**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2023-002654

First-tier Tribunal No: HU/59583/2022
LH/02087/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

9th October 2023

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**RUSHIT HITESHKUMAR PATEL**
**(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**
For the Appellant: Mr N Wain, Senior Home Office Presenting Officer
For the Respondent: Mr A Rehman, instructed by London Imperial Immigration Services Ltd

**Heard at Field House on 6th September 2023**

**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 Respondent appeals with permission to this Tribunal against a decision made by the First-tier Tribunal Judge on 22nd June 2023 to allow the Appellant's appeal against a decision of the Respondent dated 29th November 2022 to refuse his application for leave to remain on human rights grounds under Article 8 of the ECHR.

## Background

3. The background to the appeal is that the Appellant, a national of India, entered the UK on 18th September 2020 on a PBS dependant leave to enter visa valid from 9th September 2020 until 30th November 2021 as the dependant of his then wife. The Appellant's case is that, by the time he entered the UK, his ex-wife had commenced another relationship and the marriage broke down. He went to live with his brother. He claims that he met his current partner, Khushbu Maheshbhai Patel, also a national of India, in October 2020 on an Asian online dating platform. He claims that their relationship began in November 2020. She too was previously married but is now divorced and had been granted a student visa from 6th February 2020. The Appellant's divorce from his ex-wife is pending. The Appellant and his current partner married in a religious ceremony on 14th March 2021 as they could not undertake a civil wedding due to the Appellant's outstanding divorce. The couple began co-habiting after their religious marriage. The couple have a son together born on 20th September 2022.

## The Respondent's refusal

4. On 28th November 2021 the Appellant applied for leave to remain in the UK outside the Immigration Rules. The Respondent refused that application on 29th November 2022. The reasons given in the refusal letter are that the Appellant does not meet the definition of a 'partner' as defined in GEN.1.2. of Appendix FM of the Immigration Rules not being the spouse, civil partner, fiancé or proposed civil partner or a person who has been living together with his partner in a relationship akin to marriage or civil partnership for at least two years prior to the date of application. The Respondent considered that the Appellant did not meet the requirements of the Immigration Rules. The Respondent decided that there were no exceptional circumstances in the Appellant's case.

## The decision of the First-tier Tribunal

5. The case came before Judge Mill in the First-tier Tribunal who identified the issues at paragraph 11 of the decision as follows:

> "(a) whether or not the Appellant meets the requirements under Paragraph R-LTRP.1.1 of Appendix FM and if not whether Paragraph EX.1 applies.
> (b) whether or not there are exceptional circumstances justifying a grant of leave outside of the Immigration Rules."

6. The judge found that the Appellant and his partner are in a genuine and subsisting relationship [25]. The judge went on to find that there was no strict formal requirement for the Appellant and his partner to have been in a relationship for a period of two years at the time of application [29]. The judge found that the Appellant meets the terms of the Immigration Rules and therefore it would be disproportionate and unduly harsh to remove him from the UK in accordance with **TZ (Pakistan) -v- SSHD [2018] EWCA Civ 1109**. The judge did not undertake a separate proportionality assessment under Article 8 finding that the fact that the Appellant meets the Rules determines the proportionality issue.

## The grounds

7. In the Grounds of Appeal the Secretary of State contends that the judge made a material error of law at paragraph 29 of the decision. It is contended that the judge failed to apply GEN.1.2. of Appendix FM which defines a partner as follows:

> "GEN.1.2. For the purposes of this Appendix "partner" means-
> (i) the applicant's spouse;
> (ii) the applicant's civil partner;
> (iii) the applicant's fiancé(e) or proposed civil partner; or
> (iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, unless a different meaning of partner applies elsewhere in this Appendix."

8. The Respondent contends that the judge incorrectly concluded that the Appellant satisfies the requirements of the Immigration Rules. It is contended that this affected the judge's proportionality exercise because the judge found that meeting the Immigration Rules is determinative of the Article 8 proportionality balance and therefore failed to go on to undertake a proportionality balancing exercise. It is submitted that the judge's reliance on the findings of the Court of Appeal in **TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109** is erroneous. At the hearing Mr Wain submitted that the judge's error as to the Rules infected the Article 8 assessment.

9. At the hearing before me Mr Rehman, for the Appellant, submitted that the judge's finding at paragraph 29 amounted to a finding outside of the Rules. He submitted that the judge was saying that at the date of hearing the Appellant would have met the Immigration Rules and that this determined the proportionality assessment. Mr Rehman relied on the cases of **Begum (employment income; Rules/Article 8) [2021] UKUT 00115 (IAC)** and **OA and Others (human rights; "new matter"; s. 120) Nigeria [2019] UKUT 65 (IAC).**

**Error of Law**

10. I am satisfied that there is a clear error of law at paragraph 29 of the judge's decision. As set out above, the Immigration Rules require that at the date of the application the Appellant must meet the definition of a partner. The Appellant does not contend that he was in a relationship akin to marriage for at least two years prior to the date of application. His evidence in the witness statement is that he and his partner began living together after the religious ceremony on 14th March 2021. The application was made on 28th November 2021. In these circumstances the Appellant cannot meet the requirements of Appendix FM.

11. The judge erred in saying that there is no strict formal requirement for the Appellant and his partner to have been in a relationship for a period of two years at the time of application. The wording of GEN 1.2 is clear on this requirement.

12. I have considered whether the error is material. Mr Rehman submitted that the finding at paragraph 29 is made outside the Immigration Rules. He submitted, relying on the decision of the Upper Tribunal in **Begum**, that the finding that the appellant meets the Rules is a factor weighed in the Appellant's favour in the proportionality assessment.

13. However at paragraph 28 the judge said that the correct approach is to consider whether the Appellant can meet the requirements of the Rules in the first instance. At paragraph 29 the judge said that there is "no strict formal requirement for the Appellant and his partner to have been in a relationship for a period of 2 years at the time of application", and at paragraph 30 the judge found that the Appellant meets the terms of the Immigration Rules. The judge went on, in accordance with the decision in **TZ**, to find that the decision under the Rules determines the proportionality assessment. Therefore it is clear that the judge considered this matter within the Immigration Rules.

14. Mr Rehman submitted, relying on the decision of the Upper Tribunal in **OA**, that, where the Appellant met the requirements of the Rules during the course of the appeal, this was a factor relevant to the proportionality assessment. However in **OA** the tribunal said that such an issue will generally constitute a "new matter" and there is no evidence that the First-tier Tribunal judge considered it in that way or that the Secretary of State gave consent to the consideration of such a new matter. Further, as set out above, the judge did not consider this issue in the way suggested by **Begum** or **OA**. He clearly considered that the Appellant met the requirements of the Rules, Mr Rehman made no submission that a decision framed in that way was open to the judge.

15. I find that the judge's error as to the Immigration Rules is a material error. The judge made a material error as to the requirements of Appendix FM and failed to undertake a full proportionality assessment under Article 8 of the ECHR. Therefore the judge failed to undertake anything more than a cursory assessment of the public interest in accordance with the statutory provisions of section 117B of the Nationality, Immigration & Asylum Act 2002. This is a material error.

16. In these circumstances I set aside the decision of the First-tier Tribunal.

17. The parties agreed that there had been no challenge to any of the findings of fact. Therefore those findings stand. The parties agreed to make submissions in relation to re-making the decision on the basis of the facts found.

**Re-making the Decision**

18. I heard submissions from Mr Wain and Mr Rehman in relation to re-making the decision.

19. Mr Wain submitted that under Section 117B little weight should be attached to the Appellant's relationship which was developed whilst his status in the UK was precarious. He highlighted the Appellant's short immigration history, he has been in the UK since 18th September 2020, entering as a dependant. He highlighted that at the date of application the Appellant did not meet the Rules. In terms of section 117B(6) Mr Wain submitted that account should be taken of the decision and factors in **EV (Philippines) [2014] EWCA Civ 874** and **KO (Nigeria) [2018 UKSC 53**. The issue is whether it is reasonable to continue family life outside the UK. He submitted that the child is young and is not yet 1 years old and therefore the child's family life is solely with the parents. He submitted that in all the circumstances it is proportionate and in the public interest for the application to be refused.

20. Mr Rehman relied on the decision in **OA** and submitted that at the date of the hearing the Appellant met the requirements of the Immigration Rules which meant that under Article 8 it would not be proportionate to refuse the appeal. He

submitted that the genuineness of the relationship was the only aspect in dispute and that was resolved in the Appellant's favour. He highlighted Section 117B(4) which states that little weight should be attached to a relationship formed whilst the Appellant was in the UK unlawfully but this Appellant was here precariously but not unlawfully, therefore the little weight provision did not apply. He accepted that the Appellant's child is not a qualifying child within section 117B(6). According to Mr Rehman the Appellant's partner came to the UK as a student and currently has a pending application with the Secretary of State. Mr Rehman relied on the case of **Begum**. He highlighted paragraph 2 of the headnote in relation to the balancing exercise and submitted that this case is high on the scale of the balancing exercise.

21. I take account of the evidence before the First-tier Tribunal in relation to the Appellant's family life. I consider this application in light of the fact that the Appellant cannot meet the requirements of the Immigration Rules as at the date of application because he does not meet the definition of a partner within Gen 1.2 as of the date of application.

22. I approach the assessment of the Article 8 appeal in accordance with the principles set out in **R v SSHD ex parte Razgar [2004] UKHL 27** .

23. I am satisfied that the Appellant has a family life in the UK with his partner and young child. It is not in dispute that the Appellant's relationship with his partner is genuine and subsisting or that the child is the child of the couple. I am satisfied that removal of the Appellant will interfere with that family life. The decision to refuse the Appellant leave to remain is in accordance with the Immigration Rules and therefore in accordance with the law.

24. In considering proportionality I consider the following factors in the Appellant's favour:

(a) The Appellant's child was born in the UK on 22 September 2022. I have considered his best interests. It is not argued that the child is a British citizen. He is just over 13 months old. There is no evidence that he has developed any life outside of his parents. I find that it is in the child's best interests to remain with his parents whether they remain in the UK, return to India, or travel elsewhere.

(b) In the reasons for refusal letter the Respondent refused the application under section S-LTR 1.7 as the Appellant had failed without reasonable excuse to comply with a requirement to provide information. At paragraph 23 of the decision the judge found that this failure was not made out. This finding was not challenged in the grounds of appeal and Mr Wain did not rely on this aspect of the reasons for refusal letter in his submissions. Therefore I am satisfied that the Appellant meets the Suitability requirements of Appendix FM.

(c) In the reasons for refusal letter the Respondent decided that the Appellant had not demonstrated that his relationship with his partner was genuine and subsisting. The judge's findings that the Appellant's relationship is genuine and subsisting has not been challenged and therefore stands.

25. In considering the public interest I take into account the following factors:

(a) I have considered whether the Appellant meets the requirements of the Immigration Rules. In the Respondent's review before the First-tier Tribunal the Respondent highlighted that the Appellant's partner does not meet the requirements of paragraph E-LTRP 1.2. which provides as follows:

**Relationship requirements**

E-LTRP.1.2. The applicant's partner must be-

(a) a British Citizen in the UK;

(b) present and settled in the UK;

(c) in the UK with protection status;

(d) in the UK with limited leave under Appendix EU, in accordance with paragraph GEN.1.3.(d); or

(e) in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay, in accordance with paragraph GEN.1.3.(e).

According to her Residence Permit, the Appellant's partner had leave to enter as a General Student until 18 January 2023. There is no evidence of any further leave to remain. In his submissions Mr Rehman said that the Appellant's partner has appending application for leave to remain. There is no evidence as to her current status. Therefore the Appellant does not meet the relationship requirements of Appendix FM. I cannot accept Mr Rehman's submission that at the date of hearing in the First-tier Tribunal or before me, the Appellant meets the requirements of Appendix FM.

(b) The Appellant did not meet the requirements of Gen 1.2 at the date of application. The judge found that they couple were residing together at the date of the hearing in the First-tier Tribunal. There is no challenge to that finding. However there is no up-to-date evidence that the couple continue to reside together. In any event, as set out above, the Appellant does not meet the eligibility requirements of Appendix FM. The failure to meet the Immigration Rules is a weighty factor in the public interest.

(c) There is no evidence before me that the Appellant can speak English. In any event, even if he does, that is a neutral factor which does not diminish the public interest (section 117B (2)).

(d) There is no evidence that the Appellant is financially independent. However, even if he is, that is a neutral factor which does not diminish the public interest (section 117B (3)).

(e) The Appellant's relationship with his partner was developed when he was in the UK lawfully, albeit with limited leave to remain andtherefore with precarious immigration status. I attach little weight to any private life he has developed whilst in the UK with precarious immigration status (section 117B (4) and (5)).

(f) As accepted by Mr Rehman, the Appellant's child is not a qualifying child (section 117B (6)).

(g) In his witness statement the Appellant claims that his partner's parents sent her to the UK for further studies as they did not want her to be bullied and intimidated by people in her local community following the breakdown

of her marriage. However the Appellant's partner did not refer to this in her witness statement and she said that her parents and both families were happy about the relationship with the Appellant.

(h) The Appellant and his partner spent most of their lives in India. Their families remain there. They would have family support upon their return there. They are both young and fit and could study or work to support themselves and their child there.

(i) The Appellant has been in the UK for a relatively short time. He came to the UK in September 2020 on the basis of a relationship which immediately broke down. His basis of stay in the UK has always therefore been temporary and without sound foundation.

(j) The Appellant's partner too has been in the UK for a relatively short time. She came in February 2020 with leave to remain for three years. There is no evidence that she has been granted further leave to remain.

26. I find that the factors raised by the Appellant do not outweigh the public interest because the Appellant's failure to meet the Immigration Rules is a particularly weighty factor in the public interest and the other factors set out . The factors set out at (g) to (j) above are further weighty factors to be weighed heavily in the public interest.

**NOTICE OF DECISION**

**The Decision of the First-tier Tribunal promulgated on 22 June 2023 involves the making of an error of law. I set aside that decision whilst preserving the findings of fact which were not challenged.**

**I re-make the decision.**

**The Appellant’s appeal is dismissed.**

**A G Grimes**

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

**4 October 2023**