



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

Appeal Number: IA/39020/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 10 December 2014**

**Determination Promulgated  
On 7 January 2015**

**Before**

**Deputy Upper Tribunal Judge Pickup**

**Between**

**Dhavalkumar Narendrabhai Patel  
[No anonymity direction made]**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

**Representation:**

For the appellant: Mr A Slatter, instructed by Ash Norton Solicitors  
For the respondent: Mr S Whitwell, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant, Dhavalkumar Narendrabhai Patel, date of birth 13.9.86, is a citizen of India.
2. This is his appeal against the determination of First-tier Tribunal Judge Omotosho promulgated 2.9.14, dismissing his appeal against the decisions of the respondent, dated 10.9.13, to refuse his application to vary leave to remain in the UK as the partner of Mrs Prinkal Dhavalkumar Patel, and to remove him from the UK pursuant to section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 4.8.14.
3. First-tier Tribunal Judge Hollingworth granted permission to appeal on 20.10.14.

4. Thus the matter came before me on 10.12.14 as an appeal in the Upper Tribunal.

### **Error of Law**

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Omotosho should be set aside.
6. The relevant and unusual background to the appeal can be summarised as follows. The appellant came to the UK as a student in 2009, with leave later extended to 30.3.12. During that time he returned to India and married Mrs Patel in December 2010. She came to the UK on 31.12.11, not as his dependant, but as a student in her own right, with leave which at the time of the First-tier Tribunal hearing was due to expire on 30.10.14. She now has further leave to remain under Tier 2, but that was not the situation prevailing at the date of the hearing in the First-tier Tribunal, even though it was foreshadowed by what is set out at §24 of the decision.
7. The appellant was refused further leave to remain beyond 2012 to complete his studies, but in a decision promulgated on 9.10.12, his appeal was allowed on the basis of article 8 ECHR and thus he was granted leave to expire 23.8.13. He apparently completed his studies in August. The day before the expiry of that leave the appellant made an application for leave to remain outside the Rules on the basis of being the partner of Mrs Patel. The refusal of that application and the decision to remove him was the subject of the appeal before the First-tier Tribunal on 4.8.14. Curiously, although his wife had Tier 2 leave to remain, the appellant did not apply for coextensive leave to remain as her dependant. At the First-tier Tribunal appeal hearing the appellant sought only to remain as long as his wife, which at that stage was to 30.10.14.
8. It was clear that the appellant could not meet the Rules for leave to remain under Appendix FM or paragraph 27ADE. The Judge very properly considered the current case law including Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC), and more recently R (oao MM and Other) v SSHD [2014] EWCA Civ 985, to conclude that on the facts of this case she ought to go on to consider the appellant's circumstances outside the Immigration Rules. Having done so, including taking into account section 117B, Judge Omotosho dismissed the appeal, relying on Nasim & Others (Article 8) [2014] UKUT 00025 (IAC), in relation to the private life claim of the appellant.
9. It is clear that amongst other considerations in the proportionality balancing exercise, the Judge's attention was drawn and careful consideration given to the claim that the appellant's wife had a medical condition which required her husband's support. She suffers from polycystic ovary problems, causing stomach and back pains. She is sometimes unable to go to work for some 5 days during her monthly period cycle. The exact length of time she is incapacitated was unclear from the decision, but was not enough to prevent her holding down full-time employment as a carer, quite a physically demanding job. The judge also took into account the assertion that the nearest family to help her in the appellant's absence was 1-1.5 hours away.

10. The judge accepted that the appellant and his wife are in a genuine and subsisting relationship. However, her leave in the UK was limited to no more than a couple of months following the appeal hearing in the First-tier Tribunal, due to expire on 30.10.14 and there was no basis to speculate at that time whether it might be extended further. There was no pending application. It is relevant that it was apparently open to the appellant to apply for leave to remain as her dependant, but he did not do so. Neither has he applied as such with or on the back of his wife's recent application, now granted for further leave to remain. The judge could only assess the circumstances at the date of the hearing on the basis that the appellant had completed his studies and his wife was due to complete her studies and leave by 30.10.14.
11. In granting permission to appeal, Judge Hollingworth found, "an arguable error of law has arisen in relation to the scope of the judge's consideration of the medical evidence in reaching the conclusions relevant to the carrying out of the proportionality exercise. Arguably good grounds were found to have been made out in relation to proceeding to consider the application of article 8."
12. I confess I do not understand the grant of permission; it is clear that the judge did go on to make a full article 8 ECHR assessment outside the Immigration Rules. In that assessment the judge gave careful consideration to the spouse's medical condition as part of the proportionality assessment. However, it has to be borne in mind that neither the appellant nor his wife could have had any legitimate expectation of being able to remain in the UK except in compliance with immigration rules. As Nasim makes clear, there is no right to study or work in the UK. A decision refusing to extend the leave of a student or former student does not engage article 8 private life, as it does not interfere with the physical or moral integrity of the appellant. Article 8 is not designed to create such a right. There may well be an interference with their rights to family life by removing the appellant pending the termination of his wife's studies and expiry of her leave, creating a period of separation of a few weeks.
13. On the basis that article 8 is engaged, the judge went on to conduct the careful proportionality balancing exercise between on the one hand the rights of the appellant and his spouse to respect for their private and family life and on the other the legitimate and necessary aim of the state to protect the economic well-being of the UK through immigration control, which is in effect the public interest.
14. Whilst he disagrees with the judge's conclusion on that proportionality assessment, Mr Slatter was unable to point to any relevant factor that had been left out of account or which should not have been taken into account. The matter of weight to be accorded to those factors was the task of the judge. Unless the appellant can demonstrate that the evidence or circumstances were such that no judge could have reached the same conclusion, or put another way that the circumstances allowed of only a conclusion that the appeal should be allowed, the grounds are no more than a disagreement with the judge's decision on matters which were for her to decide and for which conclusions she has given cogent reasons. Another judge may have reached a different conclusion, but that does not mean that the conclusion reached by this judge was an error of law so as to require the decision to be set aside and made again. There is nothing before me to show that the decision was in any way perverse.

15. Each case must, of course, be considered on its own facts. However, the fact that she has strong period pains or perhaps worse for a few days each month and has the benefit of her husband to help her during that time, as he has no work or study to go to does not necessarily render his removal from the UK disproportionate. It is not for me at this stage to replace the judge's views with my own. In Akhalu (health claim; ECHR Article 8) [2013] UKUT 00400 (IAC), the Upper Tribunal held that, "the consequences of removal for the health of a claimant who would not be able to access equivalent health care in their country of nationality as was available in this country are plainly relevant to the question of proportionality. But, when weighed against the public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interests in removal."
16. The health issue is relevant to proportionality, although in a rather different way to that in Akhalu. At §45 the Tribunal held that the correct approach was for the judge to have regard to every aspect of the claimant's private life here, as well as the consequences for her health of removal. I am satisfied that the judge did have regard to every aspect of the private and family life in the proportionality balancing exercise. She considered all the relevant facts around the health issue and grappled with it in the decision, citing appropriate and cogent reasons, particularly at §47, for reaching her conclusion. I cannot see that that decision was perverse or otherwise one not open to the judge to make.
17. I would further note that the appellant did not meet the Rules for leave to remain as a partner on the basis of private and or family life. Article 8 is not a shortcut to compliance with the Rules and he is not entitled to settle in the UK simply because that is his choice. It may at first blush seem strange that a man should be separated from his wife. However, it has to be recalled that the appellant and his wife have separately come to the UK as students; neither came as the dependant of the other. Their purpose and their leave was to remain until studies were complete and only in compliance with the rules. They must be taken to have no legitimate expectation to remain except in accordance with immigration rules and to have intended to leave the UK on completion of their studies. If the appellant, who is unemployed and no longer a student, wished to remain as his wife's dependant, it was open to him to make the appropriate application; which may still be open to him. However, he can hardly complain that he is asked to leave when his studies are complete and he has no other basis to remain, at least in relation to any application he has made. The judge took into account not only the wife's medical condition but that there would be a short period of separation before she too would have had to leave the UK. In the circumstances, it can hardly be disproportionate to refuse him leave to remain.

### **Conclusions:**

18. For the reasons set out above, I find that 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:

Date: 10 December 2014

Deputy Upper Tribunal Judge Pickup

### **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 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. 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 (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and 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:

Date: 10 December 2014

Deputy Upper Tribunal Judge Pickup