Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02462/2015

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 15th March 2016	**On 13th April 2016**

Before

Deputy Upper Tribunal Judge Pickup
Between

Secretary of State for the Home Department

Appellant

and

Parminder Singh
[No anonymity direction made]

Claimant

Representation:

For the claimant: Mr R Rashid, instructed by Malik Law Chambers Solicitors
For the respondent: Mr J Parkinson, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Phull promulgated 18.5.15, allowing on both immigration and human rights grounds the claimant's appeal against the decision of the Secretary of State, dated 8.1.15, to refuse his application made in October 2014 for leave to remain the United Kingdom and to remove him from the UK pursuant to section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 21.4.15.

2. First-tier Tribunal Judge Peart granted permission to appeal on 4.8.15.

3. Thus the matter came before me on 15.3.16 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out below, I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Phull to be set aside and remade. Having set aside the decision, I heard further submissions, the parties affirming that the circumstances remain as they were at the time of the decision of the First-tier Tribunal, and reserved my decision and reasons, which I now give.

5. The relevant background can be summarised briefly as follows. The claimant, a citizen of India, first came to the UK in 2012 with leave as a Tier 4 student. He claims to have met his wife Simran, a British national, in 2013. Shortly prior to the expiry of his visa he submitted an application for leave to remain on the basis of his relationship with Simran. Before the matter was decided by the Secretary of State, they were married on 4.12.14. On 10.1.15 they learnt his application had been refused.

6. Judge Phull took into account that the claimant's wife was studying for a BTech and hoped to go on to university in September 2015, for which she had a conditional offer of a place at the time of the First-tier Tribunal appeal hearing. It was said that she could not go to live with the claimant in India as all her family are in the UK and there are language and cultural differences. She also plays cricket at club and county level, with a product sponsorship, and has ambitions to play internationally. It was also said that the claimant would not succeed in an out-of-country application for entry clearance as a spouse, as his wife cannot satisfy the income threshold requirements.

7. Judge Phull concluded that it would not be reasonable to expect the claimant's wife to leave the UK, given her strong ties to the UK and her sporting achievements and then pending studies. The judge concluded that these amount to insurmountable obstacles to family life continuing outside the UK, under EX1 of Appendix FM of the Immigration Rules. The judge found that the claimant could not meet paragraph 276ADE in respect of private life, but went on to further allow the appeal outside the Rules on the basis of private and family life pursuant to article 8 ECHR.

8. It is not clear why, having allowed the appeal on immigration grounds, the judge felt the need to consider the circumstances outside the Rules and further allow the appeal under article 8 ECHR.

9. In summary, the grounds of application for permission to appeal assert that the judge's approach to EX1 was flawed as the finding that there would be 'serious hardship' under EX2 was based on an inadequate assessment of the factual matrix.

10. The grounds complain that at §27 the judge considered only the sponsor's alleged difficulties in relocating to India, without giving any consideration at all to the option of the claimant returning to India for a short period of temporary separation in order to make an entry clearance application, during which period he would be able to remain in communication with the sponsor using modern technology. It is submitted

that had the judge even considered this obvious solution the basis for concluding that EX1 is met falls away.

11. In granting permission to appeal, Judge Peart found the First-tier Tribunal Judge arguably erred in his assessment of the claimant's circumstances. "I bear in mind that he did not engage with the possibility that the (claimant) could return to his own country to apply for entry clearance from there. Although that evidence came out in cross-examination, the judge did not engage with it in weighing the public interest and the proportionality of the (Secretary of State's) decision. See also Chen (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC). "

12. The test under EX1 requires there to be 'insurmountable obstacles' to family life with the partner continuing outside the UK. EX2 defines insurmountable obstacles as meaning the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

13. In Agyarko & Ors, R (on the application of) v SSHD [2015] EWCA Civ 440 the Court of Appeal held that where a party who had overstayed unlawfully and married or formed a relationship with a British citizen sought leave to remain, the "insurmountable obstacles" test as to return under the Immigration Rules was a stringent test and more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom, although the test was always to be interpreted in a sensible and practical rather than purely literal way. Although this claimant had not overstayed unlawfully, at the time of his application his leave was about to expire and he had no basis for continuing leave on the same or any similar basis under the Rules. His immigration status was precarious and thus something more than reasonableness is required.

14. The matters set out by the First-tier Tribunal cannot reasonably be described as amounting to insurmountable obstacles, as they do not create very significant difficulties which could not be overcome, or which would entail very serious hardship. Neither relocating to India with the claimant nor the loss of opportunity for a potential career as a sportswoman, or university education, or product sponsorship cannot seriously be considered to be in the same league as very serious hardship. In the circumstances the decision of the First-tier Tribunal is in error of law and cannot stand. The appeal should have been dismissed under the Immigration Rules.

15. On the facts of this case there was no basis for the judge to go on to consider family or private life outside the Rules on the basis of article 8 ECHR. As the case law now makes clear, only where there are compelling circumstances insufficiently recognised in the Rules can it be justified to go on to consider private or family life outside the Rules.

16. Where someone from the United Kingdom marries a foreign national or establishes a family life with them at a stage when they are contemplating trying to live together in the United Kingdom, but when they know that their partner does not have a future right to remain in the UK, the relationship will have been formed under conditions of known precariousness and it will be appropriate to identify compelling circumstances before a violation of Article 8 will be found to arise in relation to a refusal to grant leave to remain outside the Rules.

17. In SS (Congo) and Others [2015] EWCA Civ 387 the Court of Appeal held that even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of leave to remain outside the new Rules in Appendix FM.

18. On the facts of this case I find that there are no such compelling circumstances and that the First-tier Tribunal has failed to identify any such. That she would have to forego her potential career as a sportswoman, or lose any sponsorship deal, or be unable to embark on or complete education in the UK are not compelling circumstances. There was thus no basis for going on to consider article 8 ECHR outside the Rules. Article 8 is not a general dispensing power for those who do not meet the Rules. In the circumstances, the decision of the First-tier Tribunal is in error of law and cannot stand.

19. However, I am satisfied that even if it had been appropriate to consider family life outside the Rules, that there was absolutely nothing disproportionate in the refusal decision on the facts of this case as outlined in the decision of the First-tier Tribunal.

20. I note that the judge appears to have taken no account of the fact that the Rules, including Appendix FM and paragraph 276ADE are the Secretary of State's response to private and family life claims. Any Razgar proportionality assessment must bring into the balance that the claimant cannot meet the Rules, and that it remains open to him to return to India to make application for settlement, in accordance with the Rules. The Rules provide for those in the claimant's circumstances both from within the UK and in applications made from outside the Rules. The fact that the sponsor may not be able to meet the financial requirements on any such application has been held to be not a relevant consideration. See also Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 00063 (IAC).

21. I also note that in making the article 8 proportionality assessment the First-tier Tribunal Judge misapplied section 117B of the 2002 Act. Whilst at §34 the judge accepted that immigration control is in the public interest, the judge fails to take account of the fact that the claimant's immigration status was at all times precarious and thus no weight should be given to any private life developed in the UK.

22. The judge also gave credit to the claimant for his ability to speak English "so there is no additional public interest in removal." As AM (Malawi) [2015] UKUT 0260 (IAC)

made clear an applicant can obtain no positive right to remain from the fact he speaks English or is financially independent. Further, as the sponsor is a student and the claimant is unable to work, the decision contains no assessment of financially independence, when the Tribunal is required to consider that it is in the public interest that persons seeking to remain should be financially independent.

23. It is clear that the claimant and his partner entered into a relationship when that precariousness was known and he had no real basis for seeking leave to remain and did not pursue further leave as a student. Thus the claimant and his partner took the very significant risk that he may not be able to remain, in the hope that he could be permitted to remain on a basis entirely outside the Rules. He is not entitled to settle in the UK simply because that is his choice, or even because he has married a British citizen. Article 8 is not a short-cut to compliance with the Immigration Rules.

24. Taking everything into account in the round, as a whole, the circumstances of the claimant and his partner when balanced against the legitimate and necessary aim to protect the economic well-being of the UK do not outweigh that public interest. In reaching that conclusion, I bear in mind that it remains open to the claimant to return to India and seek entry clearance as partner. That there are Rules for those who wish to settle in the UK with a British partner renders it not unreasonable to expect him to do so, and thus it follows that the decision of the Secretary of State cannot be regarded as disproportionate to the claimant's rights to respect for private and family life.

Conclusions:

25. For the reasons set out above, I find that 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.

Signed

Deputy Upper Tribunal Judge Pickup

Dated **17 March 2017**

Deputy Upper Tribunal Judge Pickup

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.

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.

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 **17 March 2017**