Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA 06046 2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 December 2013	**On 24 December 2013**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

KULWINDER RAM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Jafar, Counsel instructed by Lee Valley Solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal came before Upper Tribunal Judge Grubb on 2 October 2013. He ruled that the First-tier Tribunal had erred in law and directed the appeal be decided again in the Upper Tribunal. The case was subsequently transferred to me. I respectfully adopt and incorporate into my decision the decision of Judge Grubb dated 10 October 2013 which was sent to the parties on 24 October 2013. An unsigned copy of that decision is appended hereto.

2. The appellant is a citizen of India who was born in 1964 and so is now 49 years old. It is his case that he entered the United Kingdom in 2002. On 5 July 2013 he applied for leave to remain on the basis of his relationship with his partner Ms Lolita Dulmuan Belible who is a British citizen. The application was refused on 11 February 2013 under paragraph 295F with reference to paragraph 295D(i) and (iv) and paragraph D-LTRP 1.3 with reference to paragraph R-LTRP 1.1(d) and paragraph 276CE with reference to paragraph 276ADE(iii)-(vi) of HC 395.

3. The rules have been amended so many times that identifying them is becoming increasingly tedious. The above is a rather elaborate way of saying that the respondent found that the appellant did not satisfy the rules relevant to his application to remain as the partner of a person present and settled in the United Kingdom because the appellant was present in the United Kingdom in breach of Immigration Rules and could not show that paragraph "EX 1" applies. This means that the appellant could not show that there were "insurmountable obstacles to family life" with a partner continuing outside the United Kingdom. It is clear from the fact the appellant did not have leave to be in the United Kingdom that there was no possibility of his satisfying the requirements of the Rules. The appellant does not claim to have been in the United Kingdom for twenty years and so he is unable to show that he should be permitted to stay under the rules by reason of long residence.

4. The appellant and his partner gave evidence before me. I do not think it necessary to go through the evidence in great detail. Certain things are quite clear. The appellant and his partner have lived together in the United Kingdom for at least two and a half years before applying for leave to remain. Their relationship has every sign of commitment and permanence. Some time ago, when he was in India, the appellant married a woman who is not his present partner but that marriage is dead. There is documentary evidence before me confirming this.

5. The appellant's partner is in regular work as a staff nurse in the National Health Service. She has an income in excess of £30,000 a year and is able to accommodate the appellant.

6. Although the appellant chose to give his evidence through an interpreter he has some competence in the English language and has passed an English language test administered by Trinity College London in speaking and listening at "Entry 1".

7. Mr Tarlow cross-examined the appellant and the sponsor asking questions intending to expose any deficiency in their evidence that they live together. The answers were not perfectly complementary but I am satisfied that the inconsistencies are much more likely to be the result of two honest people remembering a recent event of no great consequence in their lives rather than two dishonest people trying to pretend to be living together when that is not the case. The evidence of their cohabitation includes, for example, council tax bills showing that the sponsor stopped claiming the relief entitled to her as a single person and other documents indicating the appellant lived at the sponsor's address. I have no hesitation in concluding that on the balance of probabilities the points indicated above have been established.

8. Mr Jafar submitted that I should allow the appeal with reference to the decision of the House of Lords in **Chikwamba v SSHD [2008] UKHL 40** and the explanation of that and subsequent decisions in **SSHD v Hayat (Pakistan) [2012] EWCA Civ 1054**.

9. The appellant does not want to return to his native India. He has not been there since 2002 and would not be welcome there because of ill feeling in his family and

his former wife's family as a result of the break up of his marriage. This evidence was not tested before me but I believe it. It is not surprising that the appellant was a married man when he came to the United Kingdom or that the marriage has broken up and that there is still tension in the family as a consequence. I can see no reason whatsoever why he need tell his family he has returned to India and the chances of his being discovered in India by accident are extremely remote.

10. The sponsor does not wish to live in India. She feels she would be estranged by the language and culture and religion. She did not know if she could work in India. Although I have no specific evidence on the point I think it likely that a woman with the qualifications necessary to work as a staff nurse in the United Kingdom National Health Service would be employable in India. She does not want to work there. She is a little older than the appellant and is not interested in learning to adapt to a new culture. She is content in her employment in the United Kingdom and does not want to give up that job. I find these things inherently reasonable but they are not insurmountable obstacles in the path of her joining her husband in India.

11. It was not suggested before me that the sponsor would not be entitled to enter India in the sense that she would be unable to satisfy the requirements for entry into that country, assuming there are such.

12. I accept that the appellant's partner was widowed in September 2008 and was shocked and depressed as a result. I accept that she received some medical treatment to help her come to terms with the grieving process and that the subsequent arrival of the appellant was a very happy event in her life. I am quite satisfied that his departure for India would cause her considerable personal distress but not that it would be likely to so disrupt her health so that she became seriously ill as a consequence. There is no evidence to support such a conclusion. The sponsor is fearful of his departure but she is an educated woman experienced in life and could be expected to cope.

13. I am not here to decide an entry clearance application but the evidence before me points very firmly in the direction of the appellant being able to satisfy the requirements for admission as a long-term partner and any adverse consequences by reason of his poor immigration history in the event of his making an application would be ameliorated by the need to promote his and his British national partner's private and family lives.

14. It is right to say that Mr Tarlow did not oppose my finding that the appellant appeared to satisfy the requirements of the Rules for admission.

15. Mr Jafar reminded me, rightly, that the decision in **Chikwamba** is a decision of the House of Lords and therefore highly authoritative. He reminded me too that **Chikwamba** did not deal solely with cases where the Article 8 claim was particularly strong. Indeed in considering the case in **Hayat**, Elias LJ at paragraph 17 confirmed that the need for a proper Article 8 assessment was just as strong in a case where the claim might appear to be weak. His point was that Article 8 is a bulwark against arbitrary decision making.

16. I am quite satisfied that removing the appellant would interfere with his and his partner's private and family lives. If the Rules are meant to imply that Article 8

is only relevant where there are insurmountable obstacles in the path of couples living together outside the United Kingdom I firmly disagree. The law here was, if I may respectfully say so, clearly and helpfully summarised by Sedley LJ in **VW (Uganda) v SSHD [2009] EWCA Civ 5** at paragraph 19 where he said:

> "Whilst it is of course possible that the facts of any case may disclose an insurmountable obstacle to removal, the inquiry into proportionality is not a search for such an obstacle and does not end with its elimination. It is a balanced judgment of what can reasonably be expected in the light of all the material facts."

17. I consider the sponsor's disinclination to travel to India to be entirely reasonable for a person in her circumstances and that removing the appellant would interfere with the private and family life of both him and his wife.

18. It does not necessarily follow that removal is disproportionate.

19. Although I have read the explanation of the jurisprudence given in **Hayat** the jurisprudence does not, and is not intended to, determine the outcome of every case brought on human rights grounds. What is clear is that each case needs to be thought about with a constant eye on the proportionality of removal. Removal becomes harder to justify when a person has a good (or excusably bad) immigration history or where the lives of children are being disrupted or where return would involve someone returning to a country that was, for example, dangerous or from where it would be very difficult to make an application for permission to return.

20. Removal is likely to be a disproportionate interference with private and family life unless the respondent can show that it is for a sensible reason.

21. This appellant has a bad immigration history. He has come to the United Kingdom for the sole purpose of bettering himself. That is not intrinsically discreditable but this appellant did so without permission. It is unfair to people who obey the Rules to see those who do not prospering and it must encourage others to flout the Rules if people who flout the Rules are allowed to remain.

22. I do remind myself that it is right to give considerable weight to the private and family lives of the appellant and his sponsor. Clearly the appellant is the author of his own misfortune, in the sense he has chosen to live in the United Kingdom unlawfully but he entered some years ago and has established significant private and family life after his illegal entry. Although the sponsor admits to knowing of the appellant's unsatisfactory immigration status at a fairly early stage in their relationship she has not allowed the relationship to develop in order to harbour an immigration offender but because she has found a companion. These are things to respect.

23. However when I consider the impact of removal on the relationship I remind myself that this is not a deportation appeal. The appellant's exclusion will not subject him to a ten year blanket ban on return. Rather everything suggests he would be able to satisfy the requirements of the Rules and enter the United Kingdom lawfully to enjoy his close relationship with his sponsor.

24. It is also relevant that he would be returning to a country of which he has adult memories. I appreciate he has not been in India for seven years and it will no

doubt be a challenging experience for him to return to a country that must have changed in his absence. It is still the country of which he is a national in which he has lived for a significant part of his life. Many close couples wish to live together but accept some periods of separation as part of their relationship. It has not been shown that there is a particularly strong dependency here in the sense that the sponsor cannot manage without him. She would prefer to be with him but that is an entirely different point.

25. No one has given evidence about the time it would take to process an entry clearance application but nothing has been done to suggest it would inordinate. The appellant may well be able to take some work in India or be maintained from his wife's resources. Separating them does not destroy their relationship and does not subject either of them to high degrees of hardship.

26. Removing him would show that the Immigration Rules are not lightly waived and that people who disregard them cannot just assume that the Human Rights Act will save them from the consequences of their own misconduct. It is sensible to requiring the appellant to leave the United Kingdom and return to the country of which he is a national to uphold the integrity of the rules.

27. In this case, separation for the purposes of complying with the Immigration Rules would be in the nature of a nuisance rather than a calamity. I find it wholly proportionate.

28. In the circumstances although the decision of the First-tier Tribunal has been set aside I remake the decision and I dismiss the appellant's appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 23 December 2013

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/06046/2013

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Representation:

For the Appellant: Mr A Jafar instructed by Lee Valley Solicitors
For the Respondent: Ms H Horsley, Senior Home Office Presenting Officer

DECISION

1. The appellant is a citizen of India who was born on 24 August 1964. He claims to have entered the United Kingdom in 2002 when aged 38. On 5 July 2013, he applied for leave on the basis of a relationship with his British citizen partner, Ms Lolita Dulmuan Belible. On 11 February 2013, the Secretary of State refused the appellant's application.

2. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 26 July 2013, Judge Glossop dismissed the appellant's appeal in which he relied upon Article 8 of the ECHR. The Judge accepted that the appellant and his sponsor had a "relationship" that engaged Article 8 but found that the appellant's removal would be a proportionate interference with his private and family life, in particular on the basis that he could return to India and seek entry clearance.

3. In reaching that finding, Judge Glossop was not satisfied as to the depth or length of the relationship. In paragraph 12 of his determination the Judge stated that:

> "12. …I am not satisfied that the relationship is subsisting in the manner of a permanent relationship. To be precise I am not satisfied as to [the appellant's] ultimate intentions. I am not satisfied as to the intentions of his partner either who was claiming an undying love declined to say that she would go to India albeit for a short period."

4. On 16 August 2013, the First-tier Tribunal (Judge Hemingway) granted the appellant permission to appeal to the Upper Tribunal essentially on the following ground:

> "2. …It is arguable that the Judge has given inadequate reasons as to why he apparently found the relationship the appellant has with his UK based partner not to be of real substance. The reasons given appear to be no more than they are not married and that there is limited documentary evidence of co-habitation which, in fact, might be attributable at least in part to the appellant not having lawful stay. The matter is potentially material as the relationship constitutes a major plank of the Article 8 argument."

5. Thus, the appeal came before me.

The Submissions

6. On behalf of the appellant, Mr Jafar submitted that the Judge's decision could not stand for a number of reasons. First, he submitted that the Judge had failed to take into account a number of documents contained within the respondent's bundle and also the appellant's bundle which gave the appellant's address as that of the sponsor dating back to 2010. This was material relevant to assessing the depth and length of the relationship which the parties claimed had resulted in them living together since May 2010. Secondly, Mr Jafar submitted that the Judge had been wrong to raise in para 16 of his determination the possibility that the appellant was not free to form a permanent relationship with the sponsor on the basis that it had not been shown that his previous marriage in India had ended. Mr Jafar submitted that a divorce deed had been sent to the Home Office, a copy of which was contained within the appellant's bundle prepared for the Upper Tribunal. In any event, Mr Jafar submitted that this had not been raised before and the appellant had not had an opportunity to deal with it.

7. On behalf of the respondent, Ms Horsley submitted that the Judge had taken into account the vast majority of the evidence. She accepted that he may not have taken into account some council tax bills but that was not sufficient to require his careful

and detailed determination to be overturned. She submitted that the Judge had looked at the evidence in the round and he was entitled to take the view that the nature and strength of the parties' relationship had not been established. In any event, the Judge had found, and was entitled to find, that it was not disproportionate to require the appellant to return to India in order to obtain entry clearance given the circumstances of his immigration history and that the relationship had been formed in the full knowledge of the appellant's precarious immigration status.

8. In reply, Mr Jafar referred me to the Court of Appeal's decision in VW (Uganda) and AB (Somalia) v SSHD [2009] EWCA Civ 5. He submitted that in finding that the appellant could return to India to seek entry clearance, the Judge had failed to make any findings on whether it would be reasonable to expect the appellant's partner, a British citizen (which he submitted was important) who worked in the NHS and had no connection with India, to accompany him. He submitted that this issue could, in any event, only be determined in the light of a proper finding in relation to the strength and nature of the parties' relationship. If that latter finding could not stand, then the assessment of proportionality was also flawed.

Discussion

9. At the conclusion of the submissions, I indicated that I was satisfied that the First-tier Tribunal's decision involved the making of an error of law and could not stand. These are my reasons.

10. First, I accept Mr Jafar's submission that the Judge failed to take into account a number of documents relevant to the parties' claim that they had been living together as a couple since May 2010.

11. At para 11 of his determination the Judge said this:

> "11. …The Respondent does not concede the depth or length of the relationship. The Appellant has put forward documentary evidence which shows that he has been using his partner's address for banking purposes for about two years and that two years ago they bought a double duvet with other items. There is no firmer evidence that the parties are and have been living together for a precise period of time such as registering with a doctor, dentist, paying council tax (the council tax bill for 2013/2014 is in both names), or any other agency which would require proof of where a person was living. The Presenting Officer specifically challenged the depth of the relationship."

12. It is clear that the Judge only took into account two pieces of documentary evidence, namely a receipt for a double duvet (at page 16 of the appellant's bundle) in the appellant's name dated 2 June 2010 and a council tax bill for the year 2013/2014 (at page 109 of the appellant's bundle) giving the appellant's address as that at which, it is not disputed, the sponsor lived, namely "8 Thackeray Avenue, Tilbury, Essex". There were, however, a number of other documents contained both within the appellant's bundle and that of the respondent which between 2010

and 2013 gave the appellant's address as that of the sponsor. There were a number of other council tax documents. First, there is a council tax demand notice for 2010/2011 dated 14 December 2010, secondly for the year 2011-2012 dated 5 March 2011 (at page 34 of the respondent's bundle); and finally one for the year 2012/2013 dated 12 March 2012 (at page 33 of the respondent's bundle). Each of these documents gives the appellant's address as that of the sponsor. Perhaps quite significantly, the first of these shows that the sponsor claimed a single occupancy reduction for the period 1 April 2010 to 31 October 2010 and thereafter, with the demand showing the appellant's name also, no longer claimed that: the inference being that the appellant was now living with her. These documents were relevant to the Judge's assessment of the nature of the parties' relationship.

13. Further, there are a number of Sky TV bills dated between December 2010 and April 2012 (see page 37 of the respondent's bundle and pages 17-20 of the appellant's bundle) again giving the appellant's address as that of the sponsor. There are also a number of Barclays Bank statements covering the period 2011-2012 (at pages 38-41 of the respondent's bundle) giving the appellant's address as that of the sponsor.

14. Although there are also documents giving the appellant's address (as he claimed) before he moved in with the sponsor, in assessing the evidence at para 11 of his determination, the Judge failed to take into account all the relevant evidence.

15. I also accept Mr Jafar's submission that the Judge failed to take into account the photographs which, it was claimed, supported the parties' claim as to their relationship over time.

16. In addition, I accept Mr Jafar's submission that in paragraph 16 the Judge was wrong, without raising the matter at the hearing, to doubt whether the appellant was able to form a "new permanent relationship" on the basis that nothing was known about his previous marriage in India. At para 16 the Judge said this:

> "16. …The question left hanging is whether the Appellant is in fact free to form a permanent relationship with another party, the threats to which he has been subjected have not been made explicit nor the reasons for them. If it were the case that the Appellant is already married and has children this question should be resolved before the Appellant is permitted to make a new permanent relationship with another party in the UK."

17. It is not clear whether the divorce deed was in fact put before the Judge although, Mr Jafar told me on instructions that it had been sent to the Home Office. In any event, the ability of the appellant to marry does not appear to have been a matter relied upon by the Presenting Officer or by the Judge at the hearing. If it was a matter that troubled the Judge in reaching his findings on the nature of the parties' relationship, it was something which should have been raised by the Judge in order that the appellant, through his representative, could seek to deal with the point.

18. I do not accept Ms Horsley's submissions that the Judge's failure to consider what, on the face of it, looks highly relevant evidence as to the parties' relationship and to

doubt its permanency on the basis that the appellant's previous marriage might not allow him to form a permanent relationship were not matters of sufficient seriousness that should lead to the Judge's decision being set aside. In my judgement, these errors make the Judge's adverse findings unsustainable. In reaching his findings, he failed to take into account the totality of the evidence.

19. Although Ms Horsley sought to support the Judge's decision on the basis of his finding in para 14 that it was proportionate for the appellant to return to India in order to obtain entry clearance, that submission is not sustainable. First, Ms Horsley herself accepted that the Judge's view as to the nature and degree of the relationship was a significant matter in determining whether a breach of Article 8 was established. That issue is important in determining the proportionality of any interference with the appellant's private and family life. The degree of disruption to the appellant's family life was material to the Judge's assessment of whether it was proportionate to require him to seek entry clearance (see SSHD v Treebhowan; Hayat v SSHD [2012] EWCA Civ 1054 at [30] *per* Elias LJ). Further, in reaching an assessment of proportionality, it was relevant to determine whether it would be reasonable to expect the appellant's partner to accompany him to India at least for the purpose of seeking entry clearance. The dilemma faced by the appellant's partner, as a British citizen with employment in the UK, whether or not to accompany the appellant or remain in the UK had, as Sedley LJ pointed out in VW (Uganda) at [42], itself to be taken into account in assessing proportionality:

> "It is the hardship of the dilemma itself which has to be recognised and evaluated."

20. In my judgement, the Judge failed to engage with these matters in assessing proportionality.

21. It is of course correct, as Ms Horsley submitted, that in assessing proportionality the appellant's poor immigration history was relevant. However, even though relevant, it did not dictate the outcome of the proportionality assessment in the absence of proper factual findings as to the nature of the parties' relationship, the impact of removal - whether temporarily or long term - on the parties and as to the reasonableness of the appellant's partner accompanying him to India.

22. Consequently, for these reasons the Judge's decision did involve the making of an error of law and I set aside that decision.

Decision and Disposal

23. The decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 involved the making of an error of law. The decision cannot stand and is set aside.

24. Having indicated my decision at the hearing, Mr Jafar (at least initially) invited me to remit the appeal for a rehearing in the First-tier Tribunal. Ms Horsley invited me to retain the appeal in the Upper Tribunal. I indicated that this was an appropriate case for retention in the Upper Tribunal.

25. Following some discussion, both representatives invited me to adjourn the hearing for a resumed evidential hearing. Given the remaining court time available, and given that Mr Jafar wished to take instructions from the appellant and Ms Horsley requested time to consider the documents, it was apparent that the appeal could not be concluded in the time available. Consequently, I adjourned the hearing to be relisted before me in order to remake the decision on the first available date.

Signed

A Grubb
Judge of the Upper Tribunal

Date: