Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09978/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 July 2015	**On 18 August 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Harjinder Singh
[No anonymity direction made]

Claimant

Representation:
For the claimant: Ms C Charlton, instructed by Bhogal Partners Solicitors
For the appellant: Mr P Nath, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Harjinder Singh, date of birth 1.7.86, is a citizen of India.

2. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Narayan promulgated 23.12.14, allowing, on Article 8 ECHR grounds only, the claimant's appeal against the decisions of the Secretary of State, dated 5.2.14 to refuse his application made on 31.1.12 for leave to remain (LTR) in the UK as a Tier 4 (General) Student migrant, pursuant to the Points Based System (PBS) of the Immigration Rules. The Judge heard the appeal on 5.12.14.

3. First-tier Tribunal Judge Nicholson granted permission to appeal on 19.2.15.

4. Thus the matter came before me on 23.7.15 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 Narayan should be set aside.

6. The appellant entered the UK in January 2010 and subsequently granted LTR as a Tier 1 Post Study worker to February 2012. That same month he made his in time application for LTR as a Tier 4 Student. Subsequent to his application, in October 2013, he married a British citizen.

7. There was no dispute in the First-tier Tribunal appeal hearing that the appeal could not succeed under the Immigration Rules, but Judge Narayan allowed the appeal outside the Rules on human rights grounds under Article 8 ECHR on the basis of the claimant's marriage. At §32 of the decision, Judge Narayan stated, "I find although it is a matter which is finely balanced that it is not proportionate to enforce immigration control because it would in fact be gravely detrimental to this appellant and his spouse and would not serve any useful purpose apart from the argument which is that the appellant would have to go back to India and make an application and so in effect not queue-jump. I find that the appellant's impeccable immigration history and his industrious life in the UK and the fact that it cannot be reasonably expected that his spouse relocate to India bearing in mind her family and job in the UK that the respondent's decision is not proportionate in all the circumstances of this case. I therefore find this appeal stands to be allowed under Article 8 of the European Convention on Human Rights."

8. In granting permission to appeal, Judge Nicholson noted that at §28 the First-tier Tribunal found the claimant's immigration status was not precarious at the time of his marriage, because he married before the refusal of his application. However, the claimant's immigration status was precarious, as was confirmed in AM (S117B) Malawi [2015] UKUT 0260 (IAC), because a person's immigration status is precarious if their continued presence in the UK will be dependent upon their obtaining a further grant of leave.

9. Whilst section 117B of the 2002 Act only requires the judge to give limited weight to the claimant's relationship if it was entered into at a time when the claimant was present illegally, nevertheless if it was entered into at a time when his immigration status was precarious, that is a relevant factor in any Article 8 proportionality balancing exercise. At the time the claimant married he had only section 3C leave, having made an application under the Immigration Rules that could not possibly succeed. The First-tier Tribunal Judge erred in concluding that his status was not precarious.

10. Further, the judge gave credit in the proportionality balancing exercise to the claimant's "impeccable immigration history," the fact that he speaks fluent English, and that he has been working legally. However, the claimant can obtain no positive right to a grant of leave to remain from section 117B, whatever the degree of his fluency in English, or indeed the strength of his financial resources. Neither does the fact that he complied with immigration control, no more than he was expected and required to do, increase the weight of his private and family circumstances in the balance against the public interest. The judge also failed to take into account that immigration control is deemed to be in the public interest by virtue of section 117B.

11. I also note that before going on to address Article 8 ECHR, the judge did not consider whether the private and family life circumstances of the claimant were so compelling and insufficiently recognised in the Immigration Rules so as to render the decision of the Secretary of State unjustifiably harsh so as to require, exceptionally, the appeal to be allowed under Article 8 ECHR. In MF (Nigeria) v SSHD [2013] EWCA Civ 1192, the Court of Appeal held that in relation to deportation cases the 'new' Immigration Rules are a complete code but involve the application of a proportionality test. Whether that is done within the new rules or outside the new rules as part of the Article 8 general law was described as a sterile question, as either way the result should be the same; what matters is that proportionality balancing exercise is required to be carried out. However, if the Rules have already adequately addressed the private and family life circumstances, there is no purpose in doing so again under Article 8 ECHR.

12. This approach has subsequently been endorsed by the Court of Appeal in Singh v SSHD [2015] EWCA Civ 74, and again in SSHD v SS (Congo) & Ors [2015] EWCA Civ 387, promulgated after the date of Judge Narayan's decision, where the Court of Appeal held that it is clear that whilst the assessment of Article 8 claims requires a two-stage analysis, and there is no threshold or intermediary requirement of arguability before a decision maker moves to consider the second stage, whether that second stage is required will depend on whether all the issues have been adequately addressed under the Rules. In other words, there is no need to conduct a full separate examination of Article 8 outside the Rules where in the circumstances of a particular case, all issues have been addressed in the consideration under the Rules. The Tribunal failed to identify what compelling circumstances were insufficiently provided for in the Immigration Rules and why those circumstances would render the decision of the Entry Clearance Officer unjustifiably harsh.

13. As clarity on this issue was not available at the time of Judge Narayan's decision, it was not an error of law to go on in any event to make an Article 8 ECHR assessment. However, for the reasons set out herein, that assessment was flawed and amounts to an error of law.

14. With regard to the judge's reference to whether it was proportionate that the claimant should return to India to make a partner entry clearance application, this is not a Chikwamba situation. The claimant failed to meet the requirements of Appendix FM for leave to remain in the UK and it is by no means clear that any

application from outside the UK could succeed. Whilst the claimant could not meet the Rules, one might have expected the judge to consider the test that is provided within the Rules, namely whether there are insurmountable obstacles to continuing family life outside the UK, defined in EX1 and EX2 as very significant difficulties which could not be overcome or which would entail very serious hardship. Or, under paragraph 276ADE, the test of very significant obstacles to the claimant's integration in India.

15. Both parties agreed that no further evidence was necessary and that I could proceed to remake the decision without the need for any further hearing. Having indicated to the parties that I found that the decision was in error of law and had to be set aside, I offered each representative the opportunity. However, both agreed that they had said all that they could in their respective submissions.

16. In remaking the decision, I take account of all the evidence now in the papers before me and drawn to my attention by the respective bundles of the parties, including the appellant's 353-page bundle of objective and subjective material whether or not specifically referred to. In particular, I have carefully considered the claimant's witness statement of 29.9.14 the undated witness statement of Kiranjeet Kaur Chahal, the claimant's wife, and the letter before claim, dated 31.3.13.

17. Whilst there was no proportionality assessment under Appendix FM or paragraph 276ADE, as stated above, the tests under the Rules, designed from 2012 to be the Secretary of State's response to private and family life claims are relevant. Under EX1 as defined under EX2, the claimant would have to show insurmountable obstacles to family life with his spouse continuing in India. That she has employment and family members in the UK and does not want to relocate to India does not demonstrate insurmountable obstacles or significant difficulties they would face in continuing family life together outside the UK and which could not be overcome or would entail very serious hardship for either of them. Neither does the fact that she does not like the heat or was ill after visiting on two previous occasions. There is no medical evidence to demonstrate that living in India would entail very serious hardship.

18. Similarly, in relation to private life, I have first to take into account that as his status has been precarious throughout, little weight should be given to any private life the claimant has developed whilst in the UK. As far as his wife's private life is concerned, as a British citizen she is not required to leave the UK and it will be her choice whether to do so in order to continue family life. In any event, I am not satisfied that even applied to either of them that they have demonstrated anything which could be properly described as very significant obstacles. Although born in the UK she has visited India and has family there, and has evidently been raised with an Indian cultural background amongst an extended family in the UK.

19. Having considered all the evidence in the round, taken together, I find that there are no compelling circumstances in this case that would not have been considered within the Immigration Rules for private and family life, such that the decision of the Secretary of State would be unjustifiably harsh. However, as there was no such

consideration by the Secretary of State and it is clear that the Rules could not be met, there has therefore been no proportionality balancing exercise and thus it is not inappropriate to do so under Article 8 ECHR private and family life, taking account of section 117B of the 2002 Act that immigration control is deemed to be in the public interest.

20. That the claimant cannot meet the requirements of the Immigration Rules, for the reasons obvious from the decision of the First-tier Tribunal, is highly relevant to any Razgar Article 8 proportionality assessment.

21. I note from the claimant's witness statement that he has been looking for professional jobs and wants to start his own business. However, he now works as a railway engineer. He has completed a MSc in international business and management, which will stand him in good stead, together with his lengthy experience in the UK, in the job market on return to India.

22. I take into account that Ms Chahal is a British citizen born in the UK and that the majority of her family are in the UK. However, when she met the claimant his immigration status was precarious and she knew that he was here on a temporary basis as a student. He and she could have had no legitimate expectation of being able to remain in the UK except by meeting the requirements for further leave to remain, and in the event had only 3C leave, pending the outcome of an application that in fact could not possibly succeed and in respect of which the decision was awaited. He could have withdrawn that application and made an application for leave to remain on the basis of being the partner of a British citizen under Appendix FM, but did not do so, evidently because he could not meet those requirements either.

23. Article 8 is not a shortcut to compliance with Immigration Rules and the parties are not entitled to settle together in the UK just because that is their desire or choice. In the circumstances, I find that, when conducting the Razgar balancing exercise between on the one hand the rights of the claimant and his wife and on the other the public interest in the legitimate and necessary aim to protect the economic well-being of the UK through immigration control, little weight should be accorded to the relationship entered into in full knowledge of his precarious status. As stated above, that he speaks English or is gainfully employed, or has complied with immigration control are not matters that can be placed in the balance against the public interest, as confirmed in AM (S117B) Malawi.

24. In SS (Congo), after reviewing the authorities, the Court of Appeal stated, "It is clear, therefore, that it cannot be maintained as a general proposition that LTR or LTE outside the Immigration Rules should only be granted in exceptional cases. However, in certain specific contexts, a proper application of Article 8 may itself make it clear that the legal test for grant of LTR or LTE outside the Rules should indeed be a test of exceptionality. This has now been identified to be the case, on the basis of the constant jurisprudence of the ECtHR itself, in relation to applications for LTR outside the Rules on the basis of family life (where no children are involved) established in the United Kingdom at a time when the presence of one or other of the

partners was known to be precarious: see Nagre, paras. [38]-[43], approved by this court in MF (Nigeria) at [41]-[42]."

25. This claimant's case is one that meets the above circumstances. There are no children involved and the presence of the claimant was known to be precarious when the relationship and then marriage were entered into.

26. Putting all these matters together in the round with the evidence taken as a whole, I find that the decision of the Secretary of State is not disproportionate to the rights of the claimant and his wife, but is entirely proportionate. Neither do I find the decision unjustifiably harsh and consider that if she wishes to pursue family life with the claimant, it would not be unreasonable to expect the claimant's wife to relocate with him to India, on the basis that there is no evidence to demonstrate that there are insurmountable obstacles to doing so.

Conclusions:

27. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it on both immigration and human rights grounds.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

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

Deputy Upper Tribunal Judge Pickup

Dated