

**THE IMMIGRATION ACTS**

Heard at Field House  
On 1 December 2008

Date sent out  
On 10 December 2008

Before

Senior Immigration Judge Gleeson

Between

[ ]

Appellant

and

The Secretary of State for the Home Department

Respondent

**Representation:**

For the Appellant: Mr R Toal, Counsel instructed by Wesley Gryk Solicitors LLP

For the Respondent: Ms K Lonsdale, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. This is the reconsideration, with permission granted to the respondent, of the determination of the Tribunal (Immigration Judge Devittie) allowing the appellant's appeal against the decision of the Secretary of State to refuse him leave to remain in the United Kingdom on Article 8 ECHR grounds as the unmarried partner of a person present and settled in the United Kingdom. The appellant is a citizen of Bolivia who came to the United Kingdom as a student. The existence of private and family life was not in dispute.
2. The grant of reconsideration refers to the inappropriate weight placed on the appellant having to leave behind not only his partner but also their joint cat, [ ] More significantly, the Secretary of State argued that the Immigration Judge had erred in law in applying a withdrawn policy, DP3/96, which no longer applied at the date of decision.
3. The Secretary of State's application was made out of time. SIJ Nichols treated it as in time; had she not done so, she could have extended time on the basis set out in the grounds for review. The question of time is no longer before me.

4. The appellant served a rule 30 notice, disputing the extension of time and arguing that there was no material error of law since the Immigration Judge had in any event, been entitled to rely on Article 8 ECHR to allow the appeal, even if his decision under DP3/96 was erroneous.
5. Until today's hearing, the Tribunal and the parties had overlooked paragraph 53.4.1 of the United Kingdom Border Agency enforcement instructions and guidance:

**“53.4.1 Procedures when dealing with an offender who is the unmarried partner of a person present and settled in the UK**

As from the 24 April 2008 the marriage policy DP3/96 and its related policy DP2/93 have been formally withdrawn. This also applies to the unmarried partners provision.

Future consideration of all enforcement cases involving marriage, civil partnerships and partnerships akin to marriage of which DP3/96 (chapter 53.3) and DP2/93 (chapter 53.3.2) apply must now be considered under the published guidance on Article 8 considerations and paragraph 395C of the immigration Rules (chapter 53. 1.2). This also applies to the unmarried partner's provision in chapter 53.4.1 of the Enforcement Manual.

**Transitional arrangements:**

The following published guidance on the application of DP3/96, DP2/93 and the unmarried partner's provision will now only apply to those enforcement cases where consideration of any of the above mentioned policies had already been initiated prior to their withdrawal on the 24 April 2008.

DP3/96, DP2/93 and the unmarried partner's provision will also continue to apply in appeal cases where the policies have already been applied and rejected pre-24 April 2008 but the individual is now challenging the decision. This in effect means that if a caseworker has already considered any of the policies prior to their withdrawal, and it was necessary at that time to write to the individual or the representative for further information / evidence in relation to the marriage / partnership akin to marriage, then the policy will continue to apply to that case even if the information requested is received by the United Kingdom Border Agency after the 24th April 2008. The same factors contained within the policies including “clock stopping” will still apply when considering any of the latter cases under any of these policies DP3/96, DP2/93 and the unmarried partners provision will also continue to apply to appeal cases in which the policies had already been considered by the decision taker prior to 24 April 2008 and it had been decided that the individual should not be allowed to benefit from the provisions of either policy.

Enforcement action should not normally be initiated in the following circumstances:

Where the subject has a genuine and subsisting relationship akin to marriage with a person who is present and settled here and the couple have lived together in this country for at least two years before the commencement of enforcement action

and

any previous marriage (or similar relationship) by either partner has permanently broken down

and

it is unreasonable to expect the settled partner to accompany the subject on removal  
and

the couple are not involved in a consanguineous relationship with one another.

Where a person makes representations after the commencement of enforcement action, on the basis of a common law or same sex relationship, the normal course will be to proceed to enforcement action unless it is clear that the couple had lived together for 2 years or more before enforcement action commenced and that the parties are not involved in a consanguineous relationship with one another.

As with cases involving marriage any compelling or compassionate circumstances advanced by the couple must be considered. Similarly, the commencement of enforcement action "stops the clock" in terms of the two-year qualifying period (see 36.3.2)."

6. In the light of that guidance, which she accepted applied to the present appeal, Ms Lonsdale accepted that any error in the determination was immaterial. Had the transitional provisions been properly applied, the Immigration Judge would have been entitled to allow the appeal under DP3/96 as he had in fact done.
7. The Immigration Judge's determination is upheld and the cat, [     ], need no longer fear having to adapt to Bolivian mice.

### **DECISION**

**The original Tribunal did not make a material error of law and the original determination of the appeal shall stand.**

Signed  
Senior Immigration Judge Gleeson

Dated: 01 December 2008

