Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/16537/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision sent to parties on:**
On 3 May 2018	**On 11 May 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GURPREET SINGH
[NO ANONYMITY ORDER]

Respondent

Representation:

For the appellant: Ms Rhona Petterson, a Senior Home Office Presenting Officer
For the respondent: Ms Marian Cleghorn, Counsel instructed by Maalik & Co solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal under the Immigration Rules HC395 (as amended) against her decision to refuse him leave to remain as the spouse of a person present and settled in the United Kingdom. The claimant is a citizen of India.

Background

2. The claimant came to the United Kingdom as a student on 8 May 2012, with leave on that basis which expired on 31 July 2015. On 30 July 2015, one day before the expiry of his leave, the claimant submitted an application on form FLR(FP). That application was rejected as invalid on 13 October 2015. On 19 September 2015, the claimant married his wife in a civil ceremony recognised by United Kingdom law.

3. On 3 November 2015, the claimant made an FLR(M) application on the basis that he was the spouse of a person present and settled in the United Kingdom and that his removal to India would be a disproportionate breach of his human rights. The claimant relied on evidence of his own and his new wife's income, which at the date of application was a total of £6324.75 from two employments for the claimant's wife, and a further £2833.99 for the claimant's own income. On 23 March 2016, the claimant purported to vary his application, but the purported variation was to the same type of application. He wished to update his financial circumstances to those which existed in March 2016, rather than those which accompanied the November 2015 application.

4. In her letter of 20 June 2016, the respondent dealt with the November 2015 application. She accepted that the claimant and his wife had a genuine and subsisting marital relationship, and that his wife was present and settled as the Rules required. The suitability requirements were also met. However, she refused the application because the minimum income of £18600 was not reached.

5. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

6. The First-tier Tribunal Judge treated the March 2016 application as a variation of the November 2015 application. He recorded that the claimant's wife was now earning £13,836 from two employments, with the claimant's income now £6968.04. He found that the minimum income level of £18600 was met and allowed the appeal, concluding that the Secretary of State had overlooked the variation application of March 2016.

Permission to appeal

7. Permission to appeal was granted, the Secretary of State contending that the purported variation was ineffective under rule 34E of the Rules, with the March 2016 application really no more than the submission of additional documents in support of the November 2015 spouse application; and in addition, because the calculation of income in both November 2015 and March 2016 should have omitted the claimant's income, as he no longer had extant leave and had no right to work.

Rule 24 Reply

8. There was no Rule 24 Reply.

9. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

10. At the Upper Tribunal hearing, Ms Cleghorn said that she had been instructed late and had not prepared a skeleton argument for the Upper Tribunal. She relied on her skeleton argument for the First-tier Tribunal hearing. She sought to adduce further documents relating to the wife's present income, which had not been the subject of an application under paragraph 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended), nor were they of relevance to the parties' income at the date of application. I refused to admit that evidence.

11. Ms Cleghorn relied on *Parveen v Secretary of State for the Home Department* [2018] EWCA Civ 932 at [27] and argued that the circumstances here were analogous.

12. I did not consider it necessary to call on Ms Petterson for the Secretary of State.

Discussion

13. The first question is which was the relevant application. I am satisfied that the First-tier Tribunal made an error of law in determining that it was the March 2016 application. Rule 34E of the Rules provides for variation of applications in the following terms:

> **"Variation of Applications or Claims for Leave to Remain**
> 34E. If a person wishes to vary the purpose of an application for leave to remain in the United Kingdom, the variation must comply with the requirements of paragraph 34 (as they apply at the date the variation is made) as if the variation were a new application. If it does not, subject to paragraph 34B, the variation will be invalid and will not be considered.
> 34F. Any valid variation of a leave to remain application will be decided in accordance with the immigration rules in force at the date such variation is made."

14. The claimant in this appeal did not seek to vary the purpose of an application for leave to remain. He was seeking to vary the date of assessment and the evidence on which that assessment was made, but he was still making an FLR(M) application for leave to remain as a spouse. He could have withdrawn the November 2015 application and made a fresh application, but he did not do so.

15. The respondent therefore correctly considered the November 2015 evidence and concluded that the income requirement was not met.

16. I have considered the effect of the decision of the Court of Appeal in *Parveen* on leave to remain outside the Rules. The facts there were different: Lord Justice Underhill (with whom Lady Justice Gloster and Lady Justice Asplin agreed), approached the appeal on the basis that the appellant had entered the United Kingdom perfectly lawfully and genuinely on a spouse visa and had remained married to her husband and resident in the United Kingdom ever since, as opposed to 'the usual run of cases where an illegal entrant or overstayer who has come to the United Kingdom as, say, a visitor or student seeks leave to remain on the basis of a marriage contracted while their status was (at best) precarious'. That is the factual matrix of this appeal: the claimant contracted his marriage to his wife when he had no extant leave and his status in the United Kingdom was unlawful and/or precarious.

17. At [28], Lord Justice Underhill revisited the 'certain to succeed' test in *Chikwamba v Secretary of State for the Home Department [2008] UKHL 40, [2008] 1 WLR 1420.* He set out the questions he considered that the Secretary of State would want to ask herself in such cases:

> "… On an application of this kind I would expect the Secretary of State to want to consider at least the following points:

> (a) whether the Appellant would, if she had made an application before the expiry of her leave to enter in May 2001, have been entitled to leave to remain and, in due course, indefinite leave to remain;
> (b) whether there was a good, or at least venial, reason for her failure to make such an application;
> (c) whether she continues to satisfy the substantive requirements for leave to remain as a spouse; and
> (d) whether it would cause real disruption for her to have to leave the country to make now from abroad the application that she should have made before 25 May 2001 and which would (if point (c) is correct) be certain to succeed."

18. This claimant does not assert that before the expiry of his leave to remain in July 2015, he was entitled to leave to remain as a spouse. He was not married then. That is a good reason for his not having made the application at the time. Paragraph (c) falls away and the claimant has not come close to showing that his application from overseas would be certain to succeed. At [28], Lord Justice Underhill makes it clear that *Chikwamba* continues to require a very strong case, which on the facts of *Parveen* was much more likely than in the present application:

> "28. For the avoidance of doubt, I do not say that the Appellant would have to tick all of boxes (a)-(d) in order for it to be right for her to be granted leave to remain outside the Rules. However, if she can do so it seems to me that she would have a very strong case. It is hard to see how it could be right to insist on the empty but disruptive formality of leaving the country in order to correct a venial administrative error made thirteen years previously: see *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, [2008] 1 WLR 1420, and the subsequent authorities."

19. In this case, there was no venial administrative error made years ago. The claimant married his wife when he had no leave to remain and their income did not meet the £18600 requirement. Further, at the date of application the claimant had no extant leave. His leave expired on 31 July 2015 and the making of an application which was rejected as incomplete did not extend any 3C leave beyond that date. The claimant was in the United Kingdom without leave thereafter and certainly without permission to work, so any income relied upon on his side was earned unlawfully. On that basis, even the March 2016 application (had it been a valid application) would have been bound to fail.

20. The Secretary of State's appeal therefore succeeds and I substitute a decision dismissing the appeal.

DECISION

21. For the foregoing reasons, my decision is as follows:
The making of the previous decision involved the making of an error on a point of law.
I set aside the previous decision. I remake the decision by dismissing the appeal.

Date: 4 May 2018 Signed *Judith AJC Gleeson*

Upper Tribunal Judge Gleeson