Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/05069/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons**
On 25 November 2014	**promulgated on 2 December 2014**

Before

The Honourable Mrs Justice Elisabeth Laing DBE
Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Sushil Vidhyadhar Joshi
(No anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation

For the Appellant:	Ms. H. Foot of Counsel instructed by Farani Javid Taylor, Solicitors.
For the Respondent:	Mr. M. Shalliday, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against the decision of Designated First-tier Tribunal Judge French dated 1 September 2014 dismissing the Appellant's appeal against a decision dated 4 July 2014 to remove him from the UK.

Background

2. The Appellant is a national of India born on 10 June 1985. Relevant aspects of his personal and immigration history are summarised at paragraphs 2 and 3 of the determination of the First-tier Tribunal Judge:

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"The Appellant obtained a BA degree in commerce whilst in India. He first came to this country as a student in January 2007 to study for an MBA in business administration at Liverpool John Moores University. Thereafter he successfully applied to remain as a Tier 1 Highly Skilled Post–Study Worker and then as a Tier 1 Highly Skilled General Migrant, leave being granted until 30th December 2012. Immediately before expiry of that leave he applied for an extension in the same capacity but that was refused. An appeal against that decision was dismissed. Subsequently, the Appellant claimed asylum, on 26th March 2014, on the basis that he was at risk if he returned to India as he is homosexual. He claimed to fear his family, the police and other authorities. His sexual orientation is accepted by the Home Office. The Appellant also relied upon his relationship with a British citizen, Kamran Qayum.

Following interview the Appellant's application was refused by letter dated 3rd July 2014 and on the following day a decision was made to remove him under Section 10 of the Immigration and Asylum Act 1999."

3. The Appellant appealed to the IAC. In his appeal the Appellant pursued arguments based on protection issues (claiming to be at risk in India from relatives, society, and the authorities because he was gay), and based on his family/private life in the UK, with particular reference to his relationship with Mr Qayum.

4. Designated First-tier Tribunal Judge French dismissed the appeal for reasons set out in his determination.

5. The Judge noted that it was not in dispute that the Appellant was gay, and summarised part of his sexual history: determination at paragraph 29. However, the Judge concluded that the Appellant was not at risk of persecution, either from his family (though nonetheless acknowledging that "*the Appellant would find it unpleasant and uncomfortable to return to*" his home area - paragraph 31), or from wider society generally (paragraphs 32-33).

6. The Judge was satisfied that family life existed between the Appellant and Mr Qayum:

"I accept that they have been together in a relationship since June 2013 (a little over one year), and that their intention is to stay together, and if possible buy a house, possibly in the Manchester area. The relationship is genuine but it was formed at a time when the Appellant did not, of course, have indefinite leave to remain, after his application for variation of his previous leave had been refused,

and whilst an appeal was pending. The word "precarious" in Section 117B of the 2002 Act is not defined but given the fact that the Appellant did not have any permanent status, in accordance with paragraph 117B(5) I attach little weight to his private life, in respect of which in any event there was little evidence. That does not have an effect on the family life, which I find he shares with Mr Qayum. They are a couple." (Paragraph 34).

7. The Judge also found, at paragraph 35, that "*it would not be reasonable to expect Mr Qayum to uproot and relocate to India*" because of "*substantial*" difficulties there specified, albeit that "*they may not amount to insurmountable obstacles*".

8. However, at paragraph 36 of the determination, the Judge decided that the Appellant could not meet the requirements of Appendix FM:

"The Appellant cannot qualify under Appendix FM to the Immigration Rules as he and Mr Qayum have not been in a relationship for two years (see GEN 1.2(iv)). There is a fiancé route under E–ECP2.1 to 4.2. There is therefore a route available to the Appellant to obtained leave to live in this country, albeit only exercisable from overseas. There is no route available to the Appellant whilst he remains in this country."

9. The Judge then went on to consider human rights, and concluded "*in the circumstances, given the facts as found, it would not be disproportionate to expect the Appellant to return to India to seek entry clearance as a fiancé*", adding "*I find that in this case it has not been shown that there are arguably good grounds for granting leave to remain outside the Immigration Rules when there is a route available under those Rules and the burden imposed upon the Appellant in seeking to comply with Rules is not an unreasonable one*" (paragraph 37).

10. The Appellant sought permission to appeal to the Upper Tribunal which was granted by Upper Tribunal Judge Deans on 16 October 2014. The Grounds in support of the application for permission to appeal argued that Judge French had erred in his approach to paragraph EX.1 of Appendix FM, with particular reference to GEN 1.2(iv). In granting permission to appeal Upper Tribunal Judge Deans considered the Grounds to be arguable, summarising them in these terms:

"The application for permission to appeal contends that the judge misconstrued and misapplied the definition of a partner under Appendix FM. The Appellant's relationship was with a proposed civil partner. The couple had been unable to

register as civil partners because the Appellant's passport was with the Home Office."

Consideration

11. The substance of the grounds of challenge as drafted in the application for permission to appeal, and the premise of Judge Deans' grant of permission, is that Judge French in referring to the Appellant and Mr Qayum not having been in a relationship for two years had wrongly confined himself to the definition of 'partner' at GEN 1.2(iv) of Appendix FM, and had thus wrongly overlooked the definition of partner at GEN 1.2(iii), which included a "*proposed civil partner*". The Appellant's grounds contend that but for this error the Appellant could have had the benefit of paragraph EX.1 - which he could have reached via the 'partner route' pursuant to R-LTRP.1.1.(d).

12. However, it is clear to us that this argument overlooks the effect of E-LTRP.1.12, which applies pursuant to paragraph R-LTRP.1.1.(d)(ii). This provides:

    "*The applicant's partner cannot be the applicant's fiancé(e) or proposed civil partner, unless the applicant was granted entry clearance as that person's fiancé(e) or proposed civil partner.*"

13. If GEN.1.2.(i) and (ii) did not apply, and GEN.1.2.(iii) could not avail the Appellant under the partner route, it is readily apparent why the First-tier Tribunal Judge focused on GEN.1.2.(iv).

14. Accordingly, we can identify no material error in the manner in which the First-tier Tribunal Judge approached the definition of 'partner' under Appendix FM of the Rules.

15. However, perhaps because she recognised the limitations of the arguments advanced in the grounds in support of the application for permission to appeal, Ms Foot presented us with a Skeleton Argument which advanced different arguments. She sought permission to amend the grounds. Mr Shalliday indicated that he did not object to such an amendment, and he did not seek further time for the Respondent to consider her position in light of the amendment. Accordingly, we were content to permit amendment of the grounds of appeal pursuant to the Tribunal's general powers of case management (Tribunal Procedure

(Upper Tribunal) Rules 2008 as amended from 20 October 2014, rule 5(1)-(3), and in particular 5(3)(c)), and the 'overriding objective' (rule 2). We then heard argument from the representatives on the issues raised in the Appellant's Skeleton Argument settled by Ms Foot.

16. We trust that we do no disservice to Ms Foot's able written and oral submissions by distilling them to the following – bearing in mind in particular that the Skeleton Argument is a matter of record on file.

(i) Relying on, in particular, the authorities of **MM [2014] EWCA Civ 985** and **Patel, Alam & Anwar v SSHD [2013] UKSC 72**, she submitted that the Immigration Rules and Convention rights are distinct systems, albeit usually overlapping, both considerably informed by notions of 'family values'. The Rules do not provide a complete code, and accordingly it is still possible to succeed in an application or on an appeal on Article 8 grounds, notwithstanding a failure to meet the requirements of the Rules.

(ii) Pursuant to **Chikwamba [2008] UKHL 40** it would be "*only comparatively rarely*" that an Article 8 appeal should be dismissed on the basis that it be proportionate for an appellant to be required to apply for entry clearance from abroad. The case of **MA (Pakistan) [2009] EWCA Civ 953** clarified that although **Chikwamba** referred to family cases involving children, that did not make it essential to a finding of disproportionality that there be children.

(iii) In **Zhang [2013] EWHC 891 (Admin)**, while declining to declare the provisions of paragraph 319C(h)(i) of the Rules to be incompatible with Article 8, the High Court, informed by **Chikwamba**, had found that the 'no switching' rule for a Tier 2 migrant – which in effect necessitated leaving the UK to apply for entry clearance in a different capacity in order to change from a Tier 2 migrant to become a Tier 1 (Post Study Work) dependant - was unsustainable as a 'blanket requirement'. This was because "*save in particular cases (such as those involving a poor immigration record… or where the engagement of Article 8 is very tenuous…) it will be rare indeed that the immigration priorities of the state are such as to give rise to a proportionate answer to Article 8 rights to family life*" by requiring such a migrant to leave the UK. (The Respondent subsequently amended the Rules, but there was no analogous amendment in respect of the position of fiancé(e)s and proposed civil partners under Appendix FM.)

(iv) In **SSHD v Hayat [2012] EWCA Civ 1054** the Court of Appeal considered the scope and application of the decision in **Chikwamba** and offered a summary of the effect of various subsequent decisions (per

Elias LJ at paragraph 30). Ms Foot emphasised the references to the need to consider the 'sensibleness' of enforcing a policy that expected an application for entry clearance to be made from abroad, notwithstanding establishment of family or private life in the UK and the presence of the applicant in the UK.

(v) Ms Foot, while emphasising that in general terms the Appellant does fall within the definition of a 'partner' under Appendix FM, recognised, and accepted, that the Appellant cannot qualify for leave to remain under the fiancé(e)/proposed civil partner route under the Rules because he had not previously been granted entry clearance as Mr Qayam's proposed civil partner: see E-LTRP.1.11 and 1.12.

(vi) Although she did not say so in her Skeleton Argument, when invited to clarify her position, Ms Foot did not shy away from asserting that E-LTRP.1.12 was incompatible with Article 8 of the ECHR. She acknowledged that, notwithstanding her reliance on **Zhang** by way of general analogy (Skeleton Argument at paragraph 23), her submission in this regard went further than the decision in **Zhang**.

(vii) In the alternative, Ms Foot's principal submission was that the reliance on E–LTRP.1.12 in effect to require the Appellant to leave the UK to apply for entry clearance ran contrary to the principles and guidance of the case law starting with **Chikwamba**, there being no sensible reason (as per **Hayat**) to defeat the Appellant's Article 8 claim on this basis.

(viii) It was noted that Mr Qayam had provided evidence that he earned between £22,000 and £24,000 per annum (determination at paragraph 18), although Ms Foot acknowledged that there was no supporting evidence of this, either generally, or such as to comply with the requirements of Appendix FM–SE: see determination at paragraph 37. (In this context it was Ms Foot's position if Tribunal decided that there had been a material error of law the Appellant wished for a further hearing at which supporting evidence of Mr Qayam's financial circumstances could be provided.) It was submitted that the possible requirement to conduct a detailed evaluation of Mr Qayam's financial position comparable with the requirements of the Rules could not reasonably amount to a sensible reason to require the Appellant to return to India to seek entry clearance. Ms Foot also emphasised those passages and findings in the decision of the First-tier Tribunal which acknowledged the 'uncomfortable' or 'unpleasant' situation that the Appellant would face in returning to India (determination at paragraphs 30-33 and in particular paragraph 31).

(ix) In so far as Ms Foot's submissions sought to raise matters not argued before the First-tier Tribunal and to that extent amounted in some considerable degree to a re-arguing of the appeal, when invited to formulate the specific error of law that would justify setting aside the decision of Judge French, she submitted that the Judge had erred in considering that it would be reasonable for the Appellant to apply for entry clearance from abroad, and had he not so erred, it would have been open to him to allow the appeal on Article 8 grounds.

17. With all due respect to Ms Foot, it does seem to us that this latter formulation is little more than a disagreement with the outcome of the appeal before the First-tier Tribunal. In our judgement Ms Foot's difficulty in formulating a specific error is largely results from the fact that she seeks to advance arguments not aired before the First-tier Tribunal - or indeed in the application for permission to appeal. Nonetheless, we have permitted amendment of the grounds of challenge. Ms Foot's submissions both require and deserve consideration.

18. For completeness we note that at one point during her submissions Ms Foot argued that the effect of E—LTRP1.12 was discriminatory against the Appellant as a homosexual, but she subsequently withdrew that submission on the basis that the same rule applies to fiancés, fiancées, and proposed civil partners, irrespective of gender or sexuality.

19. Mr Shalliday for the Respondent gratefully acknowledged the Appellant's concession – in contrast to the assertion in the grounds in support of the application for permission to appeal – that he could not meet the requirements of the Rules. In addressing the case as now advanced, Mr Shalliday essentially made the following points:

(i) He did not take any particular issue with Ms Foot's recitation of case law, but emphasised the particular context of the authorities relied upon: for example the case of **Patel** was concerned with paragraph 317 of the Immigration Rules, and as such was not directly concerned with a rule that had been drafted specifically to give effect to the Respondent's obligations under Article 8, as was the underlying intent behind Appendix FM. He also emphasised the particular factual matrix of **Chikwamba**, involving a partner who was a refugee and who could not be expected to return to Zimbabwe, and the presence of children in the UK. In respect of **Zhang** he emphasised that the applicant had lost employment through leaving the UK to apply for entry clearance from abroad, and to that extent the 'no-switching' provision had had a 'very

tangible effect'. Again he noted that **Zhang** was concerned with a 'points-based system' rule, and not with a rule specifically drafted to give effect to the U.K.'s obligations under Article 8.

(ii) Mr Shalliday also emphasised that on the facts of this particular case it had not been shown that the financial requirements of the Rules had been met, so the Judge was not engaged with an appeal where the only obstacle to succeeding under the Rules was the requirement of prior entry clearance. He submitted that this was another factual distinction between the present case and the circumstances in **Chikwamba**.

(iii) Mr Shalliday acknowledged that the unpleasant or uncomfortable circumstances that the Appellant might face as a gay man in India pending the processing of an application for entry clearance, while relevant to an overall Article 8 evaluation, should not be considered to be some sort of 'escape route' in circumstances where he had not succeeded on his asylum claim.

(iv) As regards the extent of the interference in the family life of the Appellant and Mr Qayam pending processing of an application for entry clearance from abroad, the Appellant had not produced any evidence to show that such a process would be longer than reasonable, and to that extent the factual premise of a grave or serious interference was not established through evidence.

(v) Mr Shalliday argued that there was a clear, obvious, and sound policy rationale for requiring fiancé(e)s and proposed civil partners to apply for entry clearance. He identified the different definitions of a partner at GEN.1.2, and noted that in respect of spouses, civil partners, and cohabitees of at least two years standing, there were necessarily evidential requirements as to either the formalisation of such relationships or their longevity and durability. In contrast, in order to present oneself as a partner by reference to an engagement to marry or proposed civil partnership, nothing more was required than an assertion of a proposal. Further, in respect of marriages and civil partnerships there was also mechanism to protect the public interest against abuse by way of sham relationships via the obligations imposed upon registrars to report suspicious matters. In the circumstances, it was submitted, the requirement of obtaining entry clearance, being rooted in sound policy, was more than a simple procedural requirement.

(vi) Notwithstanding what was said in **MM (Lebanon) [2014] EWCA Civ 985**, the decisions in **Nagre [2013] EWHC 720 (Admin)** and **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)** remained good law. It was still necessary, to succeed under Article 8, where the requirements of Appendix FM were not met, to identify non-

standard and particular features of a compelling nature to show that removal would be unjustifiably harsh.

20. In considering the competing submissions in this appeal, we note that we found nothing inaccurate or objectionable in the recitation and summary of case law relied upon by Ms Foot. In particular we found the distillation in **Hayat** of particular assistance because it was concerned specifically with "*issues concerning the proper scope and application of the decision of the House of Lords in Chikwamba*" (see paragraph 1 of the judgement), and contains an extensive review of authorities. We note the summary derived from case law set out at paragraph 30 in the judgement of Elias LJ, and in particular the following at 30(c): "*Whether it is sensible to enforce that policy will necessarily be fact-sensitive; Lord Brown identified certain potential relevant factors in Chikwamba. They will include the prospective length and degree of disruption to family life, and whether other members of the family are settled in the UK*".

21. In this latter context we note and acknowledge the force of Mr Shalliday's submission to the effect that the Appellant had failed to advance any supporting evidence as to the prospective length of disruption to family life he would likely face by pending application for entry clearance from India

22. We also accept Mr Shalliday's submission that the essential test in **Nagre** and **Gulshan** – "*to identify other non-standard and particular features of the case of a compelling nature to show that removal would be unjustifiably harsh*" – still applies to an appeal, such as this, where an Appellant seeks to rely upon Article 8 having failed to satisfy the requirements of Appendix FM.

23. We have noted Mr Shalliday's emphasis on the factual distinctions between some of the case law and the facts of this particular appeal. Whilst we are alert to such factual distinctions, there is nothing specific, in our judgment, that undermines the general principles to be derived from the case law, or their applicability – subject, as ever, to a case-sensitive analysis - to the instant appeal.

24. We do not accept Ms Foot's submission that E-LTRP.1.12 is incompatible with Article 8. It seems to us that this was an expedient submission rather than one carefully formulated and closely supported by authority. Indeed Ms Foot acknowledged that the only authority upon which she

could place reliance, **Zhang**, was not only in a different context, but did not reach a conclusion comparable to that which she sought. Mr Shalliday's submissions relied on policy considerations which on their face seek to strike a balance between the competing interests of the family/private lives of individuals and the wider public interest. In our judgement, something far more compelling by way of an evidence-based challenge to those policy considerations would be required in order to establish that this aspect of the Rules is incompatible with Article 8. [See section 4 of the Human Rights Act 1998].

25. Moreover, the scheme of Appendix FM does not, in our judgment, contain for the partners of British citizens, the partners of persons present and settled in the UK, or the partners of persons in the UK with refugee leave, or humanitarian protection the sort of 'blanket requirement' of leaving the UK to seek entry clearance that was the focus of concern in **Zhang**. The general immigration status requirements are set out at E—LTRP.2 .1 and are restricted to an applicant being required not to be a visitor, a person with valid leave granted for a period of six months or less (unless as a fiancé(e) or proposed civil partner), or on temporary admission. Outside these particular restrictions it is, therefore, open for any other category of migrant to seek to switch to becoming a person with leave to remain as a partner. Indeed the combined effect of E-LTRP.2 .2 and EX.1 is such that it is possible for a person present in the UK in breach of immigration laws to secure leave to remain as a partner. There is no extensive or 'blanket' prohibition on a person seeking and securing leave to remain as a partner of a British citizen, or a person present and settled in the UK, or a person in the UK with refugee leave or humanitarian protection, in circumstances where they have entered the UK in some other capacity, or even have entered or remained unlawfully.

26. The prohibition under the Rules is, accordingly, limited to the sub-class of 'partner' as a fiancé(e) or proposed civil partner, and we accept that this is for the policy reasons identified by Mr Shalliday. It is to be recalled that even this prohibition under the Rules may be mitigated on a case-by-case basis by reference to the residual discretion the Respondent retains outside the Rules, or, on appeal by reference to a compelling Article 8 case.

27. It is against this background that we consider the specific challenge to the decision of Judge French.

28. It seems to us that Judge French has set out, with manifest care, the background and issues in the appeal, has directed himself appropriately to the burden and standard of proof, has set out in adequate detail the evidence before him, and has recorded the submissions of the parties. Further, he has made findings and reached a conclusion on the Appellant's claim for protection, to which no objection has been raised. He has also reached conclusions in respect of Appendix FM in respect of which challenge is no longer pursued.

29. Further it is manifestly the case that the Judge is not to be faulted for not having engaged in any of the issues and arguments now aired for the first time before us. Ms Foot (who did not appear before the First-tier Tribunal) acknowledged that she was seeking to present the Appellant's case on a significantly different basis from that put to the First-tier Tribunal. We make no particular criticism of her for so doing, but nonetheless, as observed above, it necessarily reduces the force of an argument that there was an error of law in the decision of the First-tier Tribunal. As we have said Ms Foot had some difficulties in formulating or identifying a specific error of law.

30. Having found that the challenge to the underlying Rules must fail, we find that the Appellant is also otherwise unable to impugn the reasoning of Judge French.

31. We note that Judge French identified the Appellant's submission based on **Chikwamba**, and the "*waste of time and resources if the Appellant had to return to come back as a fiancé*" (determination at paragraph 28). The Judge made it plain in the 'Discussion and Findings' section of his decision that he had considered this submission: see paragraph 37. The Judge, in substance, stated that any issue in respect of entry clearance was not limited to the procedural requirement of seeking entry clearance, but that the Appellant had also not shown that he had met the other requirements of Appendix FM – including in particular the evidential requirements of Appendix FM-SE.

32. What is of particular significance given the arguments before us, is that the Judge expressly directed himself to the judgement in **Hayat**, and said "*that the core question was whether there was a sensible reason for enforcing the policy of requiring application to be made from abroad*" (determination at paragraph 37).

33. As we have noted above, the question of 'sensibleness' is fact sensitive. It is essentially a matter for evaluation by the decision-maker, and, in turn, for the Tribunal Judge. We consider that in addressing that question the Judge appropriately had regard to the requirements of the Immigration Rules as a starting point, including both the substantive requirements, and the specific requirement of prior entry clearance. In this latter regard we accept that the policy considerations identified by the Respondent in the submissions before us are such that neither a direct nor an approximate analogy with the approach in **Zhang** is warranted. It is also apparent that the Judge had carefully considered the circumstances that the Appellant would likely encounter upon returning to India as a gay man. In our judgement in his overall evaluation the First-tier Tribunal Judge was entitled to conclude, pursuant to **Nagre** and **Gulshan**, that there was nothing inherent in the Appellant's case that justified a departure from the Rules on Article 8 grounds.

34. Accordingly we reject the challenge to the decision of the First-tier Tribunal. The decision of Judge French contained no errors of law and therefore stands.

Notice of Decision

35. The decision of the First-tier Tribunal Judge contained no errors of law and stands.

36. The appeal is dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis 28 November 2014