



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

Appeal Number: IA/24644/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 7 April 2015**

**Determination**

**Promulgated**

**On 20 April 2015**

**Before**

**UPPER TRIBUNAL JUDGE GOLDSTEIN**

**Between**

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

Appellant

**and**

**ROHIT BHARDWAJ  
(NO ANONYMITY DIRECTION IS MADE)**

Respondent

**Representation:**

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Mr A Pipe, Counsel

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Trevaskis, who sitting at Newport on 26 November 2014 and in a determination subsequently promulgated on 10 December 2014 allowed the appeal of the Respondent (hereinafter called the claimant), a

citizen of India born on 22 November 1989, against the decision of the Secretary of State dated 23 May 2014 refusing his application for indefinite leave to remain on the basis of his relationship with Jordana Coulstock (the Sponsor).

2. In his determination at paragraph 4, the First-tier Tribunal Judge recorded as follows:

“4. It was confirmed at the outset of the hearing by both representatives that it was accepted by the Respondent that there was a genuine and subsisting relationship between the Appellant and the Sponsor; it was accepted by the Appellant that he cannot meet the requirements for the grant of family life based upon Appendix FM of the Immigration Rules. The sole issue on which this appeal is based is the proportionality of the decision to remove the Appellant, by reference to Article 8 of the ECHR.”

3. The Judge having noted that it was conceded that the Appellant did not qualify for leave as a partner under Appendix FM thus dismissed the appeal under the Immigration Rules but then went on to consider whether the appeal required to be considered according to the provisions of Article 8. In that regard, the Judge made reference to the guidance of the Court of Appeal in MM [2014] EWCA Civ 985 as follows:

“If the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker.”

4. The Judge at paragraph 30 of his determination continued that:

“There must be a good reason to consider Article 8 directly, meaning either one that is compelling or because there are exceptional circumstances. There is no test of exceptionality; there does not have to be anything extreme to move to Article 8 directly. A good reason may be present if the Immigration Rules do not provide discretion to examine hearing the immigration decision is proportionate in light of all the Appellant’s circumstances, but only if the consequences of the immigration decision are likely to have a significant impact on the private or family life continuing.”

5. The Judge continued that he found that the immigration decision in the present case was:

“...likely to have a significant impact on the private or family life continuing. The Appellant has been living in the United Kingdom for four years; he and the Sponsor have been in a genuine relationship for approximately two years. The removal of the Appellant will enforce separation between them and a disruption of the private life which the Appellant has established whilst in the United Kingdom.”

6. The Judge proceeded to consider relevant case law guidance including that of Razgar [2004] UKHL 27, that he applied against the backdrop of the facts as found.

7. Over paragraphs 40 and 41 of his determination he proceeded to set out the factors both in favour of and against the Appellant. He did so as follows:

“40. The factors in favour of the interference are: the Appellant came to the United Kingdom as a student, with limited leave granted on that basis; he has entered into a relationship knowing that his immigration status has been precarious; he is no longer studying, hence the original basis of his application to enter the United Kingdom has ceased to apply; regarding s.117A and B of the Nationality, Immigration and Asylum Act 2002, it is in the public interest that he be financially independent, but he is wholly dependent upon the Sponsor, who is working; his private life should only be given little weight as it has been established while his status was precarious; there is nothing to prevent him from returning to live in India, where he can be accommodated by his parents and can live and work in his own culture.

41. The factors against the interference are: the Appellant has been living in the United Kingdom since 2010; he has not committed any crimes; he has studied and has been working when allowed to do so, and has established a network of friends among work colleagues and beyond; he is living with his partner, by whom he is being supported financially; if he is required to return to India to apply for entry clearance as a partner, the outcome of that application is uncertain; the Sponsor would otherwise have to move to India, thereby losing her employment, her home and her family and social ties in the United Kingdom; she will be isolated in India because of her race, her religion and her inability to speak Hindi; she will be unable to find work and therefore unable to maintain contact with her family, either by travel or by indirect communication methods; her mental health, already adversely affected by the Appellant’s immigration problems, is likely to be further damaged by living in India, where appropriate treatment or medication is either harder to obtain or more expensive.”

8. Notably, at paragraph 42 of his determination the First-tier Judge continued as follows:

“42. The starting point for the balancing exercise is that the Appellant and the Sponsor are acknowledged to be in a genuine and subsisting relationship which has existed for approximately two years; **their relationship was formed at a time when the Appellant still had valid leave**; the Appellant continued to comply with the conditions of his leave, including restrictions on working, despite the fact that leave had been curtailed, apparently unbeknown to him. He subsequently applied for further leave, before the scheduled expiry of his original leave; the Respondent took eleven months to process the application before refusing it. Throughout this time, the Appellant and the Sponsor conducted themselves as though his leave was still valid, although he was not studying; he occupied his time by undertaking private study,

and the Sponsor continued her employment, receiving an income which made them economically self-sufficient.” (Emphasis added).

9. The Judge went on to note that the Appellant had demonstrated sufficient command of English to be allowed to enrol in a course which was presented in English and that he therefore satisfied that test of public interest. He continued at paragraph 43 that:

“43. Given the genuine status of the relationship, the Appellant would appear to be able to satisfy the requirements for entry clearance as a partner, but I do not consider that it is necessary or reasonable to expect him to return to India in order to undergo that process.”

10. At paragraph 44, the Judge had this to say:

“44. I find that the impact of the dismissal of the appeal upon the Sponsor will be very serious. She will be faced with the choice of the dissolution of their relationship, or a period of uncertainty whilst the Appellant is forced to make an entry clearance application, the outcome of which is always uncertain, and which will involve an indefinite period of separation. Alternatively, she will have to move to live in India; this will involve her in giving up well-paid and steady employment in which she is clearly highly valued; she will give up secure accommodation; she will give up personal contact with her family, with whom her relationship is very close; she will give up contact with her network of friends, with whom her contact is also very close; she will face an uncertain future in India, as a British woman of Christian faith who is unable to speak Hindi; it will be impossible for her to obtain work, and she will be wholly dependent upon the protection of the Appellant and his family; there are also reasonable concerns that she may be exposed to the risk of attack, whether sexual or some other form of violence; she has suffered adverse mental health problems, largely as a result of the strain placed upon their relationship by the Appellant’s immigration status, and she has fears that her condition will be aggravated by having to go to live in India, and she will be unable to find or afford the necessary treatment there.”

11. The Judge went on to conclude that the factors in favour of the removal decision were in his judgment “substantially outweighed by the factors against removal”.

12. The Secretary of State successfully sought permission to appeal that decision and in granting such permission First-tier Tribunal Judge P J G White having considered the Secretary of State’s grounds, concluded that it was arguable that in reaching his decision the Judge had failed to have sufficient regard to the fact that the relationship between the Appellant and Sponsor existed “despite the Appellant’s leave being curtailed”. Further that the Judge’s finding concerning the extent of the detriment to the Sponsor by relocating to India in respect of employment, ability to communicate with her family and mental health was “arguably unsupported by reliable evidence”. Finally that it was arguable that the

Judge had given insufficient consideration to the possibility of the Appellant returning to India to make an out-of-country application.

13. Thus the appeal came before me on 7 April 2015 when my first task was to decide whether or not the determination of the First-tier Judge contained an error or errors on a point of law such as may have materially affected the outcome of the appeal.
14. Having heard and considered the parties' respective submissions I reserved my decision.

### **Assessment**

15. I have concluded that the determination of the First-tier Judge does not disclose material errors on a point of law and that in such circumstances it should stand.
16. It is apparent to me that ground 1 of the Secretary of State's application for permission that the First-tier Judge failed to correctly apply primary legislation is wholly misconceived. It is contended that the provisions of Section 117B(4)(b) of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) applied in that it provided that little weight should be given to a relationship formed with a qualifying partner that was established by a person at a time when the person was in the United Kingdom unlawfully.
17. It is apparent on the evidence as found by the First-tier Judge that the claimant and his partner entered into their relationship in February 2012, before his leave was curtailed. It follows that the claimant was not in the United Kingdom unlawfully before the inception of the relationship. Such was the clear finding of the First-tier Judge that was open to him on that evidence.
18. It follows that the provision relied upon by the Secretary of State in ground 1 does not apply to the claimant's case. There is thus a mistake of fact in ground 1 such that the requirements of Section 117B (4) (b) simply do not apply.
19. It is also apparent to me that the Judge's reference to the fact that the claimant's immigration status was precarious, was put in the context of his only having had student leave at the time he entered into the relationship with the Sponsor, but that it was not unlawful at that point.
20. Further, and as rightly pointed out by Mr Pipe, the provisions of Section 117B (5) refer only to private life and thus weight could in any event, be given to the family life element of the claimant's relationship with the Sponsor even though it was founded at a time when the status of the claimant was "precarious", in the sense that he had only limited leave as a student at the time.

21. It was Mr Tufan's submission that the provisions of Article 8 of the ECHR should only be entered into "when something that the Rules do not cater for exists in the application", and in that regard he referred me to Singh and Khalid [2015] EWCA Civ 74 where their Lordships concluded that the decision of the court in MM (Lebanon) did not question the substantial point made by Sales J (as he then was) in Nagre that there was no need to conduct a full separate examination of Article 8 outside the Rules where, in the circumstances of a particular case, all the issues had been addressed in the consideration under the Rules.
22. Mr Tufan also referred me to an earlier decision of Mr Justice Blake in Kussin [2009] EWHC 358 (Admin) where insofar as the guidance in Chikwamba [2008] UKHL 40 was concerned, his Lordship held at paragraph 29 that:

"...the mere fact that there are obstacles to her relocating to Turkey - and it would be unreasonable to expect her to go to Turkey - does not of itself make out this case on Article 8 and make out reasonable prospects that an Adjudicator would find an Article 8 case founded. Notwithstanding the guidance in Chikwamba, in my judgment, the requirements of fair and firm immigration control do make it justifiable and proportionate to require this claimant to seek re-admission to be with his partner through the route provided by the Immigration Rules. In requiring him to do so he will not be more favourably treated than others in a similar situation and there are no compelling factors that would arguably make that requirement disproportionate."
23. Mr Tufan continued that an application on the part of the Appellant from abroad was likely to be successful subject to maintenance and accommodation requirements with reference to the requirements of Appendix FM and FM-SE.
24. In that latter regard, and with respect to Mr Tufan, I find that he failed to appreciate that the requirements and provisions of Appendix FM did not apply in this case, as the couple had not lived together for two years. As indeed the Presenting Officer at the hearing before the First-tier Judge agreed, the definition of "partner" in the Rules requires the parties to have lived together or have been married for two years. The provisions of FM-SE only apply if Appendix FM applies.
25. Mr Tufan referred to ground 2 of the Secretary's application which maintained that the Judge had given weight to immaterial matters. For example, he had attached positive weight to the claimant's ostensibly clean criminal record. In that regard in Nasim (Article 8) [2014] UKUT 00025 (IAC) it was held that a person's human rights were not enhanced by not committing criminal offences or not relying on public funds and that the only significance of such matters in cases concerning proposed or hypothetical removal from the United Kingdom, was to preclude the Secretary of State from pointing to any public interest justifying removal,

over and above the basic importance of maintaining a firm and coherent system of immigration control. Mr Tufan submitted therefore that the Judge had erred by attaching positive weight under Article 8 to an absence of criminal convictions.

26. In that regard it is, however, apparent to me on a reading of the determination, that the First-tier Judge did not use the absence of a criminal record as a weighty factor establishing an Article 8(1) right and therefore did not offend the principles set out in Nasim. At paragraph 41 of his determination, the Judge's reference in relation to the factors in favour of the claimant included the fact (amongst others) that he had "not committed any crimes", but here it was accepted that family life was engaged as it was conceded that the only issue was proportionality. It follows that I find that there was no error in the Judge's approach in this regard as he was not seeking to construct a family life based on no criminal convictions and it was simply not a factor that weighed against the claimant.
27. As regards Singh (above) their Lordships confirmed what was said in MM that there was no intermediary threshold test and effectively said that Mr Justice Sales (as he then was) in Nagre was not imposing a threshold test in a case where the Rules demonstrated in the particular circumstances, that there would be no need to go on. I observe that in the present case it was accepted that the claimant was in a genuine relationship. It was a proportionality balance and it was therefore a case where there was no threshold. In the present case the First-tier Judge and the Presenting Officer before him conceded that it was a proper case in which to go on to a consideration as to the balance to be struck in terms of the proportionality of the claimant's removal to India.
28. I find that Mr Tufan's reliance on the 2009 case of Kussin has overlooked the fact that his Lordship also stated that each case was fact-sensitive. In any event the leading case now is that of Hayat (Pakistan) [2012] EWCA Civ 1054 where at paragraph 30 Elias LJ, who gave the leading judgment, in effect endorsed the conclusion of the Mr Justice Blake in Kussin that:

"Whether it is sensible to enforce that policy will necessarily be fact-sensitive; Lord Brown identified certain potentially relevant factors in Chikwamba. They will include the prospective length and degree of disruption of family life and whether other members of the family are settled in the UK."

29. His Lordship continued inter alia:

"Where Article 8 is engaged and there is no sensible reason for enforcing the policy, the decision-maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant has no lawful entry clearance."

30. It was further held that nothing in Chikwamba was intended “to alter the way the courts should approach substantive Article 8 issues as laid down in such well-known cases as Razgar and Huang”. Finally that:

“Although the cases do not say this in terms, in my judgment if the Secretary of State has no sensible reason for requiring the application to be made from the home state, the fact that he has failed to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise.”

31. I find that here the First-tier Judge in terms, found on the facts and with the guidance of relevant case law, that there was no sensible reason why the claimant in his particular circumstances, should be required to make an application for entry clearance from his home state. This was a case where it was accepted that there was a genuine and subsisting relationship. It was thus not a case where there was a sensible reason in enforcing entry clearance.

32. I thus find that ground 2 is no more than a factual disagreement with the First-tier Judge’s findings.

33. I am mindful of the guidance of the Court of Appeal in R (Iran) [2005] EWCA Civ 982 and I find that it cannot be said that the First-tier Tribunal Judge’s findings were irrational and/or Wednesbury unreasonable such as to amount to perversity. It cannot be said that they were inadequate. It is not a case where the First-tier Tribunal Judge’s reasoning was such that the Tribunal were unable to understand the thought processes that he employed in reaching his decision.

34. I find that the First-tier Judge properly identified and recorded the matters that he considered to be critical to his decision on the material issues raised before him in this appeal.

### **Decision**

35. I find that the making of the previous decision involved the making of no error on a point of law and I order that it shall stand.

36. It follows that the appeal of the Secretary of State is dismissed.

No anonymity direction is made.

Signed

Date 15 April 2015

Upper Tribunal Judge Goldstein



