Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/25095/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 8th May 2014	**On 12th June 2014**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

HARPREET SINGH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Rea, Solicitor of Maguire Solicitors
For the Respondent: Mr R Mullen, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of India born on 5th August 1983. The appellant first came to the United Kingdom on 11th April 2010 on a Tier 4 (General) Student visa which expired on 22nd October 2012. He made an application for further leave to remain on

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1st October 2012 on the basis of his relationship with Hayley McCormack. That application was refused by the respondent on 5th June 2013 on the basis that he did not meet the Immigration Rules. A decision to remove the appellant was also made on the same occasion.

2. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Scobey on 10th February 2014. The Judge did not find that there was a good arguable case to consider the appeal of the appellant outside of the Immigration Rules and accordingly the appeal was dismissed.

3. Grounds of appeal were submitted against that decision on the basis that, although the appellant was not married when the application was submitted, he was married at the time of the hearing. In those circumstances he met the requirements of EX.1 and accordingly it was perverse of the Judge to hold in effect that there was not a good arguable case. Leave to appeal was granted on that basis and thus the matter comes before me in pursuance of that grant.

4. Mr Rea who represented the appellant at the First-tier Tribunal represents him also before me.

5. He submits that at the time of the hearing the appellant met all the requirements as set out in EX.1 of the Immigration Rules. There are two requirements set out under EX.1. The first being that the appellant is in a genuine and subsisting parental relationship with a child under 18 in the United Kingdom. The child is a British citizen of at least 7 years and that it would not be reasonable to expect that child to leave the United Kingdom. Mr Rea submits that the appellant is in such a parental relationship with the son of his wife.

6. It was clearly the case, as recognised by the Judge at the hearing, that it would not be reasonable to expect Hayley McCormack, or her son or her nephew to relocate to India. Mr Rea accepts, however, that he did not argue the parental relationship at that first hearing.

7. The second requirement is that the appellant is in a genuine and subsisting relationship with a partner who is in the United Kingdom and is British citizen settled in the United Kingdom and that there are insurmountable obstacles to family life with that partner continuing outside the United Kingdom.

8. At the time of the application the appellant had not lived with Hayley McCormack for the requisite period of time nor was he married to her. However that situation changed and he was married to her prior to the hearing on 10th February 2014. Given that the appellant met the requirements of EX.1 it was quite wrong of the Judge to have found that there was not a good arguable case to consider the matter outside the Immigration Rules.

9. Mr Rea relies heavily upon the case of **MS** setting the parameters for such a consideration. In particular he relies upon paragraph 30 of the judgment which reads as follows:-

> "In summary, therefore, we are of opinion that in all cases where the right to private and family life under article 8 is invoked the first stage must be to consider the application of the Immigration Rules. The new rules are designed to cover the considerations that are relevant to an article 8 claim in a normal case. The fundamental issue raised by article 8 is an assessment of on one hand the requirements of an effective immigration policy, including the enforcement of that policy by removal from the United Kingdom, and on the other hand the right of the individual concerned to private or family life. That exercise involves an assessment of proportionality. In most cases, the new rules will ensure that assessment is properly carried out. In some cases, however, the rules will not produce a fair result that accords with article 8. In those cases the Home Secretary, acting through immigration officials, will need to consider whether leave should be granted outside the rules. That will require an assessment of the precise circumstances of the individual case, taking account of all factors that are relevant. These will include factors mentioned in paragraph 3.2.7d of the Home Secretary's instructions and also any other factors that may be relevant to the particular assessment of proportionality that is being undertaken. The relevant factors will also include those mentioned in the rules themselves, notably in rules 276ADE-276DH, and in appendix FM, including section EX of that appendix. The purpose of those provisions is to set out the factors that normally apply to the assessment of article 8 rights in an immigration context; consequently both the terms of those provisions and the underlying policy that can be discerned from those terms are of importance. They must, of course, be weighed against the other special considerations that apply in the particular case. Before it is necessary to embark on that second-stage exercise, however, the application for leave to enter or remain must demonstrate a good arguable case that leave should be granted outside the rules; that a distinct assessment of proportionality should be made to determine whether removal would infringe the applicant's article 8 rights. If that is not demonstrated, it can be assumed that the applicant's article 8 rights will be adequately dealt with by applying the new rules. Finally, the test of exceptionality should not be used any longer; instead, decision-makers should focus on the question of whether the applicant has shown a good arguable case that his or her application should be dealt with outside the rules."

10. It is common ground in this case that the appellant still cannot meet the Immigration Rules. EX.1 is not freestanding from the other elements set out in paragraph 276ADE. In particular he cannot meet the financial requirements specified in the Rules.

11. Mr Rea submits that the Rules should not however constitute a straightjacket preventing a Judge in the appropriate circumstances for granting relief albeit that the

strict terms of the Rules are not satisfied. This, he submits, is precisely this case, given the acceptance by the Judge that the appellant's wife, son and nephew could not be expected as UK citizens to go to India. The appellant's wife is working in the United Kingdom, her son is at school in the United Kingdom and her nephew is studying.

12. Mr Rea submits that the Judge, in considering whether or not there was a good arguable case, altogether ignored the best interests of the other parties affected by the decision, in particular Hayley McCormack and her son. There was an emotional dependency such that the removal of the appellant would be detrimental to the wellbeing of both his wife and his children and to a lesser extent his nephew.

13. Mr Mullen, who represents the respondent, invited me to find that the Judge carefully considered all the ingredients in the case in coming to a decision as to whether there was indeed a good arguable case. He submits that in effect the grounds are seeking to reargue the merits rather than identify an error of law. He invited me to find that the Judge specifically considered the children in the remarks that were made. He further submits that there is no evidence of dependency in this relationship.

14. He invites me to find that what is effectively being sought is to circumvent the Rules by the use of Article 8 so as to in effect separate EX.1 from the Rules and treat it as a freestanding provision. He invites my attention to the decision of the Supreme Court in **Patel [2013] UKSC** 72 which made it very clear that Article 8 was not to be used to circumvent the application of the Rules without more.

15. The nature and scope of the relationship is set out by the Judge in the determination. Although the relationship developed as from January 2011 it was not until the date of the marriage in August 2013 that the appellant and Hayley started to live together.

16. In the household is the appellant's wife's son by a prior relationship. He is aged 8 and sees his natural father every two weeks. The sponsor's nephew also lives at home and the sponsor has a guardianship order so far as he is concerned. He was born on 12th August 1996 and is approaching therefore his majority.

17. My attention was drawn to statements which they had written, which are enclosed with the bundle of documents that was before the First-tier Tribunal. At page 19 of one such bundle is the statement of Kalvin McCabe who is the nephew. He has been living with his aunt for the past five years, and says essentially that he likes the appellant who is very nice to him. They shall acquire for him a job in the summer holidays. He is pleased that his aunt is married and says that they are clearly happy together.

18. As a matter of common sense the nephew will shortly be going to college and within a few years will be living an independent life. There was no indication that there is any emotional dependency upon the appellant so far as he is concerned. There is a

somewhat indirect statement from the son at page 24. Seemingly his grandparents encouraged him as part of a pretend game to write things he liked about the appellant and how he would feel if he went to India. The description of the appellant set out is that he is strong and funny. The witness enjoys wrestling with the appellant and playing with him. He says that the appellant is kind to him and to his mother. It is said that the witness would miss the appellant because the appellant told him that he is his best friend and his brother. The son's feelings towards the appellant are understandable but fall far short of any indication of emotional independency. The long term figure in the son's life is not only his mother but also his natural father.

19. There is also the statement of Hayley McCormack dated 4th February 2014. In that statement she describes how she came to meet the appellant and how she has found him to be a caring and trusting person. She speaks of her son having an excellent relationship with the appellant, he having taught the son aspects of life of which he was previously unaware. She speaks of the need to provide stability and support for her son and for her nephew.

20. Once again that is thoroughly understandable and to be expected in a developing relationship. The reality, however, as recognised by the Judge in the determination, is that the appellant has developed this relationship with Hayley and with the children relatively recently.

21. In particular it was recognised at paragraph 29 that the nephew is nearly an adult. Although the Judge accepts that they may have a bond, there is little doubt that the nephew would cope without the appellant. Similarly the appellant has only come into Hayley's son's life recently. The Judge has recognised that removal may have more of an effect on him. However the appellant is not his father.

22. A significant factor considered by the Judge is that the marriage was undertaken in August 2013 following the refusal of 5th June 2013. Therefore a decision was taken, both to marry and to live together, at a time when it would be apparent to both the appellant and his wife that his right to remain in the United Kingdom was precarious.

23. Mr Rea relies upon certain remarks made in paragraph 22 of the determination as being indicative of bias towards the appellant and tainting therefore of the proportionality exercise. He says for example that the Judge was unfair to criticise the appellant and his wife for having "an indifferent regard for the Immigration Rules of this country". They were entitled to marry so as to express their relationship. He submits that it was therefore unduly harsh of the Judge to criticise them in that way.

24. I accept that it may perhaps have been a strong statement to have been made in the circumstances. However the comment made of the relationship being entered into at a time when the appellant's status and position was precarious is one which I find

was properly open to be made. I did not find that there is any indication of bias in the determination. The Judge has sought to analyse the nature of the relationship, the extent of that relationship and more particularly how long that relationship has been developed.

25. The Immigration Rules relating to the requirement of maintenance to a stated figure have been criticized from a number of sources as being possibly an unduly high figure to reach. It is as I understand it a matter currently under challenge but it remains part of the Immigration Rules.

26. The relationship between maintenance of the other aspects of the Immigration Rules was considered by the Tribunal in the case of **Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC)**. It was a case in which an elderly wife was seeking to come to the United Kingdom to be with her husband who was a British citizen. It was argued that it was unreasonable to employ the Immigration Rules and particularly the requirement of maintenance to hit a barrier to what undoubtedly was a longstanding marriage, there having been a number of children in that relationship. The Tribunal looked at the practicalities of "insurmountable obstacles" and embarked upon an analysis of the case law that existed at the time of the hearing.

27. It found at paragraph 27 of the judgment that a Judge should not embark upon a freewheeling Article 8 analysis unencumbered by the Rules. The Judge should have paid attention to the guidelines. Only if they were arguable good grounds for granting leave to remain outside the Rules was it necessary for the Judge to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.

28. The Tribunal in paragraph 28 of the judgment considered the particular circumstances of the appellant and sponsor and in that case did not find there to be insurmountable obstacles to family life in Pakistan or unjustifiably harsh results.

29. The Tribunal in that case noted that the maintenance requirement was in the Rules in order to safeguard bank finances and to ensure that other persons were not a burden unnecessarily to the state. The Rules as drafted represent the will of parliament and generally set out where the public interest lies.

30. Even were the appellant, and it may well be the case that he does, meet the requirements set out in EX.1 that is not sufficient according to the Rules unless he also satisfies the financial requirements. I have indicated that juxtaposition has been the subject of challenge but at present remains good law. What in effect Mr Rea is seeking to persuade the First-tier Tribunal Judge to do was to use Article 8 as a means of separating EX.1 from the other requirements. That is clearly on the authority of **Patel** something that Article 8 should not be used for.

31. However in certain circumstances it is recognised that the personal, private or family circumstances of individuals are so compelling as to demand a different result.

32. In this case the First-tier Tribunal Judge had found that no such factors existed. There was no undue emotional dependency so far as the children are concerned and the sponsor entered in the marriage in the knowledge of the precarious nature of the relationship. As **MS** indicated there needs to be a consideration as in deciding whether there is a good arguable case and whether any other special considerations would apply in this particular case. There would seem to be none. None were found by the First-tier Tribunal Judge.

33. I find no error in the approach taken by the Judge to the evidence nor in consideration of that evidence. Findings were properly open be made and were not perverse in all the circumstances.

34. Accordingly this appeal before the Upper Tribunal is dismissed. The original decision shall stand namely that the appeal is dismissed in respect of the Immigration Rules and also in respect of Article 8 of the ECHR.

Signed Date

Upper Tribunal Judge King TD