



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/45209/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 6 August 2014

Determination Promulgated  
On 15 August 2014

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

MISS SUSILADEVI KANAPATHY  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Miss N Manyarara

For the Respondent: Ms J Isherwood

**DETERMINATION AND REASONS**

1. The appellant is a Sri Lankan citizen who was born on 12 May 1977. Solicitors applied on her behalf for leave to remain on the basis of her continuing family and private life in the United Kingdom but the application was refused by a decision dated 15 October 2013.
2. The appellant appealed. By a determination promulgated on 3 April 2014 First-tier Tribunal Judge B Morris dismissed the appeal. The appellant applied for permission to appeal that decision to the Upper Tribunal. Permission to appeal was granted.

The judge doing so said that he was satisfied that in reaching her decision the judge arguably made an error of law by failing to engage fully with the appellant's arguments concerning the application of the case of **MM [2013] EWHC 1900** in the consideration of Article 8.

3. Counsel who was to have represented the appellant in the Upper Tribunal was unfortunately unable to do so. An adjournment request was made on the day before the hearing before me but that application was refused. Miss Manyarara informed me that she had been briefed only very shortly before the hearing. She did not seek to renew the application for an adjournment but argued that there was a Robinson obvious point that had not been raised in the grounds seeking permission to appeal and this placed her in a difficult position.
4. Before deciding how to proceed I made enquiries of Miss Manyarara as to what point she felt had not been taken by counsel who drafted the grounds seeking permission. Miss Manyarara explained that the appellant arrived here as a fiancée and then made a timely application in-country for leave to remain. Miss Manyarara then sought to argue that an in-country variation of leave application in these circumstances did not have to meet the financial requirements element of the Rules set out at E-LTRP.3.1., although accepting that at the time of the application for leave to enter the appellant needed to do so.
5. This appeared to be a novel submission which was unlikely to succeed and upon examination of the relevant sections of Appendix FM to the Rules I found to be without merit.
6. The Reasons for Refusal Letter stated at one point:-
 

**“Although you meet the suitability and eligibility requirements** above we note that there are no insurmountable reasons why you and your husband cannot continue your family life outside the UK and therefore you have failed to meet EX.1 (b) and so the application is refused.”(My emphasis).
7. However, Appendix FM - R-LTRP (Requirements for limited leave to remain as a partner (which includes a fiancée)) at 1.1. (c) (i) sets out that the applicant must not fall for refusal under Section S-LTR: (suitability - leave to remain); and by (c) (ii) **the applicant must meet all of the requirements of Section E-LTRP.** E-LTRP.3.1. specifies the evidence that has to be provided to meet the financial requirements. Thus as well as meeting all the other requirements of the rules for the appellant to succeed she would also have to provide evidence relating to sufficiency of income.
8. The Reasons for Refusal Letter, as quoted in paragraph 6, above may have led Miss Manyarara to raise the point that she did because the letter states that the appellant meets the suitability and eligibility requirements of the rule. However, as Mr Martin appears to have recognised at the First-tier tribunal hearing, the appellant was unable to meet the financial requirements by relying on her partner's salary alone. The thrust of his argument was that there are insurmountable obstacles to the appellant and sponsor continuing family life outside the UK in Sri Lanka and

insurmountable obstacles preventing the sponsor from travelling to Sri Lanka with his wife. Compelling circumstances that should have led to the appeal being allowed on Article 8 grounds included that the financial requirements of the Rules should be viewed more broadly than in Appendix FM. However, the judge dealt with all these matters in a fully and thoroughly reasoned determination and declined to carry out a full Article 8 analysis of the case for the reasons given in paragraph 30 of the determination.

9. Counsel relied heavily in the grounds seeking permission on the case of **MM [2013] EWHC 1900** and submitted that if the appellant's *potential* earnings were taken together with her husband's current earnings they would surpass the minimum figure required of £18,600 income per annum. The submission proceeded that the judge completely overlooked the evidence of potential future earnings and "given a reason which is wrong in fact for refusing to follow **MM** as a reason to conduct an Article 8 analysis"(sic).
10. It was submitted also that there is nothing in **Gulshan [2013] UKUT 00640** which states that where somebody can bring themselves within the five features set out in paragraph 124 of **MM** that Article 8 should not be assessed.
11. One of the five features said to justify consideration of Article 8 outside the Rules is the disregard (in the rules) of the spouse's own earning capacity during the 30 month period of initial entry. Although the sponsor's earnings on their own could not meet either the £18,600 figure in the Rules or the £13,400 figure identified by the Migration Advisory Committee the appellant herself had been offered work. Those future earnings could not be considered under Appendix FM but should have led to the judge conducting an Article 8 analysis outside the Rules. If the judge was satisfied that the couple could reach the £18,600 figure or satisfied that the couple could maintain themselves without recourse to further public funds, just as they had for the thirteen months since the appellant arrived in the UK, then the appeal should have been allowed.
12. In the final submission counsel said that had an Article 8 assessment been carried out the important issue would be whether the appellant could remain here and not be a burden on the public purse. If she could then her removal would be disproportionate. Both because of the appellant's future earnings and because the couple have been able to live within their means even before the sponsor found work the couple would be able to support themselves.
13. The case of **MM** was heard in the Court of Appeal and the decision was published after the First-tier judge's determination was promulgated. The neutral citation number is **[2014] EWCA Civ 985**.
14. The appellant draws support from the point made in **MM** in the Upper Tribunal that individually, one or more of the five elements of the Rules listed at 124 did not do anything towards achieving the identified and legitimate aims of ensuring as far as possible that sufficient income is available to the couple to avoid them living on

benefits and so were not rationally connected with the overall aim. That was particularly so in relation to disregarding the appellant's own earning capacity during the 30 month period after initial entry. However, this argument did not find favour in the Court of Appeal which concluded that the judge's analysis and conclusion that the new minimum maintenance requirements were, in principle, incapable of being compatible with the Article 8 rights of UK partners was not correct (paragraphs 140 - 152).

15. The position therefore now appears to be that following the Court of Appeal decision there is no strong implication that if someone can bring themselves within the categories identified by Mr Justice Blake in the Upper Tribunal they should be able to rely on Article 8. Counsel before the First-tier Judge in this appeal made the submission that the appellant should be able to rely on Article 8 and this is noted at paragraph 29 of the determination. The judge dealt with the submissions made in paragraph 30 and concluded in that paragraph by stating that "the other matters raised by Mr Martin have been considered in relation to the Rules under EX.1 and therefore I do not find that they may amount to arguably good grounds for granting leave to remain outside the Rules". The judge then did not go on to consider whether there are compelling circumstances not sufficiently recognised under the Rules, this being the point arising from the decision in Gulshan.
16. It is arguable that Gulshan may not be correct in stating that after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them. Whatever is the correct position the judge in this appeal undertook a thorough analysis of the position of the appellant and sponsor such that if she erred in failing to undertake a separate Article 8 analysis it is abundantly clear that the appellant could not and would not have succeeded under Article 8 ECHR outside the Rules in any event. There is nothing in the financial requirements and eligibility point that helps the appellant and the sponsor and if there were to be any further reconsideration of the appeal it would be bound to fail on the facts as found by the judge which findings were open to her.

### Decision

17. As I announced at the hearing the determination reveals no material error of law and does not reveal any good reason why the decision should be set aside and reheard.
18. The decision of the First-tier Tribunal Judge therefore stands.
19. I was not addressed on the matter of anonymity. No direction was given in that regard in the First-tier and I see no reason on the facts to make such a direction now.

Signed

Date

Upper Tribunal Judge Pinkerton