Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04791/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 March 2016	**On 5 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MD ABU KAWSER MAMUN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr G Davison, Douglass Simon Solicitors

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Cohen promulgated on 28 September 2015, in which he allowed the respondent's appeal against a decision to remove him from the United Kingdom.

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2. Permission to appeal was granted by First-tier Tribunal Judge Pooler on 12 February 2016.

Anonymity

3. No direction has been made previously, and there is no reason for one now

Background

4. The respondent is a national of Bangladesh, born on 23 August 1988. He was granted leave to enter the United Kingdom as a Tier 4 migrant from 25 August 2009 until 31 October 2013. On 30 December 2013 his application for further leave to remain under Tier 4 was refused and his appeal against that decision was dismissed on 12 May 2014. On 7 August 2014, the appellant applied for leave to remain outside the Rules, in order to continue his studies in the United Kingdom. That application was refused on 9 January 2015 under paragraph 322(1) of the Rules. The decision was said to attract no right of appeal because the appellant had no leave to remain at the time of the application.

5. The appellant appealed to the First-tier Tribunal. In his grounds of appeal, it was asserted that the appellant had a right of appeal because he had previously made a human rights claim as part of his application dated 6 August 2014. He also made reference to an EEA national fiancée. A paper consideration of the appeal was initially requested.

The hearing before the First-tier Tribunal

6. The issue of jurisdiction was conceded at the hearing before the FTTJ. The FTTJ also heard the appeal of the appellant's claimed fiancée (IA/06790/2015) and allowed the fiancée's appeal under the Immigration (European Economic Area) Regulations 2006 and the respondent's appeal on human rights grounds, outside the Rules. He found that the fiancée had not attempted to enter into a marriage of convenience and in he concluded that the respondent and his fiancée were in a genuine and subsisting "*durable*" relationship.

The grounds of appeal

7. The application for permission related only to the respondent and not his claimed fiancée. In essence, the grounds argue that the FTTJ failed to have regard to the considerations required under sections 117A and B of the Nationality, Immigration and Asylum Act 2002 in performing his proportionality assessment; there had been no consideration of the fact that the respondent entered the United Kingdom as a student; that the respondent's work was incidental to his studies; that the relationship was formed after the respondent's previous appeal was dismissed; that he had treated Article 8 as a general dispensing power and he had failed "*to consider why the (respondent) had made an application to the Secretary of State under 8(5) of the EEA regulations as a partner.*"

8. Permission to appeal was granted as it was considered that it was arguable that the FTTJ misdirected himself by considering proportionality without first considering whether there were compelling circumstances which might give rise to the grant of leave outside the Rules and that he failed to consider the matters encompassed by section 117B of the 2002 Act. Permission to appeal was not expressly refused.

9. The respondent's Rule 24 response was received on 7 March 2016. The Secretary of State's appeal was opposed. It was argued that FTTJ Cohen properly directed himself as to whether there were compelling circumstances which might give rise to the grant of leave outside the Rules; that the FTTJ had regard to the relevant facts which were encompassed within Section 117B including the respondent's immigration status and the legitimate aim of immigration control. In finding that the respondent and his fiancée were in a genuine and subsisting relationship, the FTTJ had found as fact that the respondent was entitled to live and work in the United Kingdom on the basis of that relationship and that the public interest would not be served by the removal of the respondent.

The hearing

10. The arguments before me were brief. Essentially, Mr Bramble stood by the grounds of appeal and argued that the decision and reasons were muddled, but covered both Article 8 outside the Rules and Regulation 8(5). He argued that the FTTJ had erred in his freestanding consideration of Article 8, which made no allusion to section 117B of the 2002 Act.

11. Mr Bramble also argued that the FTTJ had also erred in treating the respondent's ability to speak English and earning capacity as positive factors to be considered in the balancing exercise and he had not addressed the respondent's precarious immigration status. Notwithstanding, the foregoing points, Mr Bramble conceded that the FTTJ's decision would have been the same even if he had regard to section 117B and that he had reached the right result. He stated that the Secretary of State did not dispute that the requirements of Regulation 8(5) were met.

12. In response to my query, Mr Bramble stated that the FTTJ's errors were not material, however the Secretary of State required clarity. He suggested that the decision to allow be upheld, following which the respondent could be granted a short period of Discretionary Leave to enable him to obtain his documents, marry his fiancée and apply for a residence card as an EEA family member, as he wished to do.

13. Mr Davison relied on his, somewhat extensive, skeleton argument. He accepted that the decision in question was not the best Article 8 decision he had seen. Unsurprisingly, he was in agreement with Mr Bramble. On the basis that FTTJ's factual findings as to the durable relationship, were not challenged, he invited me to uphold the decision so that an appropriate period of leave could be granted to the respondent.

Decision on error of law

14. In view of the fact that it was, rightly, conceded by Mr Bramble that the errors made by the FTTJ in his Article 8 proportionality assessment were immaterial, on account of the unchallenged findings that the respondent and his EEA national fiancée were in a durable relationship, I uphold the decision of the FTTJ in its entirety.

15. As agreed by the representatives, I would urge the Secretary of State to grant the respondent a short period of Discretionary Leave in order to enable him to marry his fiancée and submit the appropriate application for a Residence Card.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is upheld.

Signed Date: 19 March 2016
T Kamara
Deputy Judge of the Upper Tribunal