



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/36656/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 27th November 2014**

**Determination Promulgated
On 30th December 2014**

Before

DESIGNATED JUDGE MURRAY

Between

ELEWATHTHE GEDERA WIJESINGHE DAYARATNE

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Holmes, Home Office Presenting Officer

For the Respondent: Miss Cantor, Counsel for Str8t Record Limited, Portsmouth

DETERMINATION AND REASONS

1. The Appellant is a citizen of Sri Lanka born on 20th November 1967. He appealed against the decision of the Respondent dated 20th August 2013 refusing him leave to remain in the United Kingdom as the partner of a British citizen under Appendix FM of the Immigration Rules. The British citizen is Gemma White. His appeal was heard by Judge of the First-tier Tribunal Miles on 3rd September 2014 and dismissed in a determination promulgated on 12th September 2014.
2. An application for permission to appeal was made and permission to appeal was granted by Judge of the First-tier Tribunal Page. The

permission states that there is a paucity of reasoning in the determination to explain why it is considered that the Appellant and partner do not fulfil the requirements of Appendix FM. The grounds state that it was perverse of the judge to state that the evidence before him was that they had only lived together for one year after the date of the application as he found as a fact that the couple are in a genuine subsisting relationship akin to marriage and have been since 2011. The grounds also argue that the judge failed to consider material evidence in respect of the Appellant's partner returning with the Appellant to Sri Lanka and failed to consider the practicalities of a UK citizen giving up her cultural, financial, emotional and language ties in the UK to live in a country she has no connection with other than her husband. At paragraphs 9 and 10 of the determination reference is made to the Appellant's partner Gemma White working in the United Kingdom and having her family here. The judge however found there were no insurmountable obstacles to family life with the Sponsor continuing outside the United Kingdom. The permission states that it is arguable that the determination is devoid of reasoning to explain why it was concluded that the Appellant's wife could relocate to Sri Lanka. It states that although the judge referred to the guidance in **Gulshan [2013] UKUT 640** he failed to go on to consider the practical possibilities of relocation.

3. At the hearing Counsel for the Appellant submitted that she is relying on the grounds for permission. She referred to paragraph 19 of the determination in which the judge states that he accepts that the Appellant has proved, on the balance of probabilities, that his relationship with the Sponsor is a relationship akin to marriage and is genuine and subsisting and that has been the case since 2011. He then goes on to say that there are arguably no good grounds for considering the claim outside the Rules. Counsel submitted that the Article 8 argument must flow from the judge's findings in paragraph 19.
4. Counsel submitted that the Appellant's partner has said she will go to Sri Lanka with him but the judge has failed to consider whether it would be reasonable for her to do so and what obstacles she would face. She is a United Kingdom citizen, works in the United Kingdom, has no ties to Sri Lanka, cannot speak the language and knows no one from Sri Lanka apart from her husband. She submitted that it would not be right to uproot her and make her go to Sri Lanka. That would be unreasonable. She submitted that for the judge to state at paragraph 21 that they should go to Sri Lanka together shows that he has not gone into the practicalities of her leaving the United Kingdom where she has stayed all her life.
5. I was referred to the case of **VW (Uganda) [2009] EWCA Civ 5** at paragraph 31. This states that if removal is to be held as disproportionate what must be shown is more than mere hardship or a mere difficulty, there is a serious test which requires the obstacles or difficulties to go beyond matters of choice or inconvenience. At paragraphs 42 and 45 of that case it is stated that it would be risky and unfair to demand that a decision maker should treat what is at best an educated guess, as a future

fact. The hardship of the dilemma itself has to be recognised and evaluated.

6. Counsel submitted that the judge refers to **Gulshan** but what the judge should have looked at was the said case of **VW** and the case of **Beoku-Betts**. That is the guidance which should have been followed.
7. Counsel went on to state that no proper assessment was made by the judge and there was no proportionality test weighing the Appellant's and his partner's rights against public interest. She submitted that the judge must have made an error of law when he made his decision if he believes that the Appellant's relationship with his partner is akin to marriage and has been since 2011. He should have assessed proportionality.
8. Counsel submitted that this Appellant has never overstayed, has worked and has paid tax and that should have weighed in the Appellant's favour. She submitted that if the judge found that the terms of the Rules could not be satisfied he should have considered the claim under Article 8 and dealt with proportionality taking into account the case of **Razgar [2004] UKHL 27**, but he failed to do that.
9. The Presenting Officer submitted that she has difficulties in this case because of paragraph 19 of the determination in which the judge made contradictory findings. She submitted that he focussed on "living together" and finds that the appellant and his partner have only lived together for one year after the date of the application, but the judge also finds that the Appellant and his partner are in a genuine relationship akin to marriage and have been since 2011. The Presenting Officer submitted that the judge has not carried out a proper Article 8 assessment.
10. The Presenting Officer submitted that the judge does not appear to have considered the fact that the Appellant's partner, a British citizen, works here, has family here and cannot speak the language in Sri Lanka. She submitted that the judge appears not to have considered all the other matters which weigh in the Appellant's favour when proportionality is assessed. She submitted that there is also the issue that the Sponsor in this case suffers from depression.
11. The Presenting Officer submitted that she is in difficulties because of the terms of paragraph 19 but she asked me to find that the First-tier Tribunal's decision should stand.

Determination

12. The Presenting Officer is correct to state that the difficulty in this determination lies in paragraph 19. The judge should not have focused on the fact that the Appellant and his partner have only lived together for one year since the date of the application. He has given considerable weight to this although he has also found that the Appellant and his partner have had a subsisting relationship akin to marriage since 2011.

13. The judge has not carried out a proper proportionality assessment.
14. At paragraph 23 the judge refers to **Gulshan** and insurmountable obstacles and although he refers to the practical possibilities of relocation for the Appellant's partner, he has not given proper reasons for finding that it would not be unreasonable for her to go with the Appellant to Sri Lanka.
15. The Appellant's Sponsor is British and works in the United Kingdom. Her family is in the United Kingdom. She has no connection with Sri Lanka. She cannot speak the language and she suffers from depression. For her to uproot herself and go to live in Sri Lanka would not be reasonable. When all these matters are considered along with the fact that the Appellant and his partner have lived together in a relationship akin to marriage since 2011 and taking into account the contradictory findings made by the judge at paragraph 19, I find that there is a material error of law in his determination.
16. Based on the evidence before the judge I find that this appeal can succeed in terms of the Rules taking EX1 into account. There are insurmountable obstacles to this Appellant's partner going to Sri Lanka with the Appellant and settling there. This is based on the definition of "insurmountable obstacles" in VW (Uganda).

Decision

17. Because I find there to be a material error of law in the judge's determination, his decision must be set aside.
18. I direct that the determination promulgated on 12 September 2014 is overturned and I allow the appeal under the Immigration Rules.

Signed

Date **29th December 2014**

Designated Judge Murray
Judge of the Upper Tribunal