UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: IA/01151/2015**

THE IMMIGRATION ACTS

Heard at: Field House
on 12 August 2015

Decision & Reasons Promulgated
On 7 September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MR FRANK FRANCISE DAVID
NO ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr A Earnest, Legal Representative, Westbrook Law
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of India, born on 25 May 1985. He appeals with permission against the decision of First-tier Tribunal Judge Turquet promulgated on 16 April 2015. She dismissed the appellant's appeal against the decision of the respondent dated 11 December 2014 refusing his application made on 12 June 2014 for further leave to remain in the UK on the basis of marriage and to remove him by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant indicated before the First-tier Tribunal that he wanted to have the appeal decided on the papers without a hearing. Judge Turquet accordingly proceeded on that basis.

3. The appellant entered the UK in October 2009 as a Tier 4 General Student until 30 January 2011. He was then granted further periods of leave to remain until 3 April 2014. However, his leave was curtailed so as to expire on 12 May 2013. He was then granted further leave to remain s a Tier 4 (General) student from 17 June 2013 to 16 June 2014. On 12 June 2014 he made an application for leave to remain on the basis of his relationship with his partner which was refused on 11 December 2014.

4. His case was set out in is application form. As he had a fiancée and as they were engaged, they planned to marry after 13 July 2014. The Judge has recorded that his fiancée is Bianca Barboza D'Souza Mendes, is "a Portuguese national" born on 13 July 1966 [7].

5. In the application form, however, his sponsor's nationality is stated to be "Brazilian". Accordingly, the Judge wrongly recorded that she was Portuguese. The date of her birth, namely 13 July 1996, is set out correctly. His spouse would be 18 years old in July 2014 [7].

6. Their relationship began on 18 June 2013 and they started living together in March 2014. It was asserted that there was income of £20,000 from self employment and £4,800 from employment. His sponsor is self employed as a cleaner [7].

7. It was contended in his grounds of appeal that he had been a student living in the UK since October 2009 and that he and his sponsor were in a genuine relationship and living together. He intends to marry his sponsor.

8. His grounds of appeal contended that he had submitted sufficient documents to prove his relationship and to satisfy the grounds for leave to remain. His personal circumstances had not been considered by the respondent. Moreover, his application should have been considered under "the exceptional circumstances". He also contended that the decision was unlawful on Article 8 grounds. The respondent should have exercised her discretion differently. The documents submitted were photographs, a P60, an HMRC letter, two Santander bank statements, a residence permit and a Brazilian passport.

9. The respondent contended that he had not provided any documentary evidence showing that he had been living with his partner. It was not accepted that the relationship was genuine and subsisting. Nor did he meet the financial requirements. In particular, he had not provided sufficient documentary evidence showing self employment. Nor had they provided sufficient documentary evidence to show sufficient savings to meet the income threshold.

10. His private life was considered under paragraph 276ADE of the rules. He was 29 years old and had not lived continuously in the UK for at least 20 years. There would not be very significant obstacles to his integration into India where he had spent 24 years including all his formative years. He had not produced any evidence showing problems of re-integration there.

11. Nor were there any exceptional circumstances warranting consideration of leave to remain outside of the rules.

12. The appellant provided no further witness statement or documentation from either himself or his sponsor at the appeal. Directions were sent to the appellant informing him that the Tribunal may determine the appeal on the basis of the appeal documents together with any further written evidence or submissions he may wish to make. Those written submissions and evidence were to be filed on the Tribunal and served on the respondent by 12 March 2015.

13. Notwithstanding that direction, no further written evidence was produced or submissions made before Judge Turquet.

14. In her findings, Judge Turquet had regard to the relevant rules. She found that the appellant was unable to meet the eligibility requirements under the partner route. Nor was there any evidence from the appellant or his sponsor '….to address the refusal decision of the respondent. There was little evidence of their relationship. The appellant chose not to have an oral hearing and has not submitted statements from himself and his partner' [17].

15. She found that the appellant was unable to meet the eligibility requirements in respect of family life as set out in Appendix FM [18].

16. Nor had the appellant satisfied her that he met the requirements of E-LTRP.3.1. She was not satisfied that the appellant had provided specified evidence showing that he met the financial requirements. Nor had he provided any evidence on appeal to address the issue of finances [19].

17. Judge Turquet also noted that the appellant does not have a child. Accordingly he failed to satisfy the eligibility requirements and EX.1 did not apply.

18. Insofar as his private life under paragraph 276(1) ADE was concerned, she found that the appellant had not shown that he had or would have problems re-integrating into life in India. He had indicated in his application that his parents, sister, nephews and nieces live in India and that he speaks the language there [21].

19. Nor did the appellant put forward any compelling or exceptional circumstances [22]. There was no statement from the appellant or his sponsor. She was thus unable to make any finding that he enjoys family life in the UK as he had not submitted any evidence in the appeal. There was little information about his private life other than that he had studied in the UK. He had not demonstrated that he is unable to enjoy both family and private life in India. She accordingly found that there would be no breach of his right to family and private life [22].

20. Moreover, his private life was established whilst in the UK on limited leave in the full knowledge that he may have to return to India [22].

21. She had regard to the public interest considerations under s.117B of the 2002 Act. His status was precarious when he entered into his relationship.

22. She stated at [23] that even if she found that Article 8 was engaged, the decision to remove was not disproportionate in the circumstances [23].

23. The grounds in the permission application contended that the Judge had referred to the appellant's fiancée as a Portuguese national whereas she is a Brazilian national with indefinite leave to remain.

24. It was noted in paragraph 7 of the grounds that the Judge found that the appellant does not have a child. The grounds however, which are drawn by his representatives, state that "..... the appellant and his fiancée are expecting a baby together and that she is more than 12 weeks pregnant now and also submitting documents from the hospital confirming pregnancy along with this permission to appeal application" (sic).

25. It was also contended that the finding that his status was precarious was wrong, as the couple started their relationship when he had valid leave for more than 15 months. Finally, the Judge failed to consider the insurmountable obstacles for the appellant and his fiancée.

26. In granting permission to appeal to the Upper Tribunal, First-tier Tribunal Judge Frankish stated that it is arguable that the finding at [7] that the Judge was dealing with a Portuguese and not a Brazilian sponsor 'amounts to approaching the entire case on a false premise'.

27. Mr Earnest relied on the grounds accompanying the application for permission to appeal. That included the fact that the appellant's sponsor is pregnant.

28. In a letter dated 7 August 2015, the appellant's solicitors requested an adjournment of the appeal as the sponsor is 27 weeks' pregnant and was physically and emotionally unable to attend Court. It is contended that she had been admitted to hospital for three days during July 2015, "due to chest pain." In a letter from the hospital dated 22 July 2015, it is recorded that she was discharged home after she remained clinically stable and her symptoms improved. The principal resident Judge refused that application on the basis that there was no medical evidence to support the assertion that the appellant was unable to attend Court. It was also noted that the discharge summary indicated the basis upon which the sponsor was discharged home, with future management requiring a routine antenatal follow up.

29. On behalf of the respondent, Ms Holmes submitted that it is evident that the Judge made the error as a result of what Ms Holmes characterised as "a slip of the pen." She treated the appeal as though the sponsor was Brazilian. In any event however, the respondent made her decision on the basis of the sponsor's correct nationality.

30. There was no evidence or submission placed before the First-tier Tribunal with regard to the condition of the sponsor or on the issue of insurmountable obstacles.

Assessment

31. The appellant failed to produce any written evidence, statement or documentation before the First-tier Tribunal, having elected to have his appeal considered without an oral hearing.

32. As already noted, he had been directed to produce any written statements and documentation that he sought to rely on at the hearing. However, no such documentation or evidence was produced.

33. There was no evidence before the Judge that the appellant's wife was pregnant. That was revealed for the first time when the application for permission to appeal was made. The Judge has thus not been shown to have made any error regarding the sponsor's pregnancy, as at the date of promulgating her decision.

34. As to the Judge's reference to the sponsor as a 'Portuguese' national, I accept that this was an error. However, I am not satisfied that that error was material. Her nationality was not relevant to the assessment as to whether the requirements under the rules had been met. Further, the respondent had considered the appellant's application as presented, which included the assertion that the sponsor was a national of Brazil.

35. There is no contention that the appellant had produced the necessary specified documentary evidence so as to satisfy the income threshold requirements. There is no contention that the appellant was not able to benefit from the criteria set out at EX.1 having failed to meet the eligibility requirements under the ten year route of Appendix FM.

36. Nor was there any evidence produced before the Judge which properly challenged or engaged with the respondent's assertion that there would not be very significant obstacles to integration into India if the appellant were required to leave the UK, under paragraph 276ADE(1)(vi). The grounds of appeal did not even engage with that contention. It was simply asserted that the application should have been considered under "the exceptional circumstances" and that the decision was unlawful under Article 8.

37. In a detailed determination, Judge Turquet has considered and assessed each of the respondent's assertions under the rules. She found that the appellant did not have a child. He accordingly failed to satisfy the eligibility requirements under EX.1. There is no contention that that was not a proper finding based on the evidence adduced. She also had regard to his inability to meet the requirements under paragraph 276(1)ADE. In particular he had failed to satisfy the requirements of paragraph 276(1)(vi).

38. As noted, there was no evidence put forward of any very serious problems under paragraph 276. She had regard to the fact that he had spent 24 years in India before coming here. He had only been here for six years. She accordingly found that he had not demonstrated that he would have problems re-integrating to life in India. She had regard to the fact that he had indicated in his application form that his parents, sister, nephews and nieces all live in India and that he speaks Malayan, the language of Kerala in India [21].

39. The Judge also had regard to the issue of compelling or exceptional circumstances. She found that he had not put forward any compelling or exceptional circumstances. He did not submit any evidence at the appeal. There was no statement from him or his sponsor. In the circumstances she not even able to find that he enjoyed family

life in the UK. In any event, he has immediate family in India. Apart from the fact that he had studied in the UK there was little information about his private life here.

40. She went on to consider and subsequently found that even if the proposed removal constituted an interference with his private life he had established, that had been established in the full knowledge that he may have to return to India.

41. In the grounds set out in the permission application, it is asserted that the finding that his status was precarious when he entered into the relationship was incorrect, as the couple started their relationship when he had valid leave for more than 15 months.

42. In that respect, I have had regard to the decision in AM (s.117B) Malawi [2015] UKUT 0160 where the Upper Tribunal stated 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 was merely "precarious."

43. Those who at any given date 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" however if their continued presence in the UK will be dependent upon their obtaining a further grant of leave.

44. The tribunal also noted that in some circumstances, it may also be that even a person with indefinite leave to remain, or a person who has obtained citizenship, enjoys the status that is "precarious" either because that status is revocable by the secretary of state as a result of their deception, or because of their criminal conduct. In such circumstances, the person will be well aware that he has imperilled his status and thus it cannot viably be claimed thereafter that his status is other than precarious.

45. I accordingly find that the appellant's ground at paragraph 8 has no merit and is certainly not "irrational" as contended.

46. The First-tier Tribunal Judge has given a lengthy and detailed determination based on the documents and evidence placed before her. She has given sustainable reasons based on the evidence for those findings.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any material error of law and shall stand.

No anonymity direction is made.

Signed Date 4 September 2015

Deputy Upper Tribunal Judge Mailer