



**Upper Tribunal  
(Immigration and Asylum Chamber)  
number: IA/14489/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On November 28, 2014**

**Decision and Reasons  
Promulgated On December  
01, 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**Between**

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

Appellant

**and**

**MR SHEHAN MANDIS KARUNARATNE  
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Whetwell (Home Office Presenting  
Officer)

For the Respondent: In person

**DETERMINATION AND REASONS**

1. Whereas the respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The appellant, born November 5, 1973 is a citizen of Sri Lanka. On September 19, 2002 he came to the United Kingdom as a visitor with limited leave to remain. He was subsequently granted discretionary due to the fact he was

caring for his uncle, Dr Bastian, and that leave was valid until December 12, 2013. His uncle died on August 8, 2012 although by February 2012 the appellant had entered into a relationship with his partner. He applied on December 12, 2013 for leave to remain on the basis of his private and family life under the Immigration Rules. This application was rejected by the respondent on March 11, 2014.

3. The appellant appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on March 25, 2014. On September 3, 2014 Judge of the First Tier Tribunal Borsada (hereinafter referred to as the "FtTJ") heard his appeal. He dismissed the appeal under the Immigration Rules but allowed the appeal under article 8 ECHR in a determination promulgated on September 17, 2014.
4. The respondent lodged grounds of appeal on September 25, 2014 and on October 30, 2014 Judge of the First-tier Tribunal Saffer granted permission to appeal finding it arguable the FtTJ had erred by a possible misapplication of Nagre.

#### **SUBMISSIONS ON ERROR OF LAW**

5. Mr Whitwell submitted the FtTJ erred because he found the appellant and his partner did not meet GEN 1.2 of the Immigration Rules and consequently there was no need to proceed further because this was a specific requirement of the Rules and it was wrong for the FtTJ to find the Rules were not met and then in effect overlook that specific failing and allow it under article 8 ECHR. There was nothing further that needed considering outside of the Rules and this was a material error.

#### **PRELIMINARY ISSUE**

6. The original appellant was unrepresented at the hearing but I am satisfied he had notice of the same because the notice of hearing was properly sent to both him and his solicitors on November 4, 2011. His solicitors were contacted on the morning of the hearing and advised they were no longer acting. I called the case on at 3.30pm by which time the appellant had not attended. I was satisfied he had been served and proceeded to deal with the case.

#### **MY FINDINGS ON ERROR IN LAW**

7. The background to this appeal is that the appellant came to the United Kingdom as a visitor in 2002. According to the chronology contained in the original appellant's bundle

it seems he lived here, without permission, between 2002 and 2007. On December 20, 2007 he submitted an application for discretionary leave to remain to care for his uncle. This was refused by the respondent on November 10, 2009 and also by a First-tier Tribunal Judge on May 6, 2010. Following a successful appeal to the Upper Tribunal he was granted discretionary leave to remain until December 14, 2013.

8. According to the chronology in the appellant's bundle he met his partner in February 2012 but they only commenced partial co-habitation in July 2012 and as at the date of the original hearing they still only stayed together when his partner's son stayed at his father's.
9. He submitted his current application on December 12, 2013 just before the expiry of his leave. GEN 1.2 of Appendix FM of the Immigration Rules makes it clear that two years co-habitation is required prior to the date of the application. It therefore follows that the appellant could not for the purposes of the appeal before the FtTJ meet the requirements of Appendix FM because he did not satisfy the definition of a partner-this being a requirement of Section R-LTRP of Appendix FM. The fact the genuineness of the relationship was not disputed mattered not when considering compliance with the Rules. The appellant would now satisfy the definition of GEN 1.2 if he were to submit an application but whether he qualified under Appendix FM is a different issue.
10. The FtTJ also considered his position under paragraph 276ADE HC 395 but concluded in paragraph [11] of his determination that he did have ties to Sri Lanka and consequently he could not meet this Rule.
11. The respondent's challenge to the FtTJ's decision is that he was wrong in law to consider this appeal outside of the Rules when he failed the most fundamental requirement of the Rules. The appellant did not file a response to the grounds of appeal so I have no idea what his view of the matter is but I note he chose not to attend a hearing for which he had been given ample notice.
12. I have considered the FtTJ's determination and in particular his approach to the article 8 issue. He accepted there was a genuine and subsisting relationship between the appellant and his partner and he also noted the reason why they did not live together on a permanent basis. The FtTJ noted he had overstayed but found the respondent accepted his explanation because she granted him discretionary leave to stay based on his care for his uncle.

13. This finding in paragraph [8] of the determination would appear to be at odds with the chronology of his immigration history. The respondent actually refused the application he submitted in 2007 and opposed his appeal before the First-tier Judge in May 2011. It was only following his appeal to the Upper Tribunal that his appeal was allowed by the Tribunal. Thus the FtTJ's finding on this issue in paragraph [8] of his determination is wrong.
14. The issue is whether the FtTJ should have considered the case outside of the Rules. Mr Whitwell submits he should not because he says the appellant failed to satisfy the most basic and important requirement namely they had cohabited for a period of two years before his application. The FtTJ accepted he did not meet the requirements of the Rules and stated this in paragraphs [10] and [11] of his determination.
15. It is the FtTJ's paragraph [12] where the respondent submits there has been an error. Mr Whitwell submits that the FtTJ does not give any reasons why it was necessary to go outside of the Rules. What the FtTJ actually does in paragraph [12] is to assess proportionality under article 8 ECHR and it is based on this assessment that she allows the appeal.
16. There have been a number of cases on the correct approach to take where article 8 is raised and the Administrative Court has also passed comment on this approach.
17. The conclusion of Upper Tribunal Judge Grubb (sitting as a Deputy High Court Judge) in R on the application of Halimat SA Adiya Damiola Aliyu and Fatima Oluwakemi Aliyu v SSHD [2014] EWHC 3919 (Admin) (approving the decision of The Queen on the application of Ganesabalan v SSHD [2014] EWHC 2712 (Admin)) was that the respondent always had a discretion to grant leave outside of the Rules (apart from complete code situations) and that discretion had to be exercised on the basis of article 8 considerations and in particular an assessment of relevant factors in Article 8.2 ECHR. There is no threshold criterion to meet but that discretion must be taken alongside other factors such as compliance with the Rules and an individual's circumstances relevant to article 8. If there is no arguable case the respondent need merely say that. However, where there are good arguable grounds that the Rules do not deal with them then the individual's circumstances must be considered and a balancing act required by proportionality should be undertaken.

18. It therefore follows the FtTJ was not required to carry out a two stage test and would have to consider the appellant's article 8 claim if there were good arguable grounds that the Rules did not deal with them then the individual's circumstances must be considered and a proportionality balancing act must be undertaken.
19. I have therefore looked at the factors relied on by the FtTJ and these can be summarised as follows:
  - a. The strength of the relationship between the appellant and his partner.
  - b. The disruption to their lives if the appellant had to return to Sri Lanka.
  - c. The partner's loss of emotional support if the appellant had to leave.
  - d. The fact the partner could not go and live in Sri Lanka.
  - e. The strength of the appellant's private life and the fact he built this up whilst he was here lawfully.
  - f. The relationship began when he had leave.
  - g. Minimal effect on the economic well-being of the United Kingdom.
  - h. His general account as set out in paragraph [5] of his determination.
20. The respondent has not challenged the actual findings on article 8 and her appeal is based purely on the approach.
21. Having carefully considered Mr Whitwell's submissions I am satisfied that the FtTJ's approach is in line with current judicial thinking.
22. Whilst he erroneously found the respondent had granted him discretionary leave and the appellant in addition did not satisfy a fundamental requirement of the Rules I accept the FtTJ was entitled to consider this appeal under article 8 as there were factors which the Rules did not cover. In particular, the FtTJ accepted (not challenged by the respondent) this was a genuine and subsisting relationship which by the date of hearing had lasted over two years and he had already been granted a period of discretionary leave.
23. I do not find an error in law.

### **DECISION**

24. There was no material error of law The original decision is upheld.
25. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted

anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

No fee award was made and I see no reason to alter that decision.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis

