



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/29352/2013

THE IMMIGRATION ACTS

Heard at Field House
On 11th June 2015

Determination Promulgated
On 16th June 2015

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SERGEY MEDVEDEV
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Not Represented

For the Respondent: Mr A Melvin (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal, with permission, by the Secretary of State in relation to a Decision and Reasons of the First-tier Tribunal (Judge O Del Fabbro) promulgated on 5th November 2014 by which he allowed the Appellant's appeal on Article 8 grounds.

2. For the sake of clarity and continuity I will continue to refer, in this determination, to Mr Medvedev as the Appellant and to the Secretary of State as the Respondent.
3. The Appellant is a national of Russia born on 21st December 1983. He first entered the United Kingdom in February 2009 as a student and was then granted further leave to remain as the civil partner of a British National until 17th May 2012. He then made a further application to remain which was initially refused in January 2013 because he had not passed an English language test. That refusal was reissued in June 2013 because the Appellant had returned to Russia for family reasons in 2013. The Appellant appealed against the refusal on the grounds that he remained in a civil partnership and the refusal breached his human rights.
4. The appeal came first before the First-tier Tribunal in January 2014. On that occasion Judge Miller heard that the Appellant's relationship with his partner had irretrievably broken down, in part because of the partner having mental health issues and he was now in a settled relationship with Marcus Cashman, a British national. Judge Miller dismissed the appeal.
5. That decision was set aside by the Upper Tribunal for having contained a material error of law and the case was remitted to the First-tier Tribunal. It was the remittal which came before Judge Del Fabbro on 26th August 2014.
6. The nature of the relationship between the Appellant and Mr Cashman, a British national, is not in issue. Judge Del Fabbro accepted that the Appellant and Mr Cashman commenced their relationship in May or June 2013 and that the relationship is genuine and subsisting. Mr Cashman is employed by stockbrokers earning in excess of £34,000 per annum and the Appellant is also in employment. The Appellant has had difficulty making contact with his former partner and so has been unable to bring the civil partnership to an end.
7. The Appellant's mother in Russia does not know of his sexuality and he is concerned that he would not be able to live openly with his partner in Russia. His partner does not speak Russian and the language difficulty would prevent him working and living in Russia. The Appellant says that his life is in the UK. He works and pays taxes and has many friends here.
8. Judge Del Fabbro found that the Appellant could not satisfy the requirements of Appendix FM. He does not meet the definition of partner under the Rules and neither does he meet the requirements of paragraph 276ADE of the Rules; the provision of the Immigration Rules dealing with private life. The Judge then went on to consider whether he should consider Article 8 under the ECHR and outside the Rules. He found there were arguable grounds for a consideration of Article 8 under the ECHR. That was a matter he was entitled to find.
9. The Judge then at paragraph 14 took into account that the Appellant would be unable to qualify under the Rules in an application to join his partner in the UK and so the only alternative was for the couple to both go to Russia, which he found to be unreasonable. In attaching weight to the possible outcome of any future application

to an Entry Clearance Officer, the Judge erred. Doing so is speculative and irrelevant (SB (Bangladesh) [2007] EWCA Civ 28).

10. The Judge then went on at paragraph 16 to refer himself to the provisions of section 117B the Nationality, Immigration and Asylum Act 2002 as inserted by section 19 of the Immigration Act 2014. He noted the various positive factors weighing in favour of the Appellant. He then found that the Appellant's status in the UK could not be said to be precarious at the time of the application because he had extant leave. That was also an error. It has now been made clear by AM (S117B) Malawi [2015] UKUT 0260 (IAC) that Parliament has drawn a sharp distinction between any period of time during which a person has been in the UK "unlawfully" and any period of time during which that person's immigration status in the UK is merely "precarious." Those who at any given day held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or remain. A person's immigration status is "precarious" if their continued presence in the United Kingdom will be dependent on their obtaining a further grant of leave. That is the situation of this Appellant. It applied when he commenced his relationship with Mr Cashman and when he made his application. In finding his status was not precarious therefore the Judge erred.
11. Both of those findings were determinative of the Judge's decision to allow the appeal and thus the errors were material and I set aside the Judge's decision.
12. This appeal has already been before the Upper Tribunal and remitted to the First-tier Tribunal. I therefore decided to redecide the appeal in the Upper Tribunal.
13. The Appellant confirmed that save for the passage of time his circumstances remain as they were before the First-tier Tribunal. Mr Melvin did not challenge the genuineness of his relationship and the Appellant relied on the same evidence that he had relied on before the First-tier Tribunal.
14. I see no reason to differ from the First-tier Tribunal judge's decision that the circumstances of this particular case merit consideration of Article 8 outside the Immigration Rules. It is quite clear that this case is about proportionality. Article 8 is clearly engaged with regard to the relationship between the Appellant and his partner. The Secretary of State's decision to remove him is clearly a lawful one and in accordance with the Immigration Rules.
15. In considering proportionality I am required by section 117A of the Nationality, Immigration and Asylum Act 2002 to take into account the factors contained in section 117B.
16. Section 117B provides:-

117B Article 8: public interest considerations applicable in all cases

- (1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

- (a) are less of a burden on taxpayers, and
- (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

- (a) are not a burden on taxpayers, and
- (b) are better able to integrate into society.

(4) Little weight should be given to—

- (a) a private life, or
- (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
- (b) it would not be reasonable to expect the child to leave the United Kingdom.

17. In this case the Appellant speaks English and as both he and his partner are in employment he is financially independent.
18. The Appellant has not formed a relationship or built up his private life whilst in the UK unlawfully.
19. However, as indicated above in my decision as to the First-tier Tribunal's error of law, the Appellant's immigration status was precarious at the time that he commenced his relationship with Mr Cashman. That relationship undoubtedly constitutes private life. It is less clear whether it constitutes family life. In terms of whether it can constitute family life one would need to consider the definition of "partner". A "partner" is not defined in the 2002 Act. There is a definition for a "qualifying partner" as being a partner who is a British citizen or settled in the UK. However in terms of the definition of partner the statute is silent. To inform the definition of "partner" therefore I look to the Immigration Rules. They do not of course have the force of statute but nevertheless are a clear indication of Parliament's view which of course is also reflected by Statute. The Immigration Rules define a "partner" as a spouse, a civil partner or a person with whom a person has been living for two years. As the Appellant and Mr Cashman only met in May or June of 2013,

notwithstanding that their relationship progressed rapidly, I find they would not qualify as “partners” under the Rules. The fact that the Civil Partnership with his former partner still exists does not have any effect. If they are not “partners” then it seems that their relationship cannot be “family Life”. However, that is rather more form than substance as it clearly represents a significant aspect of the Appellant’s private life.

20. The private life that the Appellant has acquired in the United Kingdom with his partner was at a time when his status was precarious and thus little weight can be attached to it. The same would apply to family life in any event. ECHR jurisprudence is clear that a relationship commenced at a time when an Appellant cannot have any expectation of being allowed to remain carries little weight. The Appellant could not have had an expectation that he would be permitted to continue to enjoy his relationship in the UK unless he could meet the Immigration Rules.
21. I am prepared to accept that it would not be reasonable to suggest Mr Cashman should leave the United Kingdom and reside in Russia. However, that is a matter of choice for him. There is of course nothing to prevent the Appellant from returning to Russia and making an application to join Mr Cashman in the UK. The Immigration Rules contain the conditions to be met by persons wishing to come to the UK either on a temporary or permanent basis. If a person can meet those conditions they can enter or remain and if not they cannot.
22. When I asked the Appellant why he could not return to Russia to make an application to enter the United Kingdom, he said that he would be sad to be separated from Mr Cashman and that he knows applications take a while. He said that it would be easier to stay in the UK and sort out his status rather than go back to Russia. While that may well be true it is an inconvenience rather than an insurmountable obstacle and does not render his removal disproportionate.
23. Quite simply, the Appellant in this case does not meet any of the requirements of the Immigration Rules for leave to remain and there is nothing about his situation which is unusual/compelling/exceptional to permit his remaining under Article 8 of the ECHR.
24. Having decided that the First-tier Tribunal made an error of law in its decision and having set that decision aside, I remake the decision and allow the Secretary of State's appeal with the result that the Appellant’s original appeal against the Secretary of State's decision is dismissed.

No anonymity direction is made.

Signed
Upper Tribunal Judge Martin

Date 12th June 2015