



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

Appeal Number: OA/02928/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 14 April 2015**

**Determination  
Promulgated  
On 27 April 2015**

**Before**

**LORD BANNATYNE  
UPPER TRIBUNAL JUDGE ALLEN**

**Between**

**ENTRY CLEARANCE OFFICER, NEW DELHI**

**and**

**RANJEET SINGH**

Appellant

Respondent

**Representation:**

For the Appellant: Mr Clarke, Home Office Presenting Officer  
For the Respondent: Mr Singh, Counsel

**DECISION AND REASONS**

**Introduction**

1. The appellant before this Tribunal was the Entry Clearance Officer (hereinafter referred to as "the ECO"). Mr Singh is hereinafter referred to as "the applicant".
2. The appeal was against a decision of the First-tier Tribunal dated 22 December 2014 which allowed on human rights grounds the applicant's appeal against the decision of the ECO to refuse to grant entry clearance as a partner under App FM of the Immigration Rules.

## **Background**

3. The applicant is a citizen of India, aged 31. He is sponsored by his wife, Mrs Manjinder Kaur, who is a British citizen.
4. The applicant appealed to the First-tier Tribunal under the Nationality, Immigration and Asylum Act 2002, against a decision to refuse entry clearance under the Immigration Rules. The decision was made by the ECO on 10 February 2014.
5. The basis of the decision of the ECO was that the ECO was not satisfied that the applicant met the requirements of the Immigration Rules in the following respects:
  - (i) that, subject to section S-EC, Suitability - Entry Clearance Requirements, he is subject to an unrevoked deportation order (S-EC.1.3); and
  - (ii) that, subject to section E-ECP, the applicant's relationship with the sponsor is genuine and subsisting or that they intend to live together permanently in the UK.
6. Two matters were argued on behalf of the applicant before the First-tier Tribunal: first, in terms of the Immigration Rules. This argument failed before the First-tier Tribunal and formed no part of the argument before this Tribunal.
7. Secondly, it was argued that Article 8 ECHR was engaged and that the applicant's right to a family life would sustain an unlawful interference if he was refused entry clearance to the UK. This argument was successful before the First-tier Tribunal.

## **The Hearing before the First-tier Tribunal**

8. The First-tier Tribunal heard the evidence of the sponsor and in light of that and the documentary evidence before it made the following findings of fact at paragraph 14 of the determination:
  - “(i) The Appellant is subject to an unrevoked deportation order.
  - (ii) The Appellant and the Sponsor are clearly in a genuine and subsisting relationship, for the following reasons:
    - a. they have known each other for approximately eight years. I accept the Sponsor's explanation for any confusion about the commencement date of their 'relationship', based as it is on an inherently ambiguous term.
    - b. there is ample and not seriously contested evidence that they have sustained that relationship both in UK, and since the Appellant's

return to India, in that country. The Sponsor's home address was given for his bail surety, she has visited him four times since his return, [to India on 14 April 2013], providing photographic evidence [sic], sent him money and they have maintained an active and frequent correspondence".

9. The above findings in fact were not challenged on behalf of the ECO before this Tribunal.

### **Procedure since the Hearing before the First-tier Tribunal**

10. The ECO sought permission to appeal and this was granted on all grounds.

### **Submissions on behalf of the ECO**

11. It was Mr Clarke's position that the First-tier Tribunal had erred in law in a number of respects:
- First, no consideration had been given by the First-tier Tribunal to Immigration Rule 398
  - Secondly that it was made clear in Gulshan [2013] UKUT 00640 (IAC) that the Article 8 assessment should only be carried out when there are compelling circumstances not recognised by the Immigration Rules. He submitted that the First-tier Tribunal had failed to identify why the applicant's circumstances were so compelling that they amounted to exceptional circumstances outside the Immigration Rules. He in addition referred to Nagre [2013] EWHC 720 Admin which had endorsed the Secretary of State's guidance on the meaning of exceptional circumstances, namely: ones where refusal would lead to an unjustifiably harsh outcome. He submitted that the First-tier Tribunal had not followed this approach and thereby had erred in law. He went on to submit in development of the above submissions that the First-tier Tribunal's findings were wholly inadequate given that the applicant was subject to a deportation order which had not been revoked. The applicant had been fully aware of his deportation order and yet rather than seek to revoke this had chosen to apply for entry clearance. The applicant did not meet the requirements of the Rules due to his deportation order and his circumstances in no way warranted the First-tier Tribunal's findings that it was disproportionate to refuse him entry and outweighed the public interest. He submitted that the starting point in a deportation case was that it was in the public interest to continue to exclude a person subject to such an order and the First-tier Tribunal had approached the matter from a neutral starting point, instead of one heavily weighted in favour of maintaining his exclusion while this remained in force.
  - Thirdly, in carrying out the proportionality exercise no proper consideration had been given to Section 117B of the Immigration Act 2014. In particular no consideration had been given to the fact

that the relationship between the applicant and the sponsor had begun while the applicant's immigration status was unlawful, he having entered the UK illegally. The applicant and the sponsor were fully aware of that fact and were fully aware that he was subject to a deportation action. Therefore he submitted in terms of said provisions little weight should have been given to their relationship. That was not the course which had been followed by the First-tier Tribunal.

### **Reply on behalf of the Applicant**

12. Mr Singh began his submissions by directing our attention to paragraph 14 of the First-tier Tribunal's determination where he submitted at an early stage in the determination the Tribunal found that the applicant was subject to an unrevoked deportation order. Thus he contended that this was at the forefront of the First-tier Tribunal's mind when reaching its decision.
13. He then directed our attention to paragraph 16 of the First-tier Tribunal's determination. Here he submitted the First-tier Tribunal had looked, if briefly, at the issue of compelling reasons and dealt with the issue properly. The First-tier Tribunal had applied the correct test in terms of Gulshan and Nagre. He submitted that the First-tier Tribunal had set out Section 117B of the 2014 Act (see: paragraph 21 of the determination) and accordingly had had regard to this.
14. He accepted that the determination was short but said that any criticisms of the decision related more to its form rather than to the substance of the decision. It was his position that the First-tier Tribunal had had regard to the correct test and the appropriate statutory provisions. He submitted that it had produced, although a short decision, a properly reasoned one and that it had not erred in law.

### **Discussion as to Error of Law**

15. Without difficulty we are persuaded that there are a substantial number of material errors of law in the determination of the First-tier Tribunal.
16. First, paragraph 398 of the Immigration Rules is never referred to. This was the essential background to the core issue which the First-tier Tribunal was considering. It is in light of these Rules that the First-tier Tribunal required to decide whether there were exceptional circumstance such that the public interest in deportation is outweighed by other factors.
17. The court in MF (Nigeria) 2013 EWCA Civ 1192 in the context of a case where the main issue before it concerned circumstances in all material senses the same as in the instant case, namely: where an appellant could not succeed substantively under paragraphs 398 or 399 of the Rules, where he was subject to a deportation order. Thus the question before the

court was whether there were “exceptional circumstances” such that the public interest in deportation was outweighed by other factors. The court said this:

“the reference to exceptional circumstances serves the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paragraphs 398 and 399 or 399A. It is only exceptionally that such foreign criminals will succeed in showing that their rights under Article 8(1) trump the public interest in their deportation”. (See: paragraph 40).

Having regard to the above guidance it is in our view impossible to understand how a proper consideration of proportionality could be carried out in the absence of a consideration of paragraph 398. There was no recognition within the determination of the First-tier Tribunal that it would only be exceptionally where a person subject to a deportation order would succeed in showing that their rights under Article 8(1) would trump the public interest in their deportation.

18. Secondly it is correct as advanced by Mr Singh that the First-tier Tribunal in the course of its determination refers to the issue of compelling reasons. However, its decision, with respect to this issue, is we are satisfied wholly untenable. All that is said on this issue by the First-tier Tribunal is the following:

“[The applicant] is the Sponsor’s husband and his separation from his wife amounts to a compelling enough reason to consider this appeal under Article 8.” (See: paragraph 16 of the First-tier Tribunal’s determination).

If the foregoing assertion is correct then in any case where a husband is separated from his wife as a result of a decision made on behalf of the Secretary of State there would be compelling reasons; that is not the law. This bald statement renders the tests of “compelling circumstances” and “exceptional circumstances” set out in Gulshan and Nagre meaningless.

19. Thirdly at paragraph 20 of the First-tier Tribunal’s determination it makes the following finding:

“I find therefore, on the basis that the Appellant has a genuine and subsisting relationship with his wife and her children that it is manifestly not proportionate to interfere in either his or their family life”.

This finding with respect to proportionality is made on the basis of a consideration of that issue as set in paragraphs 18 and 19 of the determination. At no point either in those two paragraphs or elsewhere is any consideration given by the First-tier Tribunal to the public interest in continuing to exclude a person who is subject to a deportation order. The First-tier Tribunal completely fails to engage in the proportionality exercise. There is only consideration of one side of the equation, namely:

the interest of the applicant and his family. The First-tier Tribunal has not carried out a proportionality exercise.

20. Moreover, there is no reasoning, far less adequate reasoning, as to why it is not proportionate to interfere in either his or his family's family life. The reasoning amounts to no more than a mere assertion that where a subsisting relationship is interfered with that is not proportionate. That is clearly not a sufficient reason on its own. In particular it cannot be adequate reasoning given the approach which the First-tier Tribunal was bound to take having regard to the fact that the applicant was subject to a deportation order. Beyond that we would also observe that it is impossible to understand how the First-tier Tribunal could have come to the conclusion that it was "manifestly not proportionate" (our emphasis).
21. In paragraph 21 of the determination the First-tier Tribunal goes on to refer to the Immigration Act 2014 and the amendments made in terms thereof to the Nationality, Immigration and Asylum Act 2002 by the introduction of Section 117A - 117D. The First-tier Tribunal states within its determination that in the consideration of Article 8 it has to have regard to these sections of the Act. It is noteworthy that reference to the foregoing statutory provisions comes after the First-tier Tribunal has made its decision on proportionality at paragraph 20. We observe that paragraph 21 commences as follows:

"I now refer myself to the 2014 Immigration Act ... "

It appears to us that the First-tier Tribunal, if it considered certain parts of these provisions at all, considered them after having made its decision on proportionality. Again this is clearly an incorrect approach. Moreover, there appears when the determination is examined to be no consideration of certain central parts of these provisions. There is so far as we can identify: no consideration given to the fact that the applicant's relationship was formed with the sponsor when the applicant was in the UK unlawfully and that this was known to both of them. Nor is there any consideration given to the maintenance of immigration control being in the public interest.

22. In addition to the above no consideration is given in the Article 8 assessment to the fact that the factual matrix in this case is somewhat unusual and is this: the applicant was not in this country at the time of the matter coming before the First-tier Tribunal and on the basis of the findings made by the First-tier Tribunal family life had been able to be maintained, although the applicant and sponsor were apart, by visits to India and by modern means of electronic communication. The question of whether family life against that factual matrix could be maintained by these means is not even considered by the First-tier Tribunal. We are satisfied that the First-tier Tribunal ought to have considered that matter.

23. When all of the above is taken together we are in no doubt that there has been a material error of law on the part of the First-tier Tribunal. Overall we are persuaded that there was a total failure to grapple with the various issues which were before the First-tier Tribunal.

**Decision**

24. For the foregoing reasons we grant the appeal. Having been addressed on the issue as to whether we should re-hear the matter or remit it to a differently constituted First-tier Tribunal we have decided that given the extent and nature of the criticisms which we have made of the First-tier Tribunal's determination it was appropriate that the case be remitted to a freshly constituted First-tier Tribunal.

25. We make no anonymity direction.

Signed

Date

Lord Bannantyne  
Sitting as a Judge of the Upper Tribunal