



Upper Tier Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/00610/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 18 May 2018

Decision & Reasons Promulgated  
On 23 May 2018

Before

Deputy Upper Tribunal Judge Pickup

Between

Jatinder alias Jeet Kumar alias Singh  
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

**Representation:**

For the appellant: Mr M Aslam, instructed by 12 Bridge Solicitors  
For the respondent: Mr P Duffy, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Geraint Jones QC promulgated 11.10.17, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 12.1.16, to refuse his application made on 26.9.14 for Leave to Remain in the UK on the basis of private life.
2. First-tier Tribunal Judge Landes granted permission to appeal on 28.3.18.
3. Thus the matter came before me on 18.5.18 as an appeal in the Upper Tribunal.

*Error of Law*

4. For the reasons summarised below, I found no material error of law in the making of the decision of the First-tier Tribunal such as to require the decision to be set aside.
5. Judge Jones concluded that whilst there was a relationship of sorts between the appellant and Ms Bhanji, given the circumstances, including that they did not cohabit, it was one akin to boyfriend/girlfriend and not a partnership akin to marriage.
6. In granting permission, Judge Landes considered it arguable that the judge may have erred in assessing suitability and dishonesty in failing to disclose a conditional discharge. However, even if the judge was wrong on this, it cannot have been material to the outcome of the appeal, as it was accepted by Mr Aslam and I so find that the appellant could not meet the requirements of the Rules with regard to the claimed relationship. Even if there was an error in this regard, it was one that did not infect the rest of the decision. The application could never have succeeded under the Rules.
7. Judge Landes also considered it arguable that the judge did not correctly consider whether the relationship amounted to family life. Whilst the fact that they did not live together was not of itself determinative, it is clear that the judge carefully considered all the circumstances. That the relationship, even taken at its highest, could not meet the requirements of the Rules for family life is highly relevant as the Rules are the Secretary of State's proportionate response to family life claims and are to be given significant weight. It is within the margin of appreciation for the Secretary of State to adopt policies which set out the weight to be attached to the competing considerations in striking a fair balance, including that family life established while the applicant's stay in the UK is known to be unlawful or precarious should be given less weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK. Thus, it is, exceptionally, only where there are compelling circumstances outside the Rules that the claim could potentially succeed on family or private life grounds.
8. Mr Aslam relied on several features of the relationship but which were all taken into account by the First-tier Tribunal. That they wanted to marry or that a pregnancy miscarried is not determinative. The judge accepted that the relationship was a significant part of the appellant's private life, but after taking all the evidence into consideration concluded that it did not amount to family life. It is noted that the relationship allegedly only became formal in May 2016, after the refusal decision. At [25] the judge found the alleged partner's evidence not credible. That they intend to marry in the future is neither here nor there.
9. In effect, the grounds on this issue are little more than a disagreement with the decision. It cannot be said that the decision was perverse or one which no other judge properly directed could have reached.

10. Further, this was a relationship formed in circumstances of obvious precariousness with the appellant having entered the UK illegally and failed to pursue his asylum claim, taking steps to avoid regularising his immigration status. The relationship, however it is properly characterised, was formed when the appellant well knew that any such relationship was precarious. In R (on the applications of Agyarko and Ikuga) v Secretary of State for the Home Department [2017] UKSC 11, the Supreme Court found that overstayers, who had formed relationships with British citizens before applying for leave to remain, failed to show that there were "insurmountable obstacles" to the continuation of their family lives outside the UK, or that there were "exceptional circumstances" under Article 8 of the ECHR.
11. The Court held that the ultimate question in article 8 cases is whether a fair balance has been struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions, referring to insurmountable obstacles or exceptional circumstances, do not depart from that position, and are compatible with article 8. The "exceptional circumstances" question is also one that the Secretary of State may legitimately ask. Appendix FM is said to reflect how the balance will be struck under article 8 between the right to respect for private and family life, and the legitimate aims listed in article 8(2), so that if an applicant fails to meet the requirements of the Rules it should only be in genuinely exceptional circumstances that refusing them leave and removing them from the UK would breach article 8. The Instructions state that exceptional does not mean unusual or unique, but means circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. This is an application of a test of proportionality, consistent with the references to exceptional circumstances in European case law and cannot be regarded as incompatible with article 8.
12. From [56] onwards the Supreme Court stated,

*"Cases are not, therefore, to be approached by searching for a unique or unusual feature, and in its absence rejecting the application without further examination. Rather, as the Master of the Rolls made clear, the test is one of proportionality. The reference to exceptional circumstances in the European case law means that, in cases involving precarious family life, "something very compelling ... is required to outweigh the public interest", applying a proportionality test. The Court of Appeal went on to apply that approach to the interpretation of the Rules concerning the deportation of foreign criminals, where the same phrase appears; and their approach was approved by this court, in that context, in Hesham Ali.*

*[57] "That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in*

*question, including, where relevant, the matters discussed in paras 51-52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control,” (emphasis added).*

13. Recently, in TZ & PG [2018] EWCA Civ 1109, the Court of Appeal considered the situation where a relationship fell outside the GEN 1.2 definition despite being genuine and subsisting. The Senior President observed at [25] that “the settled jurisprudence of the ECtHR is that it is likely to be only in an exceptional case that article 8 will necessitate a grant of leave to remain where a non-settled migrant has commenced family life in the UK at a time when his or her immigration status is precarious (see, for example Jeunesse v Netherlands (2016) 60 EHRR 17 at [100] and [114]). That general principle applies to any consideration of the Rules which involves engaging with a requirement or requirements that possess an article 8 element (often wrongly described as an article 8 consideration within the Rules) and to the consideration of article 8 outside the Rules. Where precariousness exists it affects the weight to be attached to family life in the balancing exercise. That is because article 8 does not guarantee a right to choose one’s country of residence. Both the unlawful overstayer and the temporary migrant have no right to remain in the UK simply because they enter into a relationship with a British citizen during their unlawful or temporary stay.”
14. The Court of Appeal endorsed and encouraged tribunals to follow the procedure recommended by Lord Thomas in Hesham Ali at [82 to 84]. “Although there is no obligation in law for a tribunal to structure its decision-making in any particular way and it is not an error of law to fail to do so, the use of a structure in the judgments in these appeals would almost certainly have avoided the appeals, given that the ultimate conclusion of the tribunals was correct. To paraphrase Lord Thomas: after the tribunal has found the facts, the tribunal sets out those factors that weigh in favour of immigration control – ‘the cons’ – against those factors that weigh in favour of family and private life – ‘the pros’ in the form of a balance sheet which it then uses to set out a reasoned conclusion within the framework of the test(s) being applied within or outside the Rules. It goes without saying that the factors are not equally weighted and that the tribunal must in its reasoning articulate the weight being attached to each factor.”
15. In the present case, the judge correctly determined the facts and in essence conducted a proportionality assessment, taking into account as far as possible the nature of the relationship and the appellant’s private life considerations. The judge also applied section 117B of the Nationality, Immigration and Asylum Act 2002 in assessing the weight to be given to the appellant’s private life.
16. Looking at the decision of the First-tier Tribunal as a whole no material error of law is disclosed. It is clear, considering the facts of the case, that there never was any prospect of the application or the appeal against the decision to refuse succeeding.

## Decision

17. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed on all grounds.



**Signed**  
**Deputy Upper Tribunal Judge Pickup**  
**Dated**

## 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 pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. I was not addressed on the issue. 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 pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

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**