Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00463/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th December 2017	**On 18th January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR GURVINDRA SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Mr R Sharma, instructed by Malik Law Chambers Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State I refer to the parties as they were in the First-tier Tribunal.

2. The Appellant, a national of India, appealed to the First-tier Tribunal against a decision by the Entry Clearance Officer (ECO) made on 15th May 2015 to refuse his application for entry clearance as a partner. First-tier Tribunal Judge Roopnarine-Davies allowed the appeal in a decision promulgated on 20th February 2017. The Secretary of State now appeals

with permission granted by First-tier Tribunal Judge Robertson on 11th September 2017.

3. The background to this appeal is that the Appellant had leave in the UK as a Tier 4 Student from October 2009 until 19th April 2011. He applied for leave to remain in the UK in March 2011 and that application was refused on 3rd July 2012. He claimed that he met his partner in Birmingham shopping centre in April 2011 and that they lived together from 21st January 2013 until the Appellant left for India in February 2015. The couple married in India on 9th February 2015 and the Appellant's partner remained there for over a month. The Appellant's partner visited the Appellant in India from 8th to 26th February 2016. She is employed as an assistant Management Accountant.

4. The Entry Clearance Officer refused the application for entry clearance because he was not satisfied that the relationship between the Appellant and the Sponsor is genuine or subsisting. The ECO considered the evidence about the background, photographs and the evidence of the wedding. The ECO noted that the Appellant was illegally present in the UK from 19th April 2011 until he made a voluntary departure on 7th February 2015. The ECO applied discretion and decided not to refuse the application under paragraph 320(11) of the Immigration Rules as the ECO was "minded that there were not sufficient aggravating factors in this case." The ECO went on to say that the Appellant's behaviour is indicative of someone who would do anything to stay in the UK and the ECO therefore placed little weight on any statement made by the Appellant that had not been corroborated with documentary evidence.

5. It is not in dispute that, as the decision was made on 15th May 2015, the appeal to the First-tier Tribunal was limited to human rights grounds. The First-tier Tribunal Judge considered the documentary evidence and oral evidence of the Appellant's Sponsor. The judge found that the Sponsor was open and straightforward and the judge did not doubt her credibility [15]. The judge also accepted that the Sponsor was estranged from her family. The judge took into account that the legality of the marriage was not doubted and that the Sponsor was born in the UK, had a responsible job and was able to meet the financial requirements. The judge considered that it was not reasonable to expect that the Sponsor would wish to live in India. The judge considered the Appellant's intentions and took into account the oral and documentary evidence including the evidence of the Appellant's father, the duration of the relationship, the photographs, and the records of communication between the couple. The judge said at paragraph 20; "Though his immigration history is poor it was not enough to persuade the Respondent to exercise his discretion to refuse it under 320(11)". The judge noted that the Appellant left the UK voluntarily in 2005. The judge concluded that the couple's relationship was genuine and subsisting and that they intend to live together permanently in the UK. The judge concluded at paragraph 22; "The Appellant had dealt substantively with the Respondent's concerns. He meets the Rules for entry clearance to join his British citizen wife in the UK. It is otiose to

consider Article 8. The appeal succeeded." The judge went on to allow the appeal.

6. The Secretary of State appealed against that decision on the basis that the judge had made a material misdirection of law. The Secretary of State contends that, as the appeal is under the Nationality, Immigration and Asylum Act 2002 as amended by the 2014 Act, (as recognised by the judge at [8]), the judge was required to consider the appeal under Article 8 of the ECHR and it is contended that the judge erred in appearing to determine the decision under the Immigration Rules. It is contended that, had the judge considered the case under Article 8, she may have come to the opposite conclusion and dismissed the appeal on the basis that the Appellant had been an overstayer and had a poor immigration history and that these factors would have been taken into account under Section 117B and would have weighed against the Appellant in the balancing exercise of proportionality.

7. In granting permission to appeal Judge Robertson considered it arguable that the judge erred in law in failing to consider the appeal under Article 8, the only ground available to the Appellant.

The hearing

8. At the hearing in the Upper Tribunal Mr Tarlow submitted that the judge erred in saying at paragraph 22 that it was otiose to consider Article 8 when that was the very basis on which the appeal had been taken. Accordingly, in his submission, the judge failed to undertake a proportionality assessment. He argues that the judge had failed to take adequate consideration of the reasons for the refusal of entry clearance together with the public interest in maintaining effective immigration control.

9. Mr Sharma adopted his skeleton argument where he relied on Appendix FM of the Rules and the stated purpose contained in Section GEN which states that Appendix FM:

> "sets out the requirements to be met and, in considering applications under this route, it reflects how, under Article 8 of the Human Rights Convention the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic wellbeing of the UK".

10. Mr Sharma relied also on the explanatory memorandum which also states that the Rules set out proportionate requirements reflecting the view of government and Parliament as to how an individual's Article 8 rights should be qualified in the public interest to safeguard the economic wellbeing of the UK by controlling immigration and to protect the public from foreign criminals. He referred to a number of other sources saying the same thing. He also referred to case law emphasising the importance of the Immigration Rules in an assessment as to Article 8. At the hearing

Mr Sharma contended that it must be the Secretary of State's position that, if the Appellant met the requirements of the Rules, he would be entitled to entry clearance as the Rules take into account a proportionality assessment. He referred also to the fact that the Entry Clearance Officer had not taken this point under paragraph 320(11) of the Rules in reaching the decision to refuse entry clearance.

11. Mr Sharma accepted that the judge's comment that it was otiose to consider Article 8 was an error given that this was the judge's task, however he contended that that was not a material error as that is exactly what the judge had already done in her consideration of the Rules. In the alternative he submitted that the Rules would have been a starting point in assessment of the appeal on human rights grounds. Had the judge gone on to consider freestanding Article 8 assessment she would have done so on the context of the guidance in **R v SSHD ex parte Razgar [2004] UKHL 27**. In his submission it is clear that if the judge had reached the third question in **Razgar** that is whether the decision was in accordance with the law given that the Appellant met the requirements of the Rules then the assessment under the **Razgar** guidance would have stopped there. In these circumstances it was his submission that the judge had no need to engage with the provisions of Section 117B.

Discussion

12. It is clear from reading the decision that the First-tier Tribunal Judge took into account all of the evidence before her. The judge was aware of the Appellant's background noting it in the context of the refusal notice at paragraphs 2 and 3 of the decision. The judge also noted the submissions by the Presenting Officer in relation to the Appellant's poor immigration history [6]. The judge was aware of the background to the Appellant and the Sponsor's relationship as noted at paragraphs 9 to 14. The judge found that the Sponsor was credible and accepted that the relationship was genuine and that the couple intend to live together permanently. The judge therefore dealt squarely with the only issue raised in the reasons for refusal letter. In those circumstances the judge was able to conclude that the Appellant had demonstrated that he met the requirements of the Immigration Rules.

13. I attach particular weight to Mr Sharma's contention that it is clear that the Entry Clearance Officer considered that Appendix FM would be sufficient to meet the requirements of Article 8 in that, had the Appellant demonstrated that he met those requirements, entry clearance would have been granted.

14. It would have been preferable had the judge approached the decision through the prism of Article 8 attaching appropriate weight to the fact that the Appellant met the Immigration Rules. In any event this is not a material error because, in considering all of the issues raised in the judge's consideration of the Immigration Rules, the judge did in fact consider all relevant evidence and all relevant matters relevant to the determination

of this appeal. So, at paragraph 20 the judge noted that the immigration history of the Appellant was poor but also took into account the fact that the Entry Clearance Officer had not exercised his discretion to refuse the application under paragraph 320(11) thus reducing the weight attached to this factor in the judge's mind. Further, even had the judge considered this appeal in the context of the five steps set out in the guidance provided in the case of **Razgar**, I accept Mr Sharma's submission that, in light of her decision that the Appellant met the requirements of the Immigration Rules, the judge would have come to the conclusion that the decision was not in accordance with the law and could therefore have stopped the assessment under Article 8 at this point.

15. For the reasons set out above I am satisfied that the judge considered all relevant evidence in concluding that the Appellant met the requirements of Appendix FM. In light of the fact that all matters were considered a free-standing Article 8 assessment would not have reached any alternative conclusion.

16. In these circumstances I am satisfied that the decision does not disclose any error of law. _

Notice of Decision

There is no material error of law in the decision of the First-tier Tribunal.

The decision of the First-tier Tribunal will stand.

There is no anonymity direction.

Signed Date: 16th January 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

I maintain the fee award made by the First-tier Tribunal.

Signed Date: 16th January 2018

Deputy Upper Tribunal Judge Grimes