



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/51577/2013

THE IMMIGRATION ACTS

Heard at Field House

**On 4 September 2014
Prepared 4 September 2014**

Determination

**Promulgated
On 22 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AVNISH PUSHPALA

Respondent

Representation:

For the Appellant: Mr J Parkinson, Senior Presenting Officer

For the Respondent: Mr R Singer, Counsel, instructed by Bhattarai & Co
Immigration Practice

DETERMINATION AND REASONS

1. In this determination the Appellant is referred to as the Secretary of State and the Respondent is referred to as the Claimant.

2. The Claimant, a national of India, date of birth 16 December 1986, appealed against a decision of the Secretary of State, dated 20 November 2013, to refuse leave to enter and/or remain and to make removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.
3. The claimant's appeal came before First-tier Tribunal Judge Majid who, on 29 July 2014, allowed the appeal. The Secretary of State applied for permission to appeal which was granted by First-tier Tribunal Judge Reid on 19 August 2014. The grounds essentially complain that the judge had failed to properly address the Claimant's position in relation to meeting the requirements of the Immigration Rules and the judge had then gone on, without further ado to address Article 8 ECHR outside of the Rules. Finally that the judge had failed to adequately reason the basis on which he had allowed the appeal.
4. It is fair to say that the judge's decision starts from the premise, as is recited in paragraph 3 of the Determination, that he had borne in mind the relevant legal provisions of the relevant paragraphs of the Immigration Rules and meticulously borne every provision of those paragraphs in mind during the assessment of the Claimant's [Appellant's] case. The judge also said he had taken into account the new changes in the Rules brought into force on 9 July 2012 which radically changed the application of Article 8 of the ECHR.
5. The judge then throughout paragraphs 6, 7, 17, 18, 19, 20 and 21 makes references to a selection of case law, the relevance of some of which is extremely hard to see and does have the appearance of being part of a formatted determination.
6. The judge as set out in the determination simply moves from a general consideration of factors plainly pertinent to an Article 8 case to directly considering Article 8 by itself and it seems to me a fair point that the

parties make, for Mr Singer appeared before the judge, that it was no part of his case that the Appellant came within the Immigration Rules in terms of meeting the relevant requirements. It is therefore somewhat surprising that the judge set out in paragraph 27 of the determination by reference to various matters and said as follows:

“Accordingly, in my deliberations in the preceding paragraphs and having taken into account all of the oral and documentary evidence as well as the submissions at my disposal, cognisant of the fact that the burden of proof is on the Appellant and the standard of proof is the balance of probabilities, I am persuaded that the Appellant merits the benefits of the Immigration Rules, as amended. Of course, the Appellant also benefits from the humane protections of the ECHR.”

7. It is said, by Mr Parkinson, that that is manifestly wrong, not least when the claimant was not putting his case reliant upon meeting the requirements of the Rules. Mr Singer therefore submits that really, since everyone knew the proper basis on which the appeal was coming to be considered, that the judge’s remarks simply demonstrate an error which is not ultimately material to the outcome of the appeal. There might be some force in that submission if the judge had not added the words “of course, the Appellant also benefits from ...” which tends to suggest that the primary basis for the decision was that the Appellant did succeed under the Rules, notwithstanding the way the case had been advanced to him. I consider the lack of clarity of reasoning provided by the judge is a material error of law. It is trite law that determinations are expected to be of sufficiency without necessarily tackling all the points the parties would like so as to set out the proper basis for the judge’s decision, see R (Iran) [2005]EWCA Civ 982 and E and R [2004] QB 1044 CA, which demonstrate the kind of considerations expected of a determination and which had even by subsequent case law not been materially changed.

8. The judge also in my view moved to consider Article 8 in circumstances that do not demonstrate notwithstanding what was relied in the determination, namely that he has considered and/or applied the case law in being at the time, namely MF (Nigeria) [2013] EWCA Civ 1192 or Nagre [2013] EWHC 720 (Admin) or indeed the implications of or the necessary considerations that need to be addressed to show that the judge had properly considered whether there were the kind of circumstances, compelling or otherwise as may have been expressed, so as to show that Article 8 should be considered outside of the Rules. As to the Article 8 decision itself, in one sense the judge, albeit in terse fashion, does address the Razgar considerations and concluded that the Appellant has, although it is less than fulsome in description, a private life in the United Kingdom and the judge accepted the recent, as Mr Parkinson reminded me, relationship which the Appellant had entered into of a matter of some two and a half months.
9. The judge nevertheless concluded there was a private life, that the effects of interference were significant, and although the judge does not expressly deal with the third question in Razgar, drifts into the fourth question to a degree but in less than clear terms. Making the best of it, it seemed to me that one could regard questions 1 to 4 of Razgar being answered in the affirmative.
10. The judge undoubtedly concluded that the Respondent's decision was disproportionate - see paragraph 22 - although I have to say that there is a significant lack of reasoning as to why that conclusion was reached in the factual context before the judge at that time. Although it is not a point taken by the grounds of appeal, it is relevant, looking at the care given to the determination as a whole, and looking to the materiality of the way the judge's errors bear on the outcome, that the judge never addressed the public interest or even expressed the part it played in the balanced judgment to be made in dealing with the fifth question raised in

Razgar: Namely is such interference proportionate to the legitimate public interest.

11. In these circumstances with considerable regret that it should have occurred, and with some sympathy for the Claimant, much good that will of itself do, it seems to me that the reasoning in the determination is so inadequate that it really cannot stand. The judge's mistakes simply are not remediable or to be dismissed as non-material. To do so would leave a very inadequate decision which I would for my part be unwilling to conclude, was sustainable.

12. In these circumstances the decision will have to be remade.

Signed

Date 9 September 2014

Deputy Upper Tribunal Judge Davey