IAC-HW-MP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29174/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 March 2015	**On 9 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

MOHAMAD CHIT

Respondent

Representation:
For the Appellant: Ms Brocklesby-Weller, Home Office Presenting Officer
For the Respondent: Mr A Chohan, Counsel, instructed by Marks and Marks Solicitors

DECISION AND REASONS

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

2. The appellant, a citizen of Lebanon, was in the UK as a student, and subsequently for Post-Study Work, before applying for leave to remain on the basis of his relationship with a British citizen, Jessica Luke (the

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sponsor). The sponsor has retinitis pigmentosa, an incurable condition that has resulted in her having very limited sight.

3. The appeal was allowed by Judge of the First-tier Tribunal Sweet, following a refusal of the application by the Secretary of State on 1 July 2014. The decision allowing the appeal was promulgated on 27 November 2014. The judge allowed the appeal on the basis that the appellant met the requirements of paragraph 276ADE(vi) of the Immigration Rules (HC 395 as amended), on the basis that he had no ties to Lebanon. The factual background was that the appellant was born and brought up in Kuwait, as the child of Lebanese parents who were working there, and it was only after he turned 18, and was no longer allowed to remain in Kuwait, that he spent five years in Lebanon as a student. In addition to allowing the appeal under paragraph 276ADE the judge also allowed the appeal on Article 8 grounds. This was on the basis of the appellant's relationship with the sponsor.

4. Permission to appeal was granted by First-tier Tribunal Judge McDade on 17 January 2015. The grounds seeking permission to appeal had complained that the judge had not properly assessed the no ties test in paragraph 276ADE, and that on the facts of the case the appellant did not satisfy that Rule. The second ground argued was that no weight had been given to the appellant's inability to meet the requirements of the Immigration Rules. The second ground also mentioned a possible entry clearance option, although it was accepted at the hearing before me that this had not been mentioned in the refusal letter.

Error of Law Submissions

5. At the start of the hearing Ms Brocklesby-Weller, for the Secretary of State, sought leave to add a further ground, namely that there had been no consideration of the statutory public interest factors at section 117B of the 2002 Act (inserted by section 19 of the 2014 Act). There was no objection to this from Mr Chohan, and I gave leave for this additional ground to be added. It was further agreed that there was an additional point, also not raised in the grounds, which was that the wrong version of paragraph 276ADE of the Immigration Rules had been considered by the judge. The version of 276ADE should have been the one using the words "significant obstacles to integration" rather than "no ties".

6. At this stage I indicated my view that the decisions in respect of paragraph 276ADE and Article 8 could not stand. Mr Chohan did not put forward submissions to the contrary, and this was effectively a matter of agreement. It appeared to me that the consideration of the wrong version of the Rules, and the lack of any mention of the public interest factors, or the significance of the failure to meet the Rules, were sufficient in themselves to show that the judge's decisions rested on legal errors; and that they should be set aside.

Re-making of the Decision

7. I invited submissions as to the appropriate manner of re-making the decisions that had been set aside. Mr Chohan was happy to deal with the re-making immediately by way of submissions, on the basis that the facts were not disputed, there had been no change in circumstances, and there was no need for additional evidence. I gave Ms Brocklesby-Weller time to consider her position. She indicated that the matter could proceed to an immediate re-making by way of submissions, or could be adjourned to a re-making hearing in the Upper Tribunal, but she noted two areas of concern. The first was that the judge had not considered the integration test in paragraph 276ADE and had therefore not made relevant findings, and the second was that the judge had not made a clear finding as to whether the relationship amounted to family life, rather than an aspect of the appellant's private life.

8. I indicated to the parties my decision that the appeal could proceed at once to a re-making, based on the evidence before the First-tier Tribunal and the judge's findings. These findings covered the appellant's history, mentioned above. The judge accepted that the appellant had very few links to Lebanon, where he had only resided for four years whilst at university. His only relations in Lebanon were his paternal grandparents with whom he did not have a close relationship. The judge also accepted that it would be difficult for him to obtain employment, and that there were political and religious tensions in Lebanon.

9. As to the appellant's relationship with the sponsor in the UK, the judge found that the appellant had been in the UK continuously since September 2010. He accepted the medical evidence about the sponsor's genetic eye condition, as a result of which she was registered blind. He accepted that the couple had met in March 2012; that the couple lived near to each other, and that the appellant often stayed the night with the sponsor, but that they did not live together because there is insufficient space in the sponsor's specially adapted accommodation, where she lives with her siblings (who suffer from the same condition as her) and one of their partners. The judge accepted that they were in a genuine relationship, and that the only reason they could not satisfy the definition of "partner" in Appendix FM was because they had not been living together. The relationship started when the appellant was in the UK with leave for Post-Study Work, and the application was made in time.

10. The submissions on the re-making can be summarised as follows. Ms Brocklesby-Weller submitted that the appellant had not demonstrated very significant obstacles to integration into Lebanon. He had paternal grandparents there, and had not shown that he was incapable of integrating. He was an adult and in good health, and had spent five years there as a student. He would have no problems with reintegration, and the political and religious tensions mentioned had not been established by evidence. His relationship with his grandparents could be pursued and

strengthened on return (**Balogun v UK [2012]** at paragraph 51). As to the relationship this should not be said to amount to family life, and should be given little weight as an aspect of private life. The requirement of cohabitation for two years was one that was reasonable as it showed a genuine relationship, and they could not meet this aspect of the Rules. There was no clear finding as to their future intentions in the decision. Article 8 had to be considered through the prism of the Rules (**Singh**) and the sponsor's British citizenship alone was not enough to argue that the appellant should be allowed to stay. They could communicate with each other through modern methods. Although it was accepted that it had not been mention in the refusal, entry clearance could be regarded as an option, and removal was therefore not a bar to the relationship continuing. The sponsor did not actually need the appellant for her essential needs. The public interest factors were important. As a student his presence had been temporary. His immigration status had been precarious even if it was accepted that he had never been in the UK unlawfully. It was accepted that he had been financially self-supporting, both through working, and through financial support from his parents.

11. Mr Chohan, for the appellant, relied on the skeleton argument that had been prepared for the First-tier hearing, the detailed witness statements, letters, and supporting statements from family members, and the medical evidence. The sponsor was a British citizen with a disability resulting from a genetic disorder and had unique adaptations to her accommodation. The Immigration Rules could not envisage all situations. The unique aspect of the inability of the couple to live together had not been taken into account, despite the fact that the Secretary of State had been provided with evidence. The appellant had provided unique support to the sponsor both in London and Warwick. This had been essential. The relationship was akin to marriage. There were significant problems with entry clearance. For the couple to live together they would need to obtain adequate accommodation with all of the relevant adaptations. It was not possible for the sponsor to move to Lebanon given her specific needs, and if the sponsor were to be in Lebanon he could not offer her much support. The relationship did amount to family life. If the disability factor had not been there they would have been living together for two years, and could have come within Appendix FM. As a matter of public policy it was objectionable for there to be discrimination against a British citizen with a disability, where it was not a realistic option for her to live in Lebanon. The appellant had a good immigration history. It was not right to say that he was here on a precarious basis because other options were open to Post-Study Workers. As to paragraph 276ADE he was in an unusual position because of being the son of a migrant worker in Kuwait, and he had no ties with his grandparents.

Decision

12. In re-making the decision in this appeal I have decided to allow it on Article 8 grounds. I have also decided that the appeal, in being re-made, does not fall to be allowed under paragraph 276ADE of the Immigration Rules.

13. The key to this case, in my view, lies in the inability of the couple to meet the requirement of having co-habited for two years. It was suggested on behalf of the Secretary of State that this was a reasonable way to test whether a relationship was genuine. I accept that point, but I also accept the submission made on the appellant's behalf that the Immigration Rules in general, and Appendix FM in particular, cannot envisage all factual situations. This is a case that is highly unusual on the facts. There are detailed reasons for the inability of the couple to live together, which were set out at some length in the witness statements. These reasons flow directly from the sponsor's disability, and those of her siblings. As the judge found, the appellant and the sponsor are a couple, in a genuine relationship, in every respect other than that they have not been living together for these specific reasons.

14. The significance of this is that this is the only reason for the inability of the appellant to have his case considered under the exception in Appendix FM (EX.1.(b) and EX.2.). In every other respect it appears to be accepted that the appellant would fall for consideration on the basis of his relationship with the sponsor. The only bar is that the appellant does not meet the requirement, in order to be defined as a "partner", in Appendix FM GEN.1.2.(iv) which requires living together in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application. In this case the couple meet the requirement of being in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, but they have not been living together, for the particular reasons mentioned above.

15. For the purposes of Appendix FM, if the couple had been living together and the appellant did meet the definition of "partner" then the case would turn on whether there were insurmountable obstacles to family life with the appellant's partner continuing outside the UK. That is defined in EX.2. and includes "very serious hardship for the applicant or their partner" or very significant difficulties in continuing family life together outside the UK which could not be overcome. On these facts it appears to me to be reasonably clear that the sponsor, because of her unusual condition, would face very serious hardship if she were to be required to leave the UK. Even if I were to accept the submission made for the Secretary of State that the sponsor would get assistance from others if the appellant were to be removed, that is not the test within EX.1. If it were not for the definition issue, based on the fact that the couple had not been living together, it appears to me to be clear that the appellant would succeed under the exception, with the consequence that his case would therefore come within Appendix FM, as there appear to be no other relevant issues of suitability or eligibility.

16. I accept that Article 8 needs to be considered through the prism of the Rules. In doing so it appears to me to be of considerable significance that the appellant would succeed under the Rules if it were not for the issue of living together. I have no difficulty in accepting in general terms that the requirement within the definition of a partner for a couple to have been living together is a reasonable one. There can be no quarrel with that requirement in general terms, but it is well-established that there can be circumstances where it becomes necessary to look at Article 8 outside the Rules, where there are exceptional or compelling circumstances not covered by the Rules. The circumstances in this case appear to me to fall exactly into that category.

17. Turning to the public interest factors in section 117B I note the first factor, that the maintenance of effective immigration controls is in the public interest. On that point I note that the appellant has always been in the UK lawfully. I would accept that his overall status has been of a temporary nature, with some reservations about the various options open to those that have completed Post-Study Work to remain in the UK under other aspects of the Immigration Rules. The reality, however, is that the appellant, at the end of his Post-Study Work, is only seeking to remain on Article 8 grounds, on the basis of his relationship. The maintenance of effective immigration controls being in the public interest point to him being removed if he cannot comply with the Rules, but that returns to the question of exactly why it is that he cannot comply with those Rules, and the special circumstances flowing from the sponsor's disability.

18. Turning to the second factor in section 117B it does not appear to be in dispute that the appellant speaks good English. As to the third it was also accepted that he has been financially independent. As to the fourth it has not been suggested that his relationship with the sponsor was established at a time when he was in the UK unlawfully. The definition of precariousness is somewhat unclear, but it would seem that presence as a student and Post-Study Worker would be likely to be regarded as a precarious immigration status.

19. There is no mention of an entry clearance alternative in the statutory public interest factors at section 117B, and neither was there any mention of an entry clearance alternative in the refusal letter. In addition the structure of Appendix FM, including the exception and the definition of insurmountable obstacles, makes no mention of such an option. In the circumstances it appears to me to be doubtful whether the entry clearance option is of relevance to the proportionality assessment. It is notable that the only problem presented, the definition issue relating to not living together, has nothing to do with the appellant's lack of entry clearance, and if he were to be considered under the exception it would also be the case that he could succeed without entry clearance being an issue.

20. What was clear from the various statements and supporting letters, that went into the judge's finding that this was a genuine relationship, was the

overall strength of the relationship, and the degree of interdependence. The extent of this interdependence is clearly unusually high because of the sponsor's lack of sight. There appears to me to be nothing in the evidence or in the findings that would suggest the need for any qualification of any sort about the couple's future intentions. The relationship appears to be solid and well-established, and there is nothing in the evidence to raise a doubt on that score. The nature of the relationship appears to me to amount to family life rather than an aspect of private life. This is because relationships between a married couple, or a couple in a relationship akin to marriage, are generally held to amount to family life, and there is nothing here to justify departing from that approach.

21. For all these reasons my conclusion is that the unusual nature of the failure to meet the definition, and thereby the inability to take advantage of the exception, justifies turning to a consideration of Article 8 outside the Rules in this particular case. In such a consideration I find that the appellant's relationship with his partner amounts to family life; that the proposed removal would represent an interference in that family life of sufficient seriousness to engage the operation of Article 8; that the decision to remove was in accordance with the law and in pursuit of the legitimate aim; but that the decision to remove amounted to a disproportionate interference with family life, particularly when looked at through the prism of the Immigration Rules, and the unusual reasons for the inability to meet the requirements, and also when looked at in the light of the statutory public interest factors at section 117B.

22. In contrast with the strength of the Article 8 case it appears to me that the case under paragraph 276ADE is correspondingly weak. The appellant has some family connections in Lebanon, which could be pursued. He is a citizen of the country and, despite not having been brought up there, he has spent some years there as a student. He is in good health. He has continuing financial support from his parents who live in Kuwait. If the relationship issue is set to one side it appears to me that his situation falls well short of one in which it could be said that he could succeed on private life grounds. He does not appear to me to have shown that there would be very significant obstacles to his reintegration into Lebanon.

23. Having reached this conclusion I am aware of the fact that it could have been argued, from the start, that any error of law by the judge was not a material one, because I am reaching the same decision on Article 8, if not under the Immigration Rules. That may well be right, but the process of working through the error of law and re-making the decision nevertheless followed this course in this particular case, and the end result would remain the same, at least in relation to Article 8, whatever route was taken.

24. Neither side said anything about anonymity or fee awards. The First-tier Tribunal Judge made a full fee award, and made no anonymity order.

There is no basis to alter the position in either respect. There is therefore no anonymity order, and the fee award stands.

Notice of Decision

25. The judge's decision allowing the appeal is set aside, an error of law having been shown.

26. The decision in the appeal is re-made as follows. The appeal is allowed on human rights grounds, with reference to Article 8 of the ECHR.

Signed Date **1 April 2015**

Deputy Upper Tribunal Judge Gibb