Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number IA/33462/2013

THE IMMIGRATION ACTS

Heard at Field House
On 15th July 2015

Decision and Reasons Promulgated
On 18th August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

J E B S
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Dhanji (Counsel, instructed by UK Immigration Lawyers Ltd)
For the Respondent: Mr E Tufan (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant is a citizen of Venezuela, in August 2010 he came to the UK as a fiancé with a visa in that capacity. He married his fiancé and in due course was granted discretionary leave to remain as a spouse until the 27th of May 2014. The marriage did not last and he informed the Home Office in May 2013 leading to his leave being curtailed on the 22nd of July 2013. The Appellant seeks to remain in the UK on the basis of his relationship with his now civil partner, they have lived together since

December 2012 and entered the civil partnership on the 18th of July 2013 following the grant of the decree absolute.

2. The Appellant appealed the decision to curtail his leave and remove him by Notice and Grounds of Appeal of the 7th of August 2013. The appeal was heard by First-tier Tribunal Judge Iqbal at Hatton Cross on the 30th of May 2014. In a decision promulgated on the 3rd of July 2014 the Appellant's appeal was allowed under Article 8. The Secretary of State sought permission to appeal to the Upper Tribunal in grounds of the 9th of July 2014 and permission was granted on the 2nd of September 2014.

3. In paragraph 12 the Judge noted that the appeal was being pursued on the basis that the decision breached the Appellant's Article 8 rights. It had been highlighted that as the Appellant had entered a civil partnership he was in a position to make an application under the Immigration Rules but the parties wished for the matter to be dealt with under Article 8. In paragraph 14 she noted that it was conceded that the Appellant could not succeed under the Immigration Rules but it was not stated in what way the rules were not met. Relevant parts of the head note in Gushan (Article 8 – new rules – correct approach) [2013] UKUT 00640 (IAC) were included in paragraph 16 and in paragraph 17 it was found that there were arguable grounds for granting leave outside the rules. For the reasons given in paragraphs 18 to 25 the appeal was allowed.

4. The Secretary of State complained that the Immigration Rules had been applied to the Appellant's case as they would to any other and that the Appellant had not been prejudiced by this. The Appellant could only succeed outside the rules if the outcome would be unjustifiably harsh. There had been no analysis why the Appellant could not return to Venezuela and make an application from there, the Secretary of State was entitled to set requirements for those wishing to exercise family life in the UK and that included the financial ability to support themselves and it was not unjustifiably harsh for the Appellant to return and to make the appropriate application. It was further submitted that the Judge had not properly considered the situation the Appellant would face in Venezuela and the temporary nature of the separation if an application were made.

5. In granting permission Judge Holmes noted that the First-tier Tribunal Judge had not identified the manner in which the Immigration Rules had not been met, had arguably failed to have adequate regard to the public interest or the proper approach to proportionality in the light of the Court of Appeal decision in MM (Lebanon) [2014] EWCA Civ 985.

6. Article 8 is not a by-pass to the Immigration Rules and there is plenty of authority that the cases that succeed under Article 8 but not the rules are likely to be small and the circumstances required to do so are exceptional in a legal sense. The rules remain the background against which the circumstances are to be assessed, for example the maintenance requirements remain significant. Also the fact that a person will not meet the requirements of the Immigration Rules does not enhance their claim under

Article 8, Ekinci. There is also a clear difference between failing to meet the requirements of the rules and being in a situation not contemplated by the rules.

7. Also relevant in this context is the case of Chen (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC). From that decision it is clear that it is for an appellant to show that temporary separation will interfere disproportionately with protected rights.

8. Having entered the UK as a fiancé and subsequently marrying his wife the Appellant was clearly aware of the requirements of the Immigration Rules, the need to make an application and how to do so. He might not have been fully aware of the rules as the precise requirements change from time to time but he had a familiarity with the rules which would have assisted him in addressing his situation.

9. In the legal framework that applied it was not sufficient for the Judge simply to state that the Appellant could not meet the Immigration Rules. The rules form the background to an Article 8 assessment outside the rules, if that stage is reached, and so a failure to meet a particular requirement may have a particular bearing on the assessment of proportionality and the public interest. How an appellant does not meet the rules should be stated.

10. As the Judge noted in paragraph 16 of the decision, quoting from Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 00640, " after applying the requirements of the Rules, only if there may arguably be good grounds for granting leave to remain outside the rules is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them:" In short the Judge did not apply the requirements of the rules or identify the compelling circumstances not sufficiently recognised. In those circumstances the decision contained a clear error, the decision is set aside and remade.

11. It may well be that an application made by the Appellant in the proper way would now meet the substantive requirements of the Immigration Rules. However, one of the purposes of the requirement that in the Appellant's situation he should make his application from abroad is to prevent individuals from entering the UK on one basis and then seeking to switch and avoiding the scrutiny of an ECO or seeking to evade one or some of the substantive requirements.

12. For the Appellant it was argued that the Appellant did not need to make a valid application as the circumstances were caught by paragraph GEN1.9(a)(iii) as the Article 8 claim was raised in an appeal. This is set out more fully in the Appellant's skeleton argument. However it was accepted that ultimately the Appellant would also have to meet the requirements of paragraph EX1.

13. The Home Office disputed that the Appellant was exempted from the need to make an application but contended in any event that the Appellant could not meet the requirements of paragraph EX1 and would fail on that basis.

14. As the Appellant had not raised the Article 8 issue in an application but in the context of his appealing the Secretary of State's decision to curtail his leave I find that he met the requirements of GEN1.9(a)(iii) as the claim was raised in an appeal.

15. Given the accepted background the question that has to be answered to dispose of this appeal is whether there are insurmountable obstacles to family life with his partner continuing outside the UK. Insurmountable obstacles are defined in paragraph EX2 as "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

16. For the Appellant reliance is placed on the discriminatory nature of Venezuelan society and the unpleasant environment in which the Appellant and his partner would have to live. They both work for American Express, employment which would not open to them as that company has no presence in Venezuela. If the Appellant were to leave the UK he would lose his job here, their flat would have to be surrendered as his partner could not afford the rent.

17. For the Home Office it was submitted that the Appellant does not meet the requirements of EX1. It was accepted that there is discrimination but that is a fact of life and it does not amount to persecution. The evidence did not show that family life could not continue there and isolated attacks could take place in the UK. It was submitted that there were no compelling circumstances to justify consideration of the case outside the rules. In any event the Home Office relied on evidence that showed that all settlement visas submitted in Caracas were dealt with in 60 days which was reasonable, 85% were considered within 30 days.

18. The situation the Appellant is in is of his own making. It is to his credit that he informed the Secretary of State of the breakdown of his marriage, thereby bringing about the curtailment of his leave, but he was aware of the need to regularise his position in relation to his new domestic circumstances and was aware of the rules that would apply.

19. There is nothing inherently unusual in the Appellant's circumstances. Whilst there may be difficulties in his returning to Venezuela to make an application in the required manner the evidence does not show that the discrimination is such that he could not be expected to do so or, if joined by his partner, they would not be able to live together there. There may be issues surrounding employment but that would apply to many people leaving the UK to live elsewhere, not just Venezuela.

20. There is nothing from the Appellant's employer to show that he would inevitably loose his job or that it would not be held open for him to return in the timescale indicated in the evidence relating to visa processing times. The period in which the Appellant and his partner would endure a limited income would itself be limited. These matters have come about, by changes brought about by changes in the Appellant's circumstances and not by decisions of the Secretary of State.

21. In the circumstances I am not satisfied that the Appellant has shown that the situation meets the terms of paragraph EX.1. There are no insurmountable obstacles as legally defined, there may be difficulties but to say that they would be very significant would not be justified by the evidence and accordingly under that part of the rules the appeal cannot succeed.

22. Having regard to the case of Chen I do not see how a separation of 2 months indicated in the evidence could be said to be a disproportionate interference with the Appellant's family life with his partner. By section 117 B(1) the maintenance of effective immigration control is in the public interest and the Appellant has not shown that his circumstances are such that the public interest is outweighed. I find that the requirement that the Appellant return to Venezuela to make his application, supported by the relevant specified evidence, is proportionate and not in breach of Article 8.

23. There is a residual area where, although there are no insurmountable obstacles, it is appropriate to consider an appeal under Article 8 outside the Immigration Rules where there are compelling circumstances. Given the facts of this case I am satisfied that there are no compelling circumstances that take this case into the area where there could be said to be circumstances not adequately recognised by the rules. The Appellant has moved from one relationship to another and needs to regularise his position, there is nothing unusual in that and inevitably changes of that sort bring dislocation which the Appellant and his partner have experienced. However, the Appellant cannot point to any facts that make his situation an unusual example of its type and I find that there is no justification for considering this appeal outside the Immigration Rules under Article 8.

24. In summary the First-tier Tribunal Judge erred and the decision is set aside. The appeal is remade and I find that it is proportionate and reasonable to expect the Appellant to return to Venezuela to make an application for entry as a partner in the usual way. The time that it will take to process such an application, at most 2 months, is not such that it could be said to be disproportionate. It is something the Appellant could have done some time ago. There is nothing in his situation which would justify consideration outside the Immigration Rules.

CONCLUSIONS

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal dismissing the appeal of Jesus Esteban Bellorin Serrano

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In dismissing this I make no fee award.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 14 August 2015