Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34082/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19th September 2014	**On 8th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR ZEESHAN AJMAL KHAN
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Iqbal, Counsel
For the Respondent: Ms A Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Pakistan born on 5th January 1980. The Appellant had arrived in the UK on 31st May 2007 with entry clearance as a student valid until

31st August 2009. The Appellant was subsequently granted leave to remain as a Tier 4 Student on three further occasions with valid leave until 27th July 2013. On 9th July 2013 the Appellant applied to vary his leave as a dependant on his partner and this was refused by the Secretary of State on 8th August 2013. Prior to this on 3rd August 2012 the Appellant's partner had succeeded in his appeal before the First-tier Tribunal under Article 8 on the basis of his family life with the Appellant as a gay partner when the partner had applied as a Tier 1 (Post-Study Work) Migrant dependant of the Appellant. On 3rd June 2013 the Respondent granted the Appellant's partner 30 months' leave to remain based on his family life with the Appellant.

2. The Appellant appealed against the refusal of the Secretary of State and the appeal came before First-tier Tribunal Judge O'Garro sitting at Hatton Cross on 17th June 2014. In a determination promulgated on 11th July 2014 the Appellant's appeal based on Article 8 of the European Convention of Human Rights was dismissed.

3. On 27th July 2014 the Appellant lodged Grounds of Appeal to the Upper Tribunal. On 31st July 2014 First-tier Tribunal Judge Cox granted permission to appeal. In granting permission the judge noted that the grounds in essence contended that the judge had failed to apply *Secretary of State for the Home Department v Devaseelan (Tamil) [2002] UKIAT 00702* to the Appellant's civil partner's previous determination and in making findings devoid of evidential basis and therefore the decision was perverse in relation to the possibility of their living together in either Pakistan or Mauritius. Judge Cox found that in the circumstances there was arguable merit in both Grounds of Appeal.

4. On 8th August 2014 the Secretary of State in a short Rule 24 response merely indicated an intention to oppose the Appellant's appeal and that the Judge of the First-tier Tribunal directed herself appropriately.

5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by his instructed Counsel Mr Iqbal. Mr Iqbal is familiar with this case having appeared before the First-tier Tribunal. The Secretary of State is represented by her Home Office Presenting Officer Ms Everett.

The Facts

6. The Appellant is a homosexual and is in a homosexual relationship with his partner Pravinsigh Boodoo. Mr Boodoo is not the subject of this appeal. He attends the hearing merely as Mr Khan's partner. It is not disputed that they are in a homosexual relationship. Mr Boodoo attended and gave oral evidence before the First-tier Tribunal in the Appellant's appeal. He is a Mauritian national who came to the UK in 2005 and whose immigration history is set out above. The Appellant and his partner met through a dating website and have been in a relationship since August 2009. They have been living together as a couple since June 2011 and entered into a civil partnership in December 2011. Their relationship is not challenged by the Secretary of State.

Submissions/Discussion

7. Mr Iqbal points out that when Mr Boodoo applied for leave to remain instead of being given leave in line with the Appellant he was given three years' leave giving him leave beyond the date that Mr Khan held under his current visa. Consequently when Mr Khan's leave expired he applied on the basis of his relationship with Mr Boodoo. It is emphasised to me that it was the Secretary of State that granted this leave. Mr Boodoo's appeal came before Judge of the First-tier Tribunal Miles at Hatton Cross on 25th July 2012. That appeal was allowed on 3rd August 2012 under Article 8 of the European Convention of Human Rights. Following that successful appeal on 3rd June 2013 where the Secretary of State because of Mr Boodoo's circumstances granted him leave within the Immigration Rules under D-LTRP.1.1 of Appendix FM. As a result Mr Boodoo's biometric residence permit was endorsed with limited leave to remain in the United Kingdom initially for 30 months. It is clear from the letter that further applications could be made. It is the submission of Mr Iqbal that the judge has failed to give due and proper consideration in her determination to the decision of Judge Miles and the subsequent leave to remain granted to Mr Boodoo.

8. Ms Everett submits that the evidence has never been tested as to whether the Appellant can return to Pakistan or particularly as to whether or not the Appellant and Mr Boodoo can return to Mauritius. She submits that the judge has addressed all the issues and whilst acknowledging the scenario is unusual submits that there is no material error of law in the decision of the First-tier Tribunal Judge.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a

point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

11. Certain factual issues are of relevance from the determination. Firstly at paragraph 25 it is confirmed that the Respondent in her letter of refusal did not deal with the Appellant's asylum application because paragraph 339NA states that before a decision is taken on the application for asylum the applicant should be given the opportunity of a personal interview on his application but that the Appellant failed to do so. There is consequently no extant asylum application pending before the Secretary of State. Secondly at paragraph 26 Mr Iqbal indicated that he would not be pursuing the claim pursuant to Article 3 of the European Convention of Human Rights and consequently merely relies on the Appellant's Article 8 rights to family life in his appeal.

12. The Grounds of Appeal are based on two contentions. Firstly that the First-tier Tribunal Judge failed to apply the principles set out in *Devaseelan*, namely:

> *"If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated."*

13. I do not consider that the judge has failed to look at that scenario. Mr Boodoo was granted leave to remain as the partner of Mr Khan during the tenure of Mr Khan's then current visa. That factor is recognised by the First-tier Tribunal Judge. The second contention made is that the judge's findings are perverse. Again I do not find that to be the situation. The judge was looking at the position as to whether or not the Appellant was entitled to succeed under Article 8 outside the Immigration Rules. The judge had due consideration to the decision in *Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)*. Thereinafter the law has developed further.

14. The Tribunal in *Gulshan* made clear and has repeated subsequently in *Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)* at paragraph (31):

> *"Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."*

15. The Court of Appeal in *MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985* at paragraph 128 went on to state:

> *"Nagre does not add anything to the debate save for the statement that if a particular person is outside the Rule then he has to demonstrate, as a preliminary to a consideration outside the Rule that he has an arguable case that there may be good grounds for granting leave to remain outside the Rules. I cannot see much utility in imposing this further intermediary test. If the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision maker."*

16. The judge made findings that she was entitled to find that the Appellant's circumstances were consequently not compelling. Whether I or another judge would have reached that decision is not the issue that is before me. Providing the decision is not perverse and I do not consider it to be so, the question is whether or not the judge has materially erred in law and I am satisfied that she has not. In such circumstances the Appellant's appeal fails.

17. It is perhaps appropriate within this determination to add a final paragraph. I acknowledge that the situation in which Mr Boodoo and the Appellant now find themselves is unsatisfactory and indeed Ms Everett acknowledged this on behalf of the Secretary of State. Ms Everett was unable to explain the basis upon which the limited leave to remain was granted in 2013 to Mr Boodoo. What however is clear is that the First-tier Tribunal Judge was correct in effectively stipulating that the issue has never been tested as to whether or not the Appellant and Mr Boodoo can return and exercise family life either in Mauritius or in Pakistan. Neither Judge Miles' determination nor Judge O'Garro has been promulgated on this basis because the argument before them was an attempt to maintain family life in the UK based on current visas issued within the UK albeit not necessarily to the Appellant that appeared before them but to the other party. I acknowledge that there must be benefit in this matter in there being continuity. It is telling in this determination that it appears that neither Appellant has ever sought to pursue an asylum claim based on their homosexuality and their relationship. That of course is a matter for them.

Decision

18. The decision of the First-tier Tribunal does not disclose a material error of law and the appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

19. The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris