



**Upper Tribunal
Asylum and Immigration Tribunal**

Appeal Number: IA/06268/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 11 June 2015**

**Decision and Reasons
Promulgated
On 16 June 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

**MR MOHAMED FAHEMUDDIN GHORI
(anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the appellant: Mr A Otchie, Counsel

For the respondent: Mr D Clerk, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the home Department. The respondent is a citizen of India born on 14 March 1983. However for the sake of convenience, I shall refer to Mr Mohamed as the appellant and the Secretary of State as the respondent which are the designations they had before the First-tier Tribunal.

2. The appellant appealed to the First-tier Tribunal against the decision of the respondent dated 15 January 2014 to refuse to vary his leave to remain in the United Kingdom outside the Immigration Rules. First Tier Tribunal Judge Aido allowed the appellant's appeal in a determination dated 30 September 2014.
3. Permission to appeal was granted by First-tier Tribunal Judge Martin dated 12 November 2014 stating that it was arguable that the Judge erred in her approach to Article 8 in finding compelling circumstances to justify consideration outside the Immigration Rules on the basis that the appellant has been in this country lawfully for seven years when that is specifically excluded from paragraph 276 ADE and is insufficient to amount to private life worthy of protection. There was also no consideration in the determination of which parts of Appendix FM the appellant does and does not meet which is relevant to an assessment a proportionality as recognised by paragraph 117 of the Nationality, Immigration and Asylum Act 2002.

First-tier Tribunal's findings

4. The Judge made the following findings in his determination which in summary are the following.
 - I. [Paragraph 3] "At the outset of the hearing both representatives agreed that the live issue before me is that of Article 8 outside the Immigration Rules".
 - II. [Paragraph 12] "Firstly I find that it is agreed by both parties and I make a finding that the appellant cannot succeed under the Immigration Rules. He does not satisfy the requirements of appendix FM of the Immigration Rules in paragraph 276 ADE. Applying the case of **Gulshan (Article 8-new rules [2013] UKUT 00640**, I have considered whether there are compelling circumstances not sufficiently recognised by the Rules. Firstly I find that the appellant has been lawfully in the United Kingdom over a period of more than seven years. I also note that he was granted discretionary leave to remain for a period of three years based on his relationship and marriage to someone present and settled in the UK, however that relationship has now ended due to the other party's fault. I therefore find that it is a compelling circumstances that the Secretary of State has recognised that the appellant previously had family and private life in the UK".
 - III. [Paragraph 13] "With regard to the credibility I find that the appellant and sponsor have a relationship together. They are living together and there have provided documents to show that they live together".

- IV. [Paragraph 14] “I now deal with the issue under Article 8 outside the Rules applying **Razgar [2004] UK HL 27** sequential test. I find that there is family life between the appellant and the sponsor according to Article 8 of the Immigration Rules there is also private life between them. They live together. They also intend to get married which I accept. The respondent’s decision would amount to an interference with that relationship and it potentially engages Article 8 of the Human Rights Convention. As the appellant is from India and the sponsor is from Pakistan there are difficulties for them living under the same roof outside the UK due to difficulties of getting a visa from each other’s Embassy. The decision is in accordance with the law. Applying section 117B of the Nationality, Immigration and Asylum act 2002, I find that the maintenance of effective immigration control is in the public interest however section 117B (2) notes that 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 UK are able to speak English because they will be less of a burden on the taxpayer and they are able to integrate into society. The appellant has a very good academic history had obtained a first-class engineering degree. He can speak English very well and gave evidence in English before me. He came to the United Kingdom as a student, he has passed his life in the UK test and has been working at Morrison’s since 2007 he is therefore not a burden on the taxpayer. He is able to integrate into society and is financially independent”.
- V. [Paragraph 15] “His private life and his relationship with this partner was established at the time when he was lawfully in the United Kingdom. Taking all the factors of this case into account and the submissions made by Mr Ell and the fact the appellant’s relationship unfortunately ended and so did the relationship of his partner. This is a case in which the appellant’s right to private and family life should be respected. I therefore find that the respondent’s decision amounts to a breach of Article 8 of the Human Rights Convention.
- VI. [Paragraph 16] “The appeal is dismissed in respect of the Immigration Rules”.
- VII. [Paragraph 17] “The appeal is allowed on human rights grounds (Article 8 only)”

Grounds of appeal

5. The respondent in her grounds of appeal states the following which I summarise. The Judge made a material misdirection of law in respect

of Article 8. The Judge stated that the appellant cannot succeed under the Immigration Rules as he does not satisfy the requirements of appendix FM or paragraph 276 ADE. However the Judge goes on to consider it compelling that the appellant has been lawfully present in the United Kingdom for more than seven years and that his previous relationship ended due to the other party's fault and that the appellant now has a new relationship.

6. The Judge finds that there would be difficulties for the appellant and his sponsor in continuing their family life outside of the United Kingdom due to "difficulties of getting a visa from each other's Embassy" and that this is a case with the appellant's private and family life "should be respected".
7. The respondent submits that the instant appeal does not disclose a disproportionate breach of Article 8 as there is no evidence of the difficulties that the first-tier Tribunal Judge refers to a paragraph 14 and nor the efforts made by the appellant and her sponsor to secure a visa from their respective Embassies.
8. There is a clear public interest in affirming coherent system of immigration control as set out by section 117B and this is firmly within the ambit of that interest for those who wish to remain here do so in compliance with the Immigration Rules. Article 8 is not a general dispensing power and does not confer a choice upon the appellant or the sponsor as to where they wish to enjoy their family life.

The hearing

9. I heard submissions from both parties as to whether there is an error of law in the determination. The full notes of the hearing are in my record of proceedings.

Decision on error of law

10. The Judge dismissed the appellant's appeal under the Immigration Rules but allowed the appellant's appeal pursuant to Article 8 of the European Convention on Human Rights finding that the appellant's family and private life that he has built in this country, in the seven years that he has been here, has to be respected.
11. The Judge found that the compelling circumstances in the appellant's case where he should succeed pursuant to Article 8 when he cannot succeed under the Immigration Rules was that he is a citizen of India while his partner is a citizen of Pakistan. The Judge concluded that it would be difficult for them to obtain visas from their respective Embassies and therefore they could not live together in any of these

two countries. The other exceptional circumstances that the Judge found exist in the appellant's case is that the respondent had granted the appellant discretionary leave to remain in the United Kingdom on the bases of his relationship with a previous partner and that demonstrates that the respondent accepted that the appellant has family life in this country.

12. No background evidence has been referred to in the determination upon which the Judge reached his conclusion that the appellant and his sponsor who are citizens of India and Pakistan respectively, cannot continue their married life in either one of these countries. He merely accepted the word of the appellant that this is the case. The Judge materially erred in law because there was no background evidence before him that the appellant and his partner would not be able to live in Pakistan or India together given his finding that they wish to marry and therefore would be a married couple.
13. The Judge also felt materially into error when he found that the appellant had been granted discretionary leave by the respondent on the bases of his family life with a previous girlfriend. The appellant was given discretionary leave for his relationship with this particular partner. There was no suggestion that the respondent accepted that the appellant has family and private life in the United Kingdom which could, in effect be "transferred" to the appellant's current partner. The judge did not take into account that in refusing the appellant further discretionary leave, the respondent stated that the grounds upon which appellant was previously granted discretionary leave no longer persist and therefore his application is refused pursuant to 322 (1) of the Immigration Rules. This should not have been read by the Judge as an entitlement granted to the appellant that his family life will be respected and recognised for ever more notwithstanding who his partner is. As to whose fault it was that the relationship broke down is irrelevant and the Judge placed undue weight on this.
14. The Judge failed to adequately consider section 117B either implicitly or explicitly. He only considered the appellant's ability to speak English his and his economic viability but failed to consider any other public interest factors particularised within section 117B most notably 117B (i), (3)& (4). His analysis was perfunctory and unreasoned. In the case of **AM (S 117B) Malawi [2015] UKUT 0260 (IAC)**, it was stated in the headnote "an appellant can obtain no positive right to a grant of leave to remain from either section 117B (2) or (3) whatever the degree of his fluency in English or the strength of his financial resources".
15. In **DM (Zambia) v SS HD (2009) EWCA Civ**, Sedley LJ said that "the court has said many times that you cannot dispose of an Article 8 proportionality issue in a perfunctory or formalistic way. It requires a structured decision, however economically expressed".

16. In the case of **PG (USA) v the Secretary of State for the home Department [2015] EWCA Civ 118** at paragraph 27, it is stated “in considering proportionality in this context, the case for remaining in the United Kingdom on the basis of private and family life needs to be considered against the relevant policy of the Secretary of State.
17. As Beaton LJ observed in In the case of **Hummayun v Secretary of State for the home Department [2014] EWHC, 2901 (admin) (4 July 2014)** that the mere fact that the claimant may have explained exceptional circumstances is merely one side of the proportionality equation. The public interest consideration on the other side of the equation need also to be placed into the balance therewith.
18. The Judge by finding seven years residence in this country amounts to an exceptional circumstance in favour of the appellant, failed to explain why he considered this to be an exceptional factor, when residence of 20 years is required under the Immigration Rules for the appellant’s family and private life to be worthy of protection. The Judge placed no reliance on the appellant’s failure to meet the requirements of Appendix FM in his proportionality assessment.
19. The Judge has given no consideration to the fact that the appellant could make an application for entry clearance from his home country to join his spouse if he is able to meet the requirements of the Immigration Rules.
20. The upshot is that the determination of the Judge is affected by a material error by his failure to conduct a proper assessment of the appellant’s Article 8 rights.
21. I find that there is a material error of law in the determination of First-tier Tribunal and I set it aside in its entirety.
22. The appellant’s representative made an application that the appeal be sent back to the first-tier Tribunal for it to be reheard. I was of the view that given findings of fact have to be made, it is appropriate and lawful and in accordance with the Presidents Practice Directions for the appeal to be sent back to the First-tier Tribunal for a fresh hearing.
23. I directed the appeal be placed before any First-tier Tribunal Judge, other than Judge Aido to be heard on a date available.

DECISION

The Secretary of State’s appeal is allowed

Signed by

A Deputy Judge of the Upper Tribunal
Mrs S Chana
2015

Dated 13th day of June