Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14145/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24 February 2015	**On 5 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR AMAN KUMAR
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant: Mr L Tarlow, Specialist Appeals Team
For the Respondent/Claimant: Counsel instructed by ATM Law Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal on Article 8 grounds against the decision by the Secretary of State to refuse to grant him leave to remain as the partner of a

British national, and against the Secretary of State's concomitant decision to make directions under Section 47 of the 2006 Act for his removal. The First-tier Tribunal did not make an anonymity direction, and I do not consider the claimant requires anonymity for these proceedings in the Upper Tribunal.

2. The claimant is a national of India, who first entered the United Kingdom on 8 October 2009 with valid entry clearance as a Tier 4 General Student Migrant. His leave to enter as a student ran until 30 January 2012. He was granted an extension of stay in the United Kingdom until 11 January 2014 as a Tier 1 (Post Study Work) Migrant.

3. On 10 January 2014 he applied for leave to remain on the basis of his relationship with his girlfriend, Theresa Mary Byrne. In their covering letter, ATM Law Solicitors urged the Secretary of State to consider not only the appellant's human rights but those of his girlfriend when deciding the application. They urged that their client had a very strong case under Article 8, and requested the Secretary of State to consider his case "under her discretion and exceptional circumstances outside the Immigration Rules."

4. Miss Byrne made a statutory declaration in support of the application. The appellant was her boyfriend and proposed fiancé. She had known him for more than two years since October 2011, when they had met at a party. They started going out in November 2011. The appellant went back to India in January 2012 for a short holiday, and she missed him a lot while he was away. Their relationship had developed, and eventually in July 2012 they had moved in together at an address in Victoria Docks, and they continued to live together. She had been in emotional detriment since that she had come to know that the appellant's leave to remain in the UK was about to expire, and he would have to leave the UK. She would be greatly hindered if he returned back to India.

5. On 6 March 2014 the Secretary of State gave her reasons for refusing the application. From the information provided, it appeared that he had only been living with Miss Byrne since July 2012. So he did not fulfil the definition of a partner and could not meet the requirements of Section R-LTRP. His application was therefore refused under paragraph D-LTRP.1.3 of the Rules.

6. It had been carefully considered whether EX.1 applied to his application. It was acknowledged that he had a genuine and subsisting relationship with his British partner. But his application fell for refusal under the eligibility requirements of the Rules as set out earlier. These were mandatory requirements applying to all applicants regardless of whether the EX.1 criteria were met. As he failed to meet those eligibility requirements, he could not benefit from the criteria set out at EX.1.

7. It had also been considered whether his application raised or contained any exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the ECHR, might warrant consideration by the

Secretary of State of a grant of leave to remain in the United Kingdom outside the requirements of the Rules. It had been decided that it did not.

The Hearing before, and the Decision of, the First-tier Tribunal

8. The claimant's appeal came before Judge D A Pears sitting at Hatton Cross in the First-tier Tribunal on 20 November 2014. Ms Daykin of Counsel appeared on behalf of the claimant. In her skeleton argument, she submitted that the sole reason for refusal was that at the date of application the couple had not yet been living together for two years, and therefore failed to meet the definition of a partner within Appendix FM. But as they had been living together since July 2012, they now satisfied that requirement. So as of today the claimant met the Rules, and the sole issue raised for refusal fell away. Therefore, she submitted, it could not be proportionate to remove the claimant in these circumstances. The Tribunal was requested to allow the appeal under the Rules and/or under Article 8 ECHR.

9. In his subsequent decision, the judge found that both the claimant and Miss Byrne were employed, and had been living together in a relationship akin to marriage since July 2012. At paragraph [23], he held there was a conflict between the terms of the Rules and the evidence that he was entitled to take into account. He accepted that in March 2014 there might not have been exceptional circumstances. The judge continued in paragraph [24]:

> However it seems to me that this is exactly the sort of case where there are arguably good grounds for granting leave to remain outside the Rules because the circumstances are compelling and not sufficiently recognised under them. The [claimant] has Article 8 rights and so does his partner. If the [claimant] applied now he would succeed under the Rules but he had to apply when he did in order not to be in breach of the Immigration Rules.

10. The judge went on to find that it was not proportionate that a person who now met the Immigration Rules, and did so within three months of the decision, should now be required to leave. He also had regard to the terms of Section 117B and the fact that the claimant's actions had not been contrary to immigration controls. He spoke English, he was not a burden on tax payers, he had integrated into UK society by having a UK partner, they were both financially independent and he had never been in the UK unlawfully. So he allowed the appeal on human rights grounds.

The Application for Permission to Appeal

11. A member of the Specialist Appeals Team settled the application for permission to appeal to the Upper Tribunal. The judge had failed to explain why the case was exceptional. There were no children involved. There had not been any consideration of the level of earnings, only that the claimant and the sponsor were working. The judge erred by not explaining why it would not be disproportionate for the claimant to return to India and make an application for a partner visa. There had not been a consideration of the claimant's ability to meet the rules, which might then make removal an unnecessary bureaucratic exercise.

The Grant of Permission to Appeal

12. On 13 January 2015 First-tier Tribunal Judge J M Holmes granted permission to appeal for the following reasons:

> 2. Arguably it is not possible to ascertain from the decision precisely why the claimant failed to meet the requirements of the Immigration Rules for a grant of leave to remain under either paragraph 276ADE or Appendix FM. That being so it is arguable that the judge failed to place the Article 8 appeal into its proper context. There was no consideration of whether the claimant would be able to seek and obtain entry clearance from India as the sponsor's partner, and if not, why that would be likely to be refused. There was no suggestion that the claimant would lack safety in the event of removal – he would be able to visit his parents. Arguably if he and the sponsor were serious about their relationship one might expect them to plan for her to visit them in any event, which she could do while the process of obtaining entry clearance was undertaken.
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> 3. The decision makes no reference to the Court of Appeal's decision in **MM (Lebanon) [2014] EWCA Civ 985** and arguably fails to apply the guidance to be found therein.

The Hearing in the Upper Tribunal

13. At the hearing before me, Counsel for the claimant defended the judge's decision. He had set out the **Gulshan** test at paragraph [10] of his decision, and he recognised in paragraph [24] that he could only accord Article 8 relief to the claimant outside the Rules if there were compelling circumstances not sufficiently recognised under them. It was open to the judge to find in the claimant's favour on this issue. It might be a generous interpretation of Article 8, but it was not perverse. It was clear that the judge had in mind that the claimant met the financial requirements of Appendix FM, as he was earning £16,000 per annum, and his partner was earning some £12,000 per annum. So although he did not specifically mention **Chikwamba**, the judge had it in mind that it would be disproportionate to require the claimant to return to India to apply for entry clearance, as he was bound to succeed in such an application.

14. I found that an error of law was made out such that the decision should be set aside and re-made. My reasons for so finding are set out below.

15. The representatives agreed that it was not necessary for me to hear any evidence for the purposes of re-making the decision. Mr Tarlow submitted that the claimant should not be accorded Article 8 relief, as he could now make an in-country application under Appendix FM. So **Chikwamba** considerations did not arise.

Reasons for Finding an Error of Law

16. The judge failed to analyse properly where the claimant stood under the rules; and in consequence he failed to give adequate reasons for according the claimant Article 8 relief outside the Rules.

17. In order for Miss Byrne to be treated as the appellant's partner, and not merely his girlfriend, she had to have been living with the claimant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application. Accordingly, not only was this eligibility requirement not met at the date of decision, but it continued not to be met at the date of the hearing. For the date of the application remained the same. The claimant had not made a fresh application after accruing two years' cohabitation. Although it was open to the claimant to rely on his change of circumstances (the accrual of two years' cohabitation) as an additional ground of appeal, he could only bring himself within the rules by withdrawing his appeal and making a fresh application.

18. So the judge misdirected himself when he said there was a conflict between the terms of the Rules and the evidence which he was entitled to take into account. There was no conflict. The definition in GEN.1.2 enabled the claimant to make an in-country application under Appendix FM once he had accrued two years' cohabitation with Miss Byrne. The same definition prevented him for making a meritorious application before he had accrued two years' cohabitation.

19. Although the judge purported to apply the **Gulshan** threshold test, his justification for finding that the test was satisfied does not stand up to scrutiny. The proposition that the claimant has Article 8 rights and so does his partner does not in any way advance the argument, especially as under the new rules the family and private life rights of applicants and affected family members are expressly taken into account.

20. The only other justification advanced by the judge was that if the claimant applied now he would succeed under the Rules, but he had to apply when he did in order not to be in breach of the Immigration Rules. However, as the judge acknowledged elsewhere, the claimant did not satisfy any relevant Immigration Rule in order to be granted leave to remain; and there were not any exceptional circumstances in existence at the date of application (or indeed at the date of decision), which justified Article 8 relief outside the Rules. So the fact that the claimant was *now* in a position to make a successful application under the Rules due to the time which had elapsed since he had lodged an initially unmeritorious appeal from a wholly justified refusal was hardly a compelling ground, still less a sufficient one, for relieving the claimant of the obligation to make an application under the Rules like everyone else.

21. Although it is not presented as such, the reasoning in paragraph [28] is akin to a near miss argument. The judge found that the claimant should be accorded Article 8 relief outside the Rules because he was only three months short of the required two years of cohabitation at the date of decision. This justification for according the claimant Article 8 relief outside the Rules on this ground is wholly contrary to legal principle, as illuminated by the Court of Appeal in **Miah [2012] EWCA Civ 261** and by the Supreme Court in **Patel [2013] UKSC 72**.

The Remaking of the Decision

22. There was no challenge by the Secretary of State to the finding of the First-tier Tribunal that Miss Byrne now meets the definition of a partner contained in GEN.1.2, apart from the fact that the claimant has not made a relevant application.

23. If a relevant application had been made, the fact that Miss Byrne met the definitional requirement in GEN.1.2 would not be the end of the matter, but merely a necessary starting point.

24. In order to qualify for leave to remain under Appendix FM, the claimant would need either to show that he met the financial requirements contained in Appendix FM and Appendix FM-SE; or that he met the exemption criteria contained in EX.1. It has not been suggested that there are insurmountable obstacles to the couple carrying on family life in India. Reliance instead is placed on the proposition that the claimant is likely to satisfy the financial requirements, as the couple's combined income far exceeds the annual income threshold of £18,600. There is no reason to suppose that this is not the case, and therefore I accept that an application for leave to remain (or leave to enter) as the partner of Miss Byrne is likely to succeed.

25. But the claimant cannot succeed in this appeal under the Rules, as he has not made an application which complies with the Rules. On the question of whether he should be accorded Article 8 relief outside the Rules, I answer questions 1 and 2 of the **Razgar** test in favour of the Secretary of State. I find that the interference with the claimant's private or family life rights is minimal, as it is open to him to make an *in-country* application under the Rules. The refusal decision does not compel the claimant to return to India to make an application for entry clearance. Provided he makes his in-country application for leave to remain within 28 days of his appeal rights being deemed to be exhausted, he will not be treated as an overstayer. He will not have a right of appeal against the refusal of an in-country application, but there is no reason to suppose that the application will be unsuccessful.

26. As I answer questions 1 and 2 of the **Razgar** test in favour of the Secretary of State, the Article 8 claim falls away. But, for the avoidance of doubt, I consider that the decision is proportionate. It is in the public interest that the Secretary of State should be the primary decision-maker on the question of whether the claimant meets the financial requirements of the rules. Having regard to section 117B of the 2002 Act, it is in the claimant's favour that he speaks English and is financially independent. But little weight should be given to a private life established by a person at a time when his status is precarious. The claimant entered the UK for a temporary purpose and he never had any legitimate expectation of being able to remain in the UK as the partner of Miss Byrne unless and until he had made a relevant application which was fully compliant with the rules.

Notice of Decision

The decision of the First-tier Tribunal allowing the claimant's appeal under Article 8 ECHR contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal on Article 8 grounds outside the rules is dismissed.

The First-tier Tribunal did not make an anonymity direction.

Signed Date

Deputy Upper Tribunal Judge Monson