Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/48311/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 28th August 2015	**On 22nd September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MR SHIHAS THATTAI
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Nasim, Counsel, instructed by Greenfields Solicitors (London)
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I refer to the parties as they were in the First-tier Tribunal although it is the respondent who is appealing in these proceedings.

2. The appellant is a national of India, born on 18 December 1983. He came to the United Kingdom on 22 September 2008 on a student visa valid until 31 March 2010. He then obtained further leaves as a student and post student until 28 August 2013. A further application as a student was refused on 19 November 2013. His appeal was listed for 30 May 2014 but did not proceed as the decision was withdrawn.

3. On 11 August 2014 he applied for leave to remain on the basis of his private and family life. That application was refused on 14 November 2014.

4. His appeal against that refusal was heard by First-tier Judge Green at Birmingham on the 9th March 2015. At the hearing the appellant's representative accepted that the appellant could not succeed under the immigration rules but relied upon article 8 rights outside the rules. In a decision promulgated on 16 March 2015 the appeal was allowed on human rights grounds.

5. The respondent has been given permission to appeal the decision on the basis it is arguably incorrect in law. The emphasis in the appeal was on the appellant's relationship with Mrs Elliot, a British national. They met online in November 2012. The appellant was living in Hertfordshire and Mrs Elliot was residing in Essex. They would meet at weekends. As the relationship developed, Mrs Elliot obtained employment in Hertfordshire and cohabited from in or around mid-October 2014.

6. At paragraph 14 of the decision Judge Green set out the relevant facts found. The judge found the appellant and Mrs Elliot to be credible witnesses. In summary, the judge stated that since coming to the United Kingdom the appellant had graduated with a Masters degree in Business Administration. He believed there were better opportunities for him in the United Kingdom .He had been working at Asda and was well regarded. He had been offered a management training opportunity, subject to his immigration status. He contended he would be able to maintain himself and his partner without recourse to public funds. His parents and a brother and sister were still in India. They remained in contact though he did not enjoy a good relationship with his father.

7. Regarding Mrs Elliott, Judge Green found that she was a British citizen and that her whole life was based in the United Kingdom. She had obtained a decree nici in relation to her marriage of 37 years and was awaiting her divorce becoming absolute. She had two adult sons from that marriage and has a close bond with her three grandchildren living in Essex. She was working for Marks & Spencer's as a store assistant on a permanent basis earning £14,765 per year. She has a close relationship with her mother who five years ago was diagnosed with breast cancer. This subsequently spread to her lungs and kidneys and she is undergoing chemotherapy. Mrs Elliot supported and cared for her.

Permission to appeal

8. In seeking leave the respondent mounted four areas of challenge. Firstly, it was contended that Judge Green did not accurately assess the public interest consideration because of a misinterpretation of the meaning of `partner'.
9. Secondly, it was submitted the judge was wrong in concluding that the operative reason for the respondent's position was that the immigration rules must be obeyed. It was contended that the operative reason was effective immigration control which was in the public interest.

10. Thirdly, it was contended that when considering the possibility of the appellant reapplying for entry clearance there was misdirection as to the rationale of the Chickwamba and Hyatt decisions.

11. The fourth ground related to the decision of Nagre .There, the European jurisprudence was reviewed. It held that where family life is established when the immigration status of the claimant is precarious, removal will be disproportionate only in exceptional cases. In the present case it was submitted the judge's focus was on whether the separation of the appellant and Mrs Elliot could be reasonably avoided. It was contended the judge failed to consider that the interference with family life was proportionate to the public interest given the immigration rules were not met and there were no exceptional circumstances leading to unjustifiably harsh consequences.

Proceedings in the Upper Tribunal

12. Mr Nace, Presenting Officer, continued to rely upon the four challenges made.

13. Mr Nasim submitted that the grounds were misconceived. He referred me to paragraph 13 of the decision, pointing out it was common case that the appellant had a genuine and subsisting relationship with Mrs Elliot. He referred to the findings made by the judge at paragraph 14, particularly at (iv) were the judge referred to the appellant having a close relationship with Mrs Elliott and that he supported her emotionally, physically and financially. He referred me to paragraph 15 of the decision were Mrs Elliott's family circumstances are set out. At paragraph 19(v) the judge considered the question of proportionality and the policy expressed in the immigration rules. The judge said the fact an applicant fails to qualify under the immigration rules is relevant but as a starting point rather than a conclusion and that the proportionality exercise cannot be reduced to whether the case is truly exceptional. At paragraph 19(vi) the judge referred to general considerations relating to the effective and consistent operation of immigration control that may weigh in favour of refusal when assessing proportionality. He pointed out that section 117B (5) states that little weight should be given to a private life established when the persons immigration status is precarious and does not refer to family life. Regarding the possibility of applying for re-entry from India he submitted the judge set out the relevant considerations.

14. I indicated I would be reserving my decision and both parties agreed that if I found a material error of law. I could remake the decision without the need for further evidence.

Consideration

15. At paragraph 26(i) Judge Green stated:

> He established his relationship with Ms Elliot, (who is a British citizen) and, therefore, a qualifying partner for the purposes of the 2002 Act at a time when he was in the United Kingdom lawfully and his immigration status at that time was not precarious. Given the fact that he application was made 6 days after his leave expired but within 28 days of expiry it is questionable whether his immigration state became precarious as he was in the UK without limited leave to enter or remain.

There are two issues arising here, namely, whether the judge was correct in concluding Mrs Elliott was a qualifying partner, and secondly, whether his

immigration status was precarious when the relationship developed. My conclusion is the judge was incorrect on both grounds.

16. The 2002 Act at section 117 D defines a qualifying partner as a partner who is a British citizen. There is no dispute that Mrs Elliott is a British citizen. However the respondent contends that `partner' has to be understood in the same way as a `partner' is defined in Appendix FM,GEN 1.1: a spouse or someone they have been living with in a relationship akin to marriage for at least two years before the date of application. I believe this is correct. This would be consistent with the traditional distinction between a spouse and a partner. In the case of the latter two years cohabitation has traditionally been taken as a comparator in order to demonstrate durability in a relationship.

17. Judge Green was clearly wrong in concluding his immigration status was not precarious. In AM (S 117B) Malawi [2015]UKUT 290 , the tribunal noted the distinction made between times when a person has been in the United Kingdom unlawfully and times when their immigration status has been precarious. The decision points out that in order to be considered precarious person must have held a grant of leave to enter or remain. Their precarious immigration status continued if they were dependent upon obtaining a further grant of leave. This is precisely the appellant's situation. When he came to the United Kingdom it was with leave for a fixed period. His initial leave expired on 31 March 2010; he obtained further leave until 30 October 2010 and then further leave until 23 August 2013. He began a relationship with Mrs Elliott in November 2012. At that stage he had no guarantee he will be permitted to remain.

18. I note that section 117 B (4) is concerned with the situation of a person in the United Kingdom unlawfully. Judge Green at paragraph 26(i) recorded that the appellant had been in the United Kingdom lawfully save for a gap of 6 days after his leave expired and submitting any application. I acknowledge that for the bulk of the appellant's time he has been here lawfully though his immigration status was precarious because of its temporary nature.

19. I also acknowledge that section117 (B)(5) in providing little weight should be given where the persons status is precarious only applies in respect of private life. At paragraph 26(iii) Judge Green had referred to the appellant's significant private life. It is worth noting that in AM (S 117B) Malawi the Upper Tribunal at paragraph 14 pointed out that section 117 B did not grant any form of immigration status on an individual who does not meet the immigration rules on the basis of having a good command of English or being financially independent.

20. I also find that the approach taken to `the Chikwamba principal 'as refined in Hyatt is flawed. In carrying out the proportionality assessment at paragraph 28 the judge considered as an alternative to Mrs Elliott going to India, that the appellant returned to India and reapply for entry. The appellant's Counsel submitted there would be considerable uncertainties. This is completely different from the factual situation in Chikwamba. In Hayat (nature of Chikwamba principle) Pakistan [2011] UKUT 444 (IAC) it was held that the significance of Chikwamba v SSHD [2008] UKHL 40 was

that in appeals where the only matter weighing on the respondent's side of an Article 8 proportionality balance is the public policy of requiring an application to be made under the Immigration Rules from abroad, that the legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance. This is not the situation here and to expect the appellant to return to India and reapply for entry clearance is not being obtuse.

21. In conclusion, I find that there are a number of material errors of law in the decision and that it can no longer stand. The decision has been premised on a misunderstanding of what is meant by a partner within the meaning of section 117 B (4). The judge should have viewed the appellant's claim in the context that his immigration status was precarious. The judge also misdirected himself in his understanding of the Chikwamba principle.

Remaking the decision

22. It has been accepted that the appellant cannot meet the immigration rules. He relies upon a freestanding article 8 claim. It was accepted in the First-tier Tribunal that he has established a significant private life from his time here. He studied and worked here, as well as forming various social ties. However, I am obliged to have regard to the considerations in section 117 B, which includes at (4) that little weight should be given to a private life were a persons immigration status is precarious. The appellant's immigration status was precarious because he was dependent upon obtaining further leaves. Consequently, I would attach little weight to his private life. It is not disputed that he is in relationship with Mrs Elliott. The relationship is at a comparatively early stage. They first met in late 2012 and have been cohabiting since October 2014. They have always known the appellant was here on a temporary basis. It is my conclusion that the respondent's decision is proportionate.

Decision

23. The making of the decision of the First-tier Tribunal did involve errors of law. I set aside that decision.

24. I remake the decision. The appeal is dismissed under the immigration rules and there is no breach of article 8.

Anonymity

25. The First-tier Tribunal did not make an order for anonymity. No application for such an order has been made before me. I see no reason of substance for making one

Deputy Upper Tribunal Judge Farrelly
20th September 2015