Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: VA/45985/2010**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 June 2013	**On 24 June 2013**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

ATIF MUNIR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. The appellant, a homosexual Pakistani citizen, appeals with permission against the First-tier Tribunal decision dismissing his appeal against refusal of entry clearance as a general visitor under paragraphs 56D and 41 of the Immigration Rules HC 395 (as amended) and Articles 8 and 12 ECHR. Since the proposed visit was not a family visit, the grounds of appeal available to the appellant were limited to section 19B Race Relations Act 1976 and/or human rights grounds pursuant to s.6 Human Rights Act 1998.

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2. The stated purpose of the appellant's visit was to give him the opportunity to enter into a civil partnership with his partner, Nadir Khan, present but not settled in the United Kingdom. Mr Khan was a Tier 1 (Post-Study Work) Migrant under the Points-Based System pursuant to paragraph 245Z of the Immigration Rules HC 395 (as amended).

3. Despite his stated intention to return to Saudi Arabia at the end of his visit, if the appellant and Mr Khan entered into a civil partnership, he would then be entitled to remain in the United Kingdom as his partner's dependant pursuant to paragraph 245C of the Rules. Mr Khan's evidence to the First-tier Tribunal was that he regarded himself as on a settlement route, via his studies, and intended in due course to seek indefinite leave to remain.

4. When I granted permission to appeal on 25 July 2011, Mr Khan had been in the United Kingdom with leave since 2006. The appellant was living and working in Saudi Arabia. Neither Pakistan nor Saudi Arabia offers civil partnership ceremonies or status for homosexual couples. In my permission decision, I set out the basis of the application and the contended error of law as follows:

> "5. The appellant renewed his application to the Upper Tribunal. The proposed grounds of appeal on the second application were as follows:
>
> (a) that he met all the requirements of paragraph 56D of the Rules, and that if all the requirements of that rule were met and there was 'a clear Article 8 context' it would be strikingly odd for the appellant not to be entitled to succeed under Article 8;
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> (b) ground 2 of the original grounds 'simply seeks to give detailed reasons' why the Immigration Judge erred in finding that Article 8 was not engaged and/or that there was no interference;
>
> (c) Article 12 was capable of encompassing same-sex relationships, as the First-tier Tribunal judge acknowledged, but that he had erred in finding that the reference therein to 'the national laws governing the exercise of this right' referred to the laws of Saudi Arabia and Pakistan, rather than to the law of the United Kingdom.
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> 6. As regards ground (a), the Entry Clearance Officer and the Immigration Judge were not satisfied that the appellant met paragraphs 41(i) (ii) or (vi) of the Rules. In particular, the Entry Clearance Officer was concerned that the appellant would not return to either Saudi Arabia or Pakistan at the end of his marriage visit. There were also concerns regarding accommodation. It is clear from the statements of both the appellant and his partner that he does intend to join his partner in the United Kingdom as his dependant, once the civil partnership has been registered, pursuant to the provisions of the points-based system. Both parties say that he will return to Saudi Arabia to do that but, following *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, that might be unnecessary if the appellant and sponsor could then show that the appellant met all the requirements of the Rule.
>
> 7. As regards ground (c) which concerns Article 12, the Immigration Judge erred in law in regarding the relevant national laws governing the exercise of

> the right to marry and found a family as those of the country of origin. The appellant rightly observes that it is the laws of the United Kingdom which are relevant here. The effect of the present application would be to enable the appellant to reside in the United Kingdom with his homosexual partner who is said to be lawfully present as a Tier 1 (General) migrant pursuant to paragraph 245C of the Rules. The partner is not settled though he considers himself 'en route' to settlement."

5. On 17 November 2011, I set aside the determination on the following basis:

> "6. The appellant contended that the First-tier Tribunal judge (Immigration Judge Doyle) erred in law in his determination in that when considering the right to marry, if it existed in relation to same-sex partners, pursuant to Article 12 ECHR, he did so (paragraph 7(m) of his determination) in the context of the relevant national laws of the appellant's country of origin (Pakistan) or habitual residence (Saudi Arabia). The appellant challenged that on the basis that the Immigration Judge should have considered his application in relation to the laws of the United Kingdom, not of the foreign jurisdictions.
>
> 6. I am satisfied that in so doing the Immigration Judge misdirected himself in law. The United Kingdom's obligation is to consider the right to marry in the context of the national laws of this jurisdiction, not the foreign jurisdictions. I am also satisfied that such misdirection affected his consideration of Articles 8, 12 and 14 and that had he not so misdirected himself he might have come to a different conclusion."

6. I directed the parties to make any further submissions within 28 days and indicated that as there was no new evidence from the appellant, no oral hearing or evidence was required.

7. Nothing was received. On 18 May 2012, the appellant's solicitors wrote enquiring about the outcome and asking for an oral hearing. The Tribunal responded as follows:

> "The appeal will be considered on the papers as indicated in the Upper Tribunal directions of 17 November 2011. Either party may prepare and file a written submission to be received no later than the 15 June 2012."

8. No submissions were ever received. It is unclear to me why the case was not listed as a paper case thereafter. I now consider it, on the documents and matters before me.

9. The facts set out in the original determination are as follows:

> (a) Mr Khan is a senior web designer for Education First. He has been in the United Kingdom since 2006 and has had his leave extended on several occasions during that time. He considers himself to be on a settlement route.
>
> (b) Mr Munir works in Saudi Arabia.
>
> (c) They have been living apart since 2006 (seven years now).

(d) Mr Munir sought four weeks' leave as a general visitor, to come to the United Kingdom to enter into a civil partnership with Mr Khan, and then return to Saudi Arabia.

(e) Neither Pakistan nor Saudi Arabia has civil marriage ceremonies or status.

10. The First-tier Tribunal Judge considered that family life had not yet come into existence between these parties and that, by reason of their long separation, the private life which the United Kingdom must respect was, in their case, conducted at a distance. Failure to grant entry clearance would not change the situation they themselves had chosen, nor would it end their relationship. He relied on *SS (Malaysia) v Secretary of State for the Home Department* [2004] UKIAT 00091*.

11. The question therefore whether the decision to refuse entry clearance is unlawful, having regard to the provisions of Article 12, possibly considered with Article 14, of the ECHR. Article 12 provides that

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right".

12. The question is whether that extends to civil partnerships, and if so, whether it should override the Immigration Rules and require the United Kingdom to admit persons for the purpose of entering into civil partnership appellant has not put forward any written arguments at all, despite the regrettable delay of almost two years in the appeal coming back before me. He was given two separate opportunities to do so.

13. The leading decision on the right to marry between persons of the same sex remains that of *Schalk and Kopf v Austria* 30141/04 [2010] ECHR 1996, in which the court held that, taking Article 8 with 14, family life applied between a homosexual couple. The case concerns the distinction between the rights available in a registered partnership (a civil partnership in the United Kingdom) as opposed to marriage. The court held that:

> "105. The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes (see *Courten*, cited above; see also *M.W. v. the United Kingdom* (dec.), no. 11313/02, 23 June 2009, both relating to the introduction of the Civil Partnership Act in the United Kingdom). …
>
> 108. The Court starts from its findings above, that States are still free, under Article 12 of the Convention as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples."

14. The findings of fact in the present case show an attenuated level of family and/or private life between this couple, who have been living apart since

2006. The United Kingdom has civil partnership laws but the appellant's partner is not settled here and it is clear that, at least for the time being, the unqualified right in Article 12, even bolstered by Article 14, applies only to marriage and that states have a margin of appreciation as to whether they apply it to marriage between persons of the same sex. There is no requirement to promote civil partnership by permitting entry clearance for that purpose. Accordingly, although the First-tier Tribunal Judge misdirected himself as to the applicable laws in relation to Article 12, the appellants are not entitled to the benefit of Article 12 in these proceedings.

15. The appellant's challenge to the Article 8 part of the First-tier Tribunal Judge's reasoning is erroneous. The First-tier Tribunal Judge's reasons for reaching the conclusions which he did on private and family life are proper, intelligible and adequate to support his conclusions.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision and remake it by dismissing the appeal.

Date: 01 August 2013 Signed:

Judith Gleeson
Judge of the Upper Tribunal