



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: IA/41783/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 3 September 2015**

**Decision & Reasons Promulgated  
On 15 September 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR CHANDRAKANT  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr S Walker, a Home office Presenting Officer  
For the Respondent: Mr P Collins of counsel

**DETERMINATION AND REASONS**

**Introduction**

1. In this appeal, the Secretary of State appeals against a decision of the First-tier Tribunal allowing the appeal of Mr Chandrakant ('the claimant') who appealed against a decision taken on 8 October 2014 to refuse him leave to remain as a Tier 1 (Entrepreneur) Migrant.

**Background Facts**

2. The claimant is a citizen of India who was born on 4 March 1988. He applied for leave to remain as a Tier I (Entrepreneur) Migrant under paragraph 245DD of the Immigration Rules HC395 (as amended). That application was refused on the basis that the appellant had not met the financial requirements and had not met the specified evidence in relation to the required advertising.

### **Appeal to the First-tier Tribunal**

3. The claimant appealed to the First-tier Tribunal. In a determination promulgated on 16 March 2015, Judge Cresswell allowed the claimant's appeal. The First-tier Tribunal found that the claimant could not satisfy the requirements of the Immigration Rules under either paragraph 245DD (leave to remain as a Tier 1 (Entrepreneur) Migrant) or Paragraph 276ADE (1) (leave to remain on the basis of private life). However, the Tribunal allowed the appeal under Article 8 of the European Convention on Human Rights outside the Immigration Rules.

### **Appeal to the Upper Tribunal**

4. The Secretary of State sought permission to appeal to the Upper Tribunal. On 7 May 2015 First-tier Tribunal Judge Kelly granted the Secretary of State permission to appeal. Thus, the appeal came before me.

### **Summary of the Submissions**

5. The grounds of appeal assert that the judge erred by failing to apply the Article 8 test correctly. It is asserted that the judge applied a 'near-miss' principle and has failed to identify any exceptional circumstances to allow the appeal outside of the Immigration Rules. There were two further grounds of appeal that were effectively withdrawn at the hearing, namely that the Judge had failed to consider Appendix FM and paragraph 276ADE and that the judge had not considered the test as to whether there would be significant obstacles to the appellant's integration into India if required to leave the UK.
6. Mr Walker submitted that the judge had failed to identify any compelling circumstances or anything in the claimant's private life to justify allowing the appeal under Article 8. He referred to the case of AM (S 117B) Malawi [2015] UKUT 0260 (IAC). He submitted that when the claimant came here as a student he knew his immigration status was precarious. There was no legitimate reason for him to be allowed to remain under Article 8. The appellant had a private and family life in India until 2010. There is nowhere in the reasoning in the decision to show what the compelling circumstances were. Mr Walker submitted that it was speculation on the part of the judge that there may be loss of employment of 2 British workers. He asserted that, at

paragraph 15 (iv) of the First-tier Tribunal decision, the judge had only the appellant's verbal assurances that the business was doing well and he hoped to expand. With regard to the near-miss point he submitted that the judge had applied a near-miss approach as in paragraph 26, despite setting out that she had not applied a near-miss approach, the judge noted that *'the appellant cannot meet the rules but there are circumstances here which suggest to me that this is a case where application of the Rules leads to a disproportionate outcome'*. This indicated that the judge was applying a near-miss approach.

7. Mr Collins submitted that the crux of the findings of the judge were in paragraphs 15 and 26. The judge clearly rejected the near-miss principle. She considered the case of Patel and Others v SSHD [2013] UKSC 72. The judge was clear that the claimant could not satisfy the Immigration Rules. The judge has identified compelling circumstances outside the Immigration Rules. The claimant did give evidence as to the employment of 2 workers at paragraph 10 of his witness statements. The Secretary of State was represented and could have cross examined on that point. The judge heard and accepted the evidence that the claimant employed 2 people in his business. The judge has set out in paragraph 26 the compelling circumstances. It is clear that the judge has considered all the evidence in the round finding that the claimant has created a business providing employment and that the balance should weigh in his favour. Mr Collins submitted that there has been no challenge to the balancing exercise undertaken by the judge.

### **Material Error of Law**

8. Turning to the judge's decision the judge has not specifically addressed the need to identify compelling circumstances not sufficiently recognised under the Rules in order to consider the claim under Article 8. That is not to say that mere failure to set out the correct approach is an error if the substance of the decision demonstrates that the correct approach has been adopted. In this case the judge has identified a number of factors which clearly do not feature in the Rules. I am satisfied that the judge did identify circumstances not sufficiently recognised under the Immigration Rules. In paragraph 15 the judge sets out that the claimant gave evidence (which the judge accepted) that his business was going well and that there was evidence before her that the claimant has 2 employees in the business. At paragraph 26 the judge considered that the claimant had committed money to the UK economy and provided employment and tax revenue. His removal would inevitably close his business with the loss of employment for 2 British workers.
9. There is no 'exceptionality test' but there is a requirement to carry out a balancing exercise where an individual cannot meet the requirements of the Immigration Rules. The public interest will

generally only be outweighed if an applicant can show that 'compelling circumstances' exist - see [40] to [42] of SS (Congo) [2015] EWCA Civ 387. The judge clearly undertook that balancing exercise. The judge gave weight, as required to do so under sections 1117A and 117B of the Nationality and Immigration Act 2002, to the public interest in maintenance of fair immigration control. She also took into account that the claimant has built his private life in the knowledge that his immigration status is precarious. In weighing those factors the judge found that the interference in the claimant's private life was not proportionate to the legitimate aim pursued. Whilst I might have arrived at a different conclusion, the conclusion that the judge reached was open to her having heard all the evidence in the case. The decision is sufficiently well reasoned and a balancing exercise was undertaken taking the relevant considerations into account.

- 10.** The Secretary of State has not discharged the burden upon her of showing that there is any material error of law in the First-tier Tribunal decision without which that decision is not susceptible to being set-aside.

### **Conclusions**

- 11.** There was no material error of law in the First-tier Tribunal decision and I decline to re-open it.
- 12.** I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

### **Decision**

- 13.** The Secretary of State appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed P M Ramshaw  
Deputy Upper Tribunal Judge Ramshaw

Date 14 September 2015