The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: IA/23682/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On July 2, 2015	**On July 6, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Before

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR WAQAS SHAHZAD
(NO ANONYMITY DIRECTION)

Respondent

Representation:

Appellant	Miss Fijiwala (Home Office Presenting Officer)
Respondent	Miss Bexson, Counsel, instructed by Adam Bernard Solicitors

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.

2. The appellant entered the United Kingdom as a student in January 2007 and was granted leave to remain until 2011. On March 16, 2011 he married Sofia Iqbal and was subsequently granted limited leave to remain as a spouse until March 26, 2014.

The parties separated in November 2012 but shortly before he submitted his current application on March 19, 2014 the appellant and her were attempting a reconciliation.

3. On March 19, 2014 the appellant applied for leave to remain under Section R-LTRP of Appendix FM as Sofia's partner because they intended to resolve their difficulties.

4. The respondent refused this application on May 23, 2014 and at the same time took a decision to remove him under Section 47 of the Immigration, Asylum and Nationality Act 1986.

5. The appellant lodged an appeal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on June 2, 2014.

6. The matter came before Judge of the First-tier Tribunal Blake (hereinafter referred to as the "FtTJ") on February 5, 2015 and in a decision promulgated on March 5, 2015 he allowed the appeal under the Article 8 ECHR.

7. The respondent appealed this decision on March 11, 2015 and Judge of the First-tier Tribunal Page gave permission on April 28, 2015. Permission was given because Judge of the First-tier Tribunal Page found it arguable that there was nothing about the appellant's current relationship that permitted the FtTJ to have considered the claim outside of the Immigration Rules. In the alternative Judge of the First-tier Tribunal Page found it arguable that the FtTJ failed to have regard to the fact the appellant failed to satisfy the requirements for either entry clearance or leave to remain and he failed to take into account the fact the appellant's private and family life had been formed when his immigration status was precarious.

8. The matter came before me on the above date and both parties were represented as set out above. The appellant was in attendance but his partner was unable to attend as she was caring for her mother who suffered from ill-health-evidence of a recent hospital discharge was submitted.

9. The First-tier Tribunal did not make an anonymity direction pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and I make no alteration to that order.

ERROR OF LAW SUBMISSIONS

10. Miss Fijiwala relied on the grounds of appeal and submitted the FtTJ had materially erred. The appellant had applied on the basis he wanted to remain to effect a reconciliation with his former wife who had divorced him 2013 but before the FtTJ he had argued he should be allowed to remain based on his eight month relationship with Lavanya Pathmaranjan. The appellant could not satisfy GEN 1.2 of Appendix FM and consequently he could satisfy the definition of partner as they had not lived together for two years and he had also failed to produce evidence of his divorce certificate. Following the decisions of Secretary of State for the Home Department v SS (Congo) [2015] EWCA Civ 387 and R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM-temporary separation-

proportionality) IJR [2015] UKUT 00189 (IAC) Miss Fijiwala submitted the FtTJ had erred by failing to follow the approach set out in those cases. He had failed to consider whether the appellant satisfied the Immigration Rules either on entry clearance or the fact the appellant could not satisfy the requirements necessary for leave to remain. The FtTJ found exceptional circumstances based on the appellant's partner's inability to speak Urdu, their mixed religions, the appellant's partner's mother was ill and the fact the appellant helped out in the family business. None of these amounted to insurmountable factors as defined in either the respondent's IDI's or SS (Congo) and Chen. Even if there were exceptional circumstances that merited consideration of the matters outside of the Immigration Rules the FtTJ erred by failing to balance all of the facts when assessing proportionality. In particular, the FtTJ attached too much weight to the decisions of Chikwamba v SSHD [2008] UKHL 40 and Hayat (nature of Chikwamba principle) [2011] UKUT 444 (IAC) when the appellant had failed to satisfy the Immigration Rules or produce the mandatory documentation requirements of Appendix FM-SE. The FtTJ failed to have regard, when assessing proportionality, the fact the relationship had been formed when the appellant's immigration status was precarious and that he had originally applied to remain based on his relationship with his ex-wife and he had failed to disclose his marital breakdown to the respondent until he applied to extend his leave.

11. Miss Bexson invited me to uphold the decision. She accepted the appellant did not meet the Immigration Rules in respect of his application to remain and she further accepted the appellant had failed to provide any financial evidence to demonstrate his wife met the financial requirements for entry clearance but she submitted the FtTJ had given reasons for finding this was a case that should be considered outside of the Rules and he had done this having regard to all of the circumstances. When assessing proportionality he had regard to Section 117B of the 2002 Act and his decision was open to him.

FINDINGS ON ERROR IN LAW

12. The appellant entered the country as a student in 2007 and his leave to remain was extended to enable him to continue his studies. Shortly before his leave expired he married Sofia in March 2012 but this marriage was short-lived because she left the matrimonial home in November 2012 and the FtTJ was told that she and the appellant divorced a year later. With the clock ticking on his leave the appellant stated he wanted to attempt a reconciliation but this failed miserably because according to the evidence given to the FtTJ the appellant had begun a new relationship with Lavanya around June 2014 (eight months prior to the hearing).

13. When the matter came before the FtTJ the appellant sought to remain on the basis of that relationship. Miss Bexson, who represented the appellant before the FtTJ, quite properly conceded in the lower court that the appellant could not satisfy Appendix FM Section EX.1 or paragraph 276ADE HC 395. Today, she also accepted that he failed to satisfy the Rules relating to entry clearance and in particular the financial requirement and the associated documentary requirements.

14. It is against this background the FtTJ should have considered whether there were factors that enabled him to consider this case outside of the Rules. At paragraph [99] of his determination he found the appellant's new circumstances had not been resolved by the respondent (as they had never been raised) and in particular, he felt the appellant's partner's language difficulties, the fact her mother was ill and she helped run the family business meant this was a case that could be dealt with outside of the Rules.

15. I concluded at the end of submissions there had been an error in law and I now set out my reasons for that conclusion.

16. Whilst the Immigration Rules are not necessarily a complete code they are nevertheless an important starting point. The appellant had applied for leave to remain under Section R-LTRP of Appendix FM. He clearly could not succeed based on the application he submitted because he was no longer with his ex-wife. That application was doomed to failure and any article 8 argument based on that relationship was similarly doomed. He had been given leave to remain to live with his wife but within eight months of marriage they had separated and according to him they were divorced twelve months thereafter. In fact, prior to issuing this current application they were divorced and within three months or so of submitting the application he had begun a relationship with Lavanya. There were therefore no circumstances meriting consideration outside of the Rules based on the original facts.

17. The FtTJ quite properly considered the appellant's changed position although in truth the appellant should perhaps have submitted a fresh application to enable the respondent to properly consider the application as against the FtTJ being asked, at first instance, to consider the position.

18. That relationship began when his status was precarious. Their private life was precarious as was any family life they struck up. The appellant knew why he had been allowed to stay so having a relationship with another woman outside of that marriage was certainly not something covered by any expectation to remain by virtue of his spousal visa. His expectation to remain ended in reality in November 2012 when his ex-wife left the matrimonial home. The appellant was therefore unable to meet the mandatory requirement of GEN 1.2 that defines a partner as someone living with the appellant for a period of two years prior to the date of application. Miss Bexson conceded at the original hearing this Rule could not be met and by accepting paragraph 276ADE could not be met she had to accept there were no insurmountable obstacles facing the appellant if he were returned.

19. The FtTJ failed to consider any of the entry clearance requirements but instead made findings on factors why the appellant's partner could not travel to Pakistan.

20. For the purposes of this assessment I am going to accept the FtTJ was able to consider the case outside of the Rules but in doing so he still had to consider the principles of Razgar [2004] UKHL 00027 and in particular proportionality.

21. Any assessment of proportionality requires consideration of Section 117B of the 2002 Act and whilst the appellant spoke English and had demonstrated an ability to work they were only some of the factors to be considered. Section 117B(1) makes clear "the maintenance of effective immigration controls is in the public interest."

22. The appellant failed to demonstrate he could meet any of the Immigration Rules and there was a total lack of evidence to show his new partner earned the £18,600 required for an entry clearance application. They also failed to produce any of the documents set out in Appendix FM-SE.

23. Miss Bexson referred me to Chikwamba and Hayat but the principle of Chikwamba was that requiring the appellant to return when he met the Rules was disproportionate. In this case the appellant had failed to demonstrate he met any of the Rules but the FtTJ gave this no weight to this. He also gave no weight to the fact the relationship began when his immigration status was precarious. These are significant matters a Tribunal must consider when assessing proportionality. The FtTJ's failure to do so amounted to a material error.

24. The Tribunal in SS (Congo) at paragraph [44] set out the correct approach to be taken and at paragraph [33] the Tribunal reiterates that very compelling reasons are needed to consider article 8 claims outside of the Rules. Even if I accept, for the purpose of this argument, this hurdle was overcome, the Court in Chen made clear there still has to be a significant interference.

25. The factors presented on the appellant and his partner's behalf do not amount to a significant interference when balanced against the importance of the maintenance of effective immigration control. The IDI's make clear that neither an inability to speak the language nor the fact one party is a British citizen amounts to an insurmountable obstacle.

26. Sales LJ in Agyarko [2015] EWCA Civ 440 found there was a gap between Section EX.1 of Appendix FM and what Article 8 might require in some cases. However he went on to say,

> "Thus it is possible that a case might be found to be exceptional for the purposes of the relevant test under Article 8 in relation to precarious family life even where there are no insurmountable obstacles to continuing family life overseas. This means that there is a gap between section EX.1 of Appendix FM and what Article 8 might require in some cases: see Nagre, paras. [41]-[48]. But this does not mean that the issue whether there are or are not insurmountable obstacles to relocation drops out of the picture where there is reliance on Article 8. It is a material factor to be taken into account: see Nagre, paras. [41] and [47]; Rodrigues da Silva and Hoogkamer v Netherlands, para. [39]; and Jeunesse v Netherlands, paras. [107] and [117]. In relation to precarious family life cases, as I observed in Nagre at para. [43], the gap between section EX.1 and the requirements of Article 8 is likely to be small."

27. There were no insurmountable obstacles as defined by Section EX.2 of Appendix FM and the FtTJ had to have regard to that fact but this is a precarious family and private life case because the appellant knew what his position was.

28. Sales LJ made clear at paragraph [31] of Agyarko that-

> "It is possible to envisage a Chikwamba type case arising in which Article 8 might require that leave to remain be granted outside the Rules, even though it could not be said that there were insurmountable obstacles to the applicant and their spouse or partner continuing their family life overseas. But in a case involving precarious family life, it would be necessary to establish that there were exceptional circumstances to warrant such a conclusion"

29. The FtTJ erred in finding these circumstances exceptional and his reliance on Chikwamba and the factors contained in paragraphs [99] to [104] and [121] and [122] had to be weighed against the factors set out above and of course the fact the appellant had family he could return to. There was no suggestion that his family did not accept his partner because she was a Hindu.

30. As regards the appellant's partner's mother's ill health there was limited evidence submitted. A discharge form was produced but there was no evidence of any ongoing treatment. It is a factor I have to consider on any proportionality assessment but it it is not a factor that on its own trumps all other concerns. Although it was claimed the appellant's partner helped run the family business no evidence of her level of involvement was adduced and in particular there was no evidence of any income received or accounts. The letter from the accountant is wholly insufficient.

31. Even if the FtTJ should have considered this claim outside of the Rules I am satisfied that in considering stage 5 of Razgar it would not be disproportionate to require the appellant to leave the United Kingdom and my reasosn for this are based on the findings I have made above.

32. In the circumstances, I find the FtTJ erred in allowing this appeal under article 8 ECHR and for the reasons set out above I set aside that decision and I dismiss this appeal.

DECISION

33. There was a material error in law. I set aside the FtTJ's decision and remake the decision. I dismiss the appeal under both the Immigration Rules and article 8 ECHR.

Signed: Dated: **July 6, 2015**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed: Dated: **July 6, 2015**

Deputy Upper Tribunal Judge Alis