



IAC-FH-AR-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/16888/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 22 February 2016**

**Decision & Reasons
Promulgated
On 21 March 2016**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**NATHAN WICKLINE
(NO ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Ms A. Brocklesby-Weller, Home Office Presenting Officer
For the Respondent: No attendance and no legal representation

DECISION AND REASONS

1. The Respondent was born on 7 June 1984 and is an Australian national. He met his British partner, Mathew Ferguson, in Sydney in January 2013 and

began a relationship with him on 10 February 2013. They started to live together on 30 March 2013. The Respondent then came to the United Kingdom on 23 May 2013 on a two year youth mobility visa under Tier 5 of the Points Based Scheme.

2. In March 2014 the Respondent's partner returned to the United Kingdom and they started living together here. On 24 March 2015 the Respondent applied for further leave to remain on the basis of his relationship. At that time he still had leave to remain under Tier 5 and, therefore, it was a variation of leave application. His application was refused on 23 April 2015. He appealed on 7 May 2015 and First-tier Tribunal Judge Narayan allowed his appeal on 13 August 2015 on a family life basis.
3. On 21 August 2015 the Appellant appealed against this decision and on 30 December 2015 the First-tier judge Pedro granted permission on the basis that First-tier Tribunal Judge Narayan had made contradictory findings and there was also a lack of reasoning in his decision.

ERROR LAW HEARING

4. The Respondent did not attend the Error of Law hearing, was not legally represented and had not sent any explanation for his non-attendance. The notice of the decision to grant the Appellant permission to appeal was sent to the Respondent by second class post on 6 January 2016 at the address which he had supplied to the Tribunal. Therefore, I am satisfied that he had been notified of his hearing and consider that it is in the interests of justice to proceed with the hearing in his absence, pursuant to regulation 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
5. The Home Office Presenting Officer made some short submissions. She noted that the Respondent had failed to establish that he had lived together with his partner for two years or more. She also noted that at paragraph 17 of his decision First-tier Tribunal Judge Narayan said:

"I find that the [Secretary of State for the Home Department] in [her] decision in dealing with the relationship akin to marriage or civil partnership for at least two years prior to the date of application has correctly interpreted the information in the application form and therefore the application falls to be refused under the Immigration Rules"

6. The Home Office Presenting Officer also pointed out that in paragraph 18 of his decision First-tier Tribunal Judge Narayan said:

"I find it has not been contested that there are no insurmountable obstacles to family life between the [Respondent] and sponsor continuing outside the United Kingdom and therefore the appellant fails to meet the requirements of the Immigration Rules in respect of family life with his partner."

7. At paragraph 21 he also found that:

“There are no exceptional circumstances which have been raised that are consistent to the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights which may warrant a grant of leave to remain in the United Kingdom outside of the Immigration Rules.”

ERROR OF LAW

8. The Respondent had not cross-appealed on the basis that he was entitled to leave to remain under the Immigration Rules. Neither had he responded to the grounds of appeal in relation to any exceptional circumstances which may have justified the decision by First-tier Tribunal Judge Narayan to consider his appeal outside the Immigration Rules.
9. In paragraphs 22 to 27 of his decision First-tier Tribunal Judge Narayan undertook such a consideration and, in particular, considered the proportionality of the decision and Section 117B of the Nationality, Immigration and Asylum Act 2002.
10. However, as correctly submitted the Home Office Presenting Officer, in paragraph 44 of *Secretary of State for the Home Department v SS (Congo) & Others* [2015] EWCA Civ 387 the Court of Appeal clearly found that it is only if there is “a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules compare *Nagre*, then in considering that case the individual interests of the applicant and others whose Article 8 rights are in issue, should be balanced against the public interest including those expressed in the Rules in order to make an assessment whether the refusal to grant leave to remain or leave to enter as the case may be is disproportionate and hence unlawful by virtue of Section 6(1) of the Human Rights Act with reference to Article 8”.
11. In paragraph 21 of his decision First-tier Tribunal Judge Narayan expressly found that there were no exceptional circumstances in the Respondent’s case, which may warrant a grant of leave outside the Immigration Rules. He did not explain what circumstances of the Respondent’s case had not already sufficiently dealt with under the Immigration Rules. At best, he noted that the Respondent was planning to marry his partner but his plans had been delayed due to his partner not yet being divorced from his previous partner and that he and his partner were working here. He did not explain why these factors had not been sufficiently addressed in the Immigration Rules, which had requirements as to the status of relationships and finances.
12. In addition, reliance should only have been placed on section 117B of the Nationality, Immigration and Asylum Act 2002 once consideration of the

appeal outside the Immigration Rules was necessary due to exceptional circumstances and factors not addressed in the Immigration Rules.

13. Therefore there were a number of material errors of law in First-tier Tribunal Judge Narayan's decision.

Notice of Decision

1. The Appellant's appeal is allowed and the decision by First-tier Tribunal Judge Narayan is set aside.
2. The Respondent's appeal is remitted to the First-tier Tribunal for a *de novo* hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judge Narayan.

Directions

1. In the light of the non-appearance by the Respondent at the error of law hearing, the matter should be set down for an initial case management hearing in the First-tier Tribunal.

Signed

Date: 3 March 2016

Nadine Finch

Upper Tribunal Judge Finch