Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26830/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22nd April 2015	**On 3rd June 2015**

Before

THE HONOURABLE LORD BANNATYNE
DEPUTY UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADEEL USMAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Ms F Beach, Counsel instructed by Selvarajah & Co

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, we shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Pakistan born on 4th April 1986. His appeal against the Respondent's decision to refuse to grant leave to remain pursuant to Article 8 was allowed by the First-tier Tribunal on 26th November 2014.

2. The Appellant entered the UK on 8th March 2006 with entry clearance as a student valid until 31st May 2009. His leave was further extended as a Tier 4 student until 8th July 2011. On 11th May 2011 the Appellant was arrested for working an excess number of hours. A decision was made to curtail his leave and his appeal was heard

by First-tier Tribunal Judge Eban, who found that the Appellant enjoyed family life and allowed his appeal. As a result the Appellant was granted discretionary leave from 13th December 2011 to 29th February 2012 in order for him to complete his studies and to marry his fiancée.

3. On 12th February 1012 the Appellant married Mrs Hangame Dayhistani, a British citizen. The Appellant then sought further leave to remain but this was refused on 13th December 2012. It would appear that the Appellant then sought reconsideration and the Respondent refused to grant leave to remain in a decision dated 12th June 2014 on the basis that the Appellant was not in a genuine and subsisting relationship with Mrs Dayhistani.

4. At the hearing before First-tier Tribunal Judge Chohan, it was accepted that the appeal was on Article 8 grounds only. The judge found that the starting point must be the decision of Judge Eban, who found that the Appellant and Mrs Dayhistani were credible witnesses and their relationship was genuine and subsisting. In the Respondent's decision of 13th December 2012 the Appellant's application had been refused on the basis that he had leave to remain for less than six months. At that time no issue was taken in respect of the Appellant's relationship with Mrs Dayhistani.

5. In relation to this appeal before the First-tier Tribunal, the Respondent relied on the Appellant's interview record in concluding that the relationship was not genuine and subsisting. The First-tier Tribunal considered the interview record in the light of the findings made by Judge Eban. He took into account the oral evidence of the Appellant and Mrs Dayhistani which was consistent. The judge found that Mrs Dayhistani and the Appellant were in a genuine and subsisting marriage. The judge went on to find that the Appellant had established family life and that removal would interfere with his family life which would have consequences of such gravity so as to potentially engage the operation of Article 8.

6. The judge found that since Judge Eban's decision nothing had really changed in respect of the parties' relationship apart from the fact that they were now married and therefore had reinforced their relationship. Following Judge Eban's decision, the Respondent granted the Appellant leave to remain in order for him to complete his studies and get married. That he had done and the judge saw no purpose in making him return to his home country in order to make an application for entry clearance.

7. The Appellant had been in the country lawfully and established a relationship at a time when he was here in a legal capacity. The judge found that the Appellant's leave to remain was not of a precarious nature. The Appellant could speak English and the evidence suggested that he was financially independent. The judge went on to find that, on balance, he was satisfied that the interference with the Appellant's family life was not necessary for any of the reasons set out in Article 8(2) of the ECHR.

8. The Respondent applied for permission to appeal on the ground that the judge had misdirected himself in law in failing to take into account Section 117 of the Nationality, Immigration and Asylum Act 2002. The Respondent accepted that the judge referred to Section 117, but submitted that he did not engage with the public interest factors contained therein. The judge had failed to adopt the correct approach at paragraphs 26 to 32 and therefore his Article 8 findings were unsustainable as the judge had failed to properly acknowledge the public interest.

9. In ground 2 the Respondent submitted that the judge's conclusion that nothing had really changed in respect of the Appellant's circumstances was misconceived because there had been an appreciable change in the legal landscape in relation to Section 117. Ground 3 submitted that the Article 8 assessment was fundamentally flawed because the judge failed to take into account the fact that family life could reasonably be enjoyed in Pakistan and there was no evidence to the contrary.

10. Ground 4 related to the burden and standard of proof but was not relied on at the hearing and was adequately dealt with in the Appellant's skeleton argument and accordingly it did not amount to a material error of law.

11. Permission to appeal was granted by First-tier Tribunal Judge Lambert on the grounds that the judge had failed to demonstrate that he had taken into account Section 117 of the 2002 Act and that the matter should have been remitted for reconsideration given that the Secretary of State applied the wrong standard of proof.

12. The Appellant submitted a Section 24 response and submitted that the public interest requirements under Section 117B of the 2002 Act were properly considered. The judge specifically quoted relevant Article 8 case law including the recent case of MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985 and the judge also made explicit reference to Section 117B of the 2002 Act. At paragraph 28 of the decision the judge made specific reference to the Appellant's ability to speak English and his financial independence which were factors to be considered under Section 117B. The judge properly directed himself following Devaseelan and the decision of Judge Eban was the starting point.

13. The judge also considered more recent factors and set out the balancing exercise between those factors in favour of the Appellant and those against him. The judge had in mind the public interest in removal but found that it was not proportionate to expect the Appellant to return to Pakistan. The judge properly and adequately addressed Article 8 and had given cogent and sustainable reasons for his conclusion.

14. At the hearing Ms Everett relied on the grounds of appeal and submitted that although the judge had referred to Section 117 he had failed to take into account that the Appellant did not have indefinite leave to remain and therefore his immigration status was precarious. The judge should have been aware of the changes in the law and should have properly demonstrated that Section 117 had been taken into account. The judge had not referred to whether the Appellant and his wife could

enjoy family life in Pakistan and this had affected the Article 8 assessment as a whole. Chikwamba did not have any relevance to this decision because currently the Appellant could not satisfy the financial requirements as his income could not be taken into account. Ms Everett conceded ground 4 on the basis of paragraph 10 of the Appellant's skeleton argument.

15. Ms Beach submitted that the judge referred to Section 117B and had dealt with it or the factors contained therein. The precarious nature of an applicant's immigration status related only to private life, not family life and therefore was immaterial in this particular case. The judge made a detailed assessment of the factors in the Appellant's favour and carried out a balancing exercise. He was well aware that the Appellant did not meet the requirements of the Immigration Rules and of the weight to be attached to the public interest in removal. There was strong evidence of the Appellant's relationship and his removal would not be proportionate.

Discussion and Conclusion

16. We find that the judge properly directed himself in finding that the starting point was the decision of Judge Eban. Judge Eban found that the Appellant was in a genuine relationship with Mrs Dayhistani and on the basis of those findings the Appellant was granted leave to remain. The position in the relationship had not changed since Judge Eban's decision save that the Appellant was now married to Mrs Dayhistani. The judge dealt with the discrepancy in interview and gave adequate reasons for his conclusion at paragraph 22. The judge's finding that the Appellant and Mrs Dayhistani were in a genuine relationship was one which was open to him on the evidence.

17. It was accepted that the Appellant could not satisfy the requirements of the Immigration Rules and therefore the judge applied the five stage test set out in Razgar. He properly directed himself following MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985 and specifically stated that he had taken into account Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002. The judge made findings in respect of that Section at paragraph 28 of the determination. He found that the Appellant had made his application whilst residing in the country lawfully and had established his relationship at a time when he was here legally. He could speak English and he was financially independent.

18. The judge had clearly taken into account the change in the legal landscape and applied it to the specific facts of the Appellant's case. The judge's finding that the Appellant had established family life and his removal would interfere with his family life was open to him on the evidence before him. The judge properly assessed proportionality and took into account all relevant factors attaching significant weight to the public interest as demonstrated at paragraph 25 of the decision.

19. We find that the judge's decision to allow the appeal on Article 8 grounds was open to him on the evidence before him and there was no material error of law in the

decision. The decision dated 26th November 2014 shall stand. The Respondent's appeal is dismissed.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

Signed Date 1st June 2015

Deputy Upper Tribunal Judge Frances