirements of the Immigration Rules for an application for settlement in the UK.

26. Mr Hussain submits that the decision took no account of the best interests of Ms Green's child pursuant to section 55. However, there is no evidence that this appellant has any relevant relationship with that child, who lives with his natural father, even though Ms Green may have regular contact with the child. There is no evidence in the appellant's bundle that addresses the best interests of the child or sets out any difficulty for that child if the appellant is removed. Ms Green has ILR and cannot be compelled to leave, thus whether she does so or not is entirely a matter for her. The judge had to assess the case on the rather slender evidence presented to him and Mr Hussain has not identified any part of the evidence that he can demonstrate was not taken into account.

27. In the circumstances, I find no error of law in the proportionality assessment made by Judge Chohan and on the circumstances presented to the judge can see little scope for any other conclusion.

28. I also mention in passing that even if the determination were set aside and remade, in respect of the assessment of the public interest in any article 8 consideration, I would have to take into account section 117B(4) that little weight should be attached to a private life or a relationship formed with a qualifying partner that is established by a person at a time when the person is in the UK unlawfully.

Conclusions:

29. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed: Date: 31 October 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed: Date: 31 October 2014

Deputy Upper Tribunal Judge Pickup