Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03388/2016

THE IMMIGRATION ACTS

Heard at Field House
On 3 April 2018

Decision & Reasons Promulgated
On 24 April 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

GURPREET SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Wilford, Counsel instructed by Charles Simmons Solicitors
For the Respondent: Ms N Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India born on 17 February 1989. He is appealing against the decision of the First-tier Tribunal (Judge Burns) promulgated on 19 April 2017 to dismiss his appeal against the decision of the respondent dated 22 January 2016 to refuse his application for leave to remain in the UK on the basis of his private and family life as the partner of a British citizen.

Decision of the First-tier Tribunal

2. The First- tier Tribunal made the following findings of fact, which are not in dispute:

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(1) On 5 October 2016 the appellant married a British citizen.

(2) The marriage is genuine and subsisting, and they live together.

(3) Prior to the marriage the appellant and his partner did not cohabit and at the time the appellant's application was made they neither cohabited nor were engaged.

(4) The appellant was raised in India, where his parents live.

(5) There is no evidence that the appellant and his wife could not find accommodation and employment in India.

(6) The appellant's wife is a British citizen, who has lived her whole life in the UK and whose family live in London. She has visited India.

(7) The appellant entered the UK in 2010 as a student. Since February 2015, when his visa expired, he has been in the UK unlawfully.

3. The judge considered whether the appellant was able to satisfy the financial requirements of the Immigration Rules. After noting that the evidence in the appellant's witness statement concerning his wife's income did not establish the financial requirements were met (as the amount he claimed she earned was insufficient), the judge stated that:

> *"19. At the tribunal hearing I was shown a letter from a new alleged employer stating that [the partner] now works 37.5 hours a week… at the rate of £10.26 per hour.*
>
> *20. No payslips were produced to support these figures although if they are correct and sustained over a year it may be that [the partner] now meets the income threshold, but I am unable to accept this based simply on the letter, and in any event she plainly did not at the time of the refusal appealed against."*

4. The judge then considered the appeal under Article 8 ECHR. Having found that there was a genuine marriage and Article 8 was engaged, the judge proceeded to assess whether removal would be proportionate. Applying Section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), the judge found that the public interest outweighed the appellant's family life given the relationship commenced when his immigration status was precarious and the marriage was entered into when he was in the UK unlawfully.

Grounds of Appeal and Submissions

5. The grounds of appeal submit that the judge erred by not making a clear decision under Article 8, by failing to carry out a proper proportionality assessment and by not applying <u>Razgar</u> and <u>Huang</u>.

6. In granting permission to appeal, Upper Tribunal Judge McWilliam found it arguable that the judge did not consider Article 8 on the evidence at the date of the hearing.

7. Before me, Mr Wilford argued that the judge erred by not taking into consideration in the proportionality assessment that at the time of the hearing the financial requirements under Appendix FM were satisfied. He submitted that evidence

demonstrating this, in the form of payslips, was submitted to the judge and the judge made a factual mistake when stating at paragraph 20 (cited above at paragraph 3) that no payslips were produced. There were no copies of the aforementioned payslips on the court's file. Mr Wilford's explanation was that the appellant was unrepresented before the First-tier Tribunal and had handed copies of the payslips to the judge who had returned them to him without a copy being taken.

8. A further argument made by Mr Wilford was that the judge failed to apply what he characterised as the principle in Chikwamba – that because the appellant now satisfies the requirements of the Rules there is no public interest in effectively requiring him to leave the UK in order to make an application

9. Ms Willocks-Briscoe submitted that the arguments being made by Mr Wilford departed substantially from the grounds of appeal, where it had not been argued that the judge ignored documents that were handed to him at the hearing or that chick one applied. Mr Wilford's response was that the grounds are sufficiently loose to encompass his submissions.

Analysis

10. The argument made in the grounds of appeal that the judge failed to carry out a proportionality assessment under, or to make a decision in respect of, Article 8 ECHR is entirely without merit.

11. Even on a cursory glance it is obvious that Article 8 has been considered in detail. The judge has in a structured and clear way followed the five step approach in Razgar. At paragraph 28 the judge considered whether there was - and found there to be - family life between the appellant and his wife. At paragraph 31 the judge found that the interference with the appellant's family life engaged Article 8. At paragraph 32 the judge considered whether the decision of the respondent was in accordance with the law. At paragraphs 33 – 38 the judge carried out a proportionality exercise, having regard to the mandatory considerations in section 117B of the 2002 Act. On any legitimate view, the judge has addressed and made a decision in respect of Article 8.

12. Permission was granted on the basis that the judge had not considered Article 8 on the evidence at the date of the hearing. However, reviewing the decision as a whole it is apparent that the judge has considered evidence post dating the application. The clearest example of this is that the judge has taken into account that the appellant was married, which was not the case at the date of the application. And in paragraphs 16 – 20, where the judge considered evidence of the sponsor's income, it is plain that the judge has had regard to up to date evidence about the present circumstances. The reason the judge did not accept the appellant's claim that the sponsor now earns a sufficient income to satisfy the Rules was not that the evidence post dated the application but because he did not accept that the evidence adduced (which he found to consist only of a letter and not payslips) was sufficient. This

conclusion was open to the judge and I am satisfied that an error of law was not made.

13. At the error of law hearing, Mr Wilford argued that the judge erred by failing to have regard to payslips showing the sponsor's income. He claimed that these were handed to the judge at the hearing but not retained for the court file. The difficulty with this argument is that the judge, at paragraph 20, has stated in clear terms that payslips were not produced and there is nothing on the court file to indicate they were. Noting that the decision is dated 8 April 2017 (only 2 days after the hearing) I consider it unlikely the judge would have forgotten, when drafting the decision, that he had seen the payslips. Accordingly, I do not accept the judge was given the payslips. The failure to consider them in the decision was therefore not an error of law.

14. Mr Wilford's "Chikwamba" submission is premised on the assumption that the appellant satisfied the financial requirements of the Rules at the date of the hearing. However, for reasons that were open to him (principally, that the only evidence adduced – a letter – was insufficient) this assumption is not correct. The judge could not have erred by failing to consider whether there was a public interest in removing someone who could meet the Rules when it was not accepted that the appellant could in fact meet the Rules.

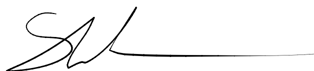
15. The appellant is unable to succeed on any of the grounds raised (including those raised for the first time at the hearing) and the appeal is dismissed.

Decision

16. The appeal is dismissed.

17. The decision of the First-tier Tribunal does not contain a material error of law and stands.

Signed



Deputy Upper Tribunal Judge Sheridan Dated: 23 April 2018