Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/52881/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 1 December 2014	**On 13 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS UDAYA CHANDRIKA RADA KRISHNAN
(Anonymity Direction not Made)

Respondent

Representation:

For the Appellant: Mr M Shilliday, Home Office Presenting Officer
For the Respondent: Mr V P Lingajorthy, Legal Representative, Linga & Co

DECISION AND REASONS

The Appellant

1. The Secretary of State made the application for permission to appeal but for the purposes of this decision the parties shall be referred to as they were before the First-tier Tribunal, that is Miss Krishnan as the appellant and the Secretary of State as the respondent.

2. The appellant is a national of Sri Lanka born on 15 November 1984 and arrived in the United Kingdom on 18 June 2009 with leave as a student valid from 10 June 2009 until 31 August 2010. On 31 October 2011 she married Mr R Sandiran, a Sri Lankan national born on 22 June 1980. He entered the United Kingdom in November 2001 and claimed asylum. The claim was refused and his appeal rights became exhausted in October 2002. On further representations he was granted indefinite leave to remain in the UK outside the Immigration Rules. On 5 March 2012 he was naturalised as a British citizen.

3. On 9 August 2010 the appellant applied outside the Rules for an extension of stay to marry and this was refused on 20 September 2010 with a limited right of appeal that was not exercised.

4. An application on 21 December 2011 to remain in the UK as a spouse was refused on 27 March 2012 under paragraph 286 of the Rules and Article 8 of the European Convention as the appellant did not have leave to remain when she applied. It was considered reasonable for her to return to Sri Lanka and apply from Sri Lanka for entry to join her husband in the UK. She did not have a right of appeal.

5. In April and May 2012 further representations were made and on 22 November 2013 the respondent made a decision to refuse the application under the provisions of the Rules by reference to Appendix FM family life and 276ADE private life. It was submitted that there were not insurmountable obstacles EX1 to prevent family life continuing outside the UK either on a temporary or permanent basis. In respect of private life the appellant did not meet the criteria. The appellant had shown a complete disregard for the Rules and the decision was proportionate to the aims.

6. Judge of the First-tier Tribunal Roopnarine-Davies heard the appeal on 12 September 2014 and allowed the appeal on 17 September 2014 on human rights grounds.

7. She made a finding at paragraph 6 that it was not disputed that the appellant and sponsor had a genuine and subsisting marriage, now nearly three years old.

8. The respondent applied for permission to appeal submitting that the Tribunal had erred in law in respect of an Article 8 assessment of the case and that **MF (Nigeria) [2013] EWCA Civ 1192** confirmed the Immigration Rules were a complete code that formed the starting point for the decision maker and any Article 8 assessment should be made after consideration of those Rules.

9. It was further submitted that it was made clear in **Gulshan [2013] UKUT 00640 (IAC)** an Article 8 assessment should only be carried out when there were compelling circumstances not recognised by the Rules and in this case the Tribunal did not identify that such compelling circumstances and its findings were therefore unsustainable.

10. It was also submitted that **Gulshan** made it clear that an appeal should only be allowed where there were exceptional circumstances, namely ones where the refusal would lead to an unjustifiably harsh outcome. It was submitted that the Tribunal had not followed this approach and thereby had erred.

11. Mr Shilliday confirmed that he did not rely on paragraph 3 of the grounds except in that the complete code referred to the issues in relation to deportation. Nonetheless he argued that Judge Roopnarine had failed to identify the test outside the Rules. This was a case which was not similar to **Chikwamba v SSHD [2008] UKHL 40** and could not be decided on that reference. In **Chikwamba** the sponsor was a refugee and there was nothing in this to suggest that the sponsor was a refugee. There had been misdirection in relation to **Chikwamba**. The comments in **R (MM (Lebanon)) v SSHD [2014] EWCA Civ 985** were strictly obiter and **Nagre, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 720 (Admin)** was the only authority relevant. There needed to be compelling circumstances.

12. Mr Lingajorthy stated that there was a scattergun approach by the Secretary of State. The judge had the benefit of hearing the appellant and the sponsor and evidence was taken in camera in relation to sensitive information on them taking fertility treatment. The appellant had entered lawfully and applied as a spouse during the currency of her visa. There were no flaws in the approach and the judge had looked at all of the evidence. She had been refused under the Immigration Rules as she did not have prior entry clearance as a spouse. It was considered under EX1 as she had no leave.

13. Mr Shilliday submitted that the Immigration Rules had not been fulfilled and **Chikwamba** did not apply as the sponsor had not shown that Appendix FM–SE had been fulfilled. The only thing shown was it was unpleasant to have to undergo her fertility treatment. This was a desperate attempt to relitigate the case.

14. I requested any further evidence be put forward in the event I should find an error of law.

15. First-tier Tribunal Judge Mark Davies granted permission to appeal on the basis that the judge had not made any finding that the appellant's circumstances were either compelling or exceptional and had given no reasons based on the evidence why the appellant was entitled to have a freestanding Article 8 claim outside the Immigration Rules to be considered.

16. I find that the judge was clear at paragraph 4 in her decision to the effect that she took into account the oral evidence of the appellant and her husband as set out in the Record of Proceedings and the evidence in the file before her from the appellant and the respondent. She also recorded

that she had regard to the public interest requirements of Section 117B of the 2002 Act.

17. At paragraph 6 under her findings the judge specifically recorded that

> *"**It has been stated** that the assessment of whether there are exceptional circumstances under Appendix FM such that the appellant should be granted leave and proportionality under Article 8 the ECHR (assessed by reference to **Razgar** and **Huang** is the same and that the Rules were no more than the starting point for a consideration of Article 8".*

The judge at this point was merely recording submissions and went on to note that she must take into account all relevant factors together with Section 117a of the 2014 Act.

18. Quite clearly at paragraph 10 the judge stated that under the immigration rules she did not accept there would be unjustifiably harsh consequences or insurmountable obstacles as interpreted in **Nagre** if the couple had to live in Sri Lanka. The judge found that the circumstances were not exceptional within EX1 and the appellant did not meet the rules. The judge clearly therefore set out the factors weighing against the appellant within the Immigration Rules.

19. However, as held in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin) there is no prior threshold which dictates whether the exercise of discretion should be considered and the authorities of **Nagre** and **Gulshan** do not displace the need to consider all the relevant evidence and consider anything not already taken into consideration. This is what the judge did.

20. The judge dealt with the evidence in a balanced manner and she proceeded to record those factors which did not favour the appellant as well as those which did, not least that the appellant feared return to Sri Lanka because her father was a prominent politician of the UNP now in opposition, although the judge rejected that the appellant would have difficulties on return to Sri Lanka because of her father's imputed political opinion.

21. The judge also rejected the claim that the appellant's husband could not return to Sri Lanka and the Article 3 claim in respect of health grounds and found that the husband was no longer receiving treatment in the UK and his final injection was in 2010. With regard to the fertility treatment, the judge made findings at paragraph 9 to the effect that the NHS treatment was sperm donation which the couple had refused and assistance from medical professionals in India.

22. However as stated above the case law in relation to **Nagre**, **MF** and **Gulshan** specifically do not exclude the consideration of Article 8 in relation to family life and indeed Section 117 of the Nationality

Immigration and Asylum Act 2002 refers to the factors which should be taken into account when deciding on proportionality. **MM (Lebanon)** confirms that there is not necessarily any artificial threshold which has to be crossed and that there is either an Article 8 assessment to be made or there is not.

23. The judge correctly referred to **Huang [2007] UKHL 11** in an assessment regarding Article 8 identifying the relevant factors. The judge did consider the matter under the Immigration Rules and I find nothing to preclude her from proceeding to a further Article 8 assessment bearing in mind she concluded that the decision under proportionality was similar to that finding exceptional circumstances.

24. Indeed, in the matter the judge ultimately found, bearing in mind the public interest considerations which were applicable in this case as designated by statute, that the decision to remove the appellant was not necessary and justified in considering the legitimate aim. The judge specifically made reference to the immigration rules and the State's legitimate aim and the public interest 'in having a coherent and consistent system of effective immigration control, preventing families being a burden on the taxpayer, the economic wellbeing of the UK and to the public interest requirements in S117B the 2014 Act (ability to speak English, to integrate into society, financial independent and lawful presence). She found that the appellant was not a burden on the State. She found she was able to speak and understand English. Specifically the judge factored in that the appellant had been an overstayer since August 2010 but had kept the respondent apprised of her movements and attempted to regularise her status. Indeed she had previously failed to exercise a right of appeal. The judge took into account that the appellant had made an application as a spouse over 3 years ago in December 2011 (which would have been prior to the new rules) and found that the marriage was genuine.

25. This is a matter for the judge to find and I conclude that there is no error of law. I note that the judge referred to **Chikwamba** and heard the submissions of the Home Office Presenting Officer and noted them as follows;

> *"Miss Dwomoh speculated that an application from outside the UK may succeed. If so, then like **Chikwamba**, to expect the appellant to go to Sri Lanka and make entry is to 'elevate principle to dogma'. … Either way I cannot see the public interest in requiring her to go to Sri Lanka to apply to join her husband in the UK."*

26. The judge was quite clear that it was not determinative that their separation and attendant stress was likely to have a negative impact on their efforts to try and conceive natural and on married life. The critical finding of the judge is that

> *"The appellant's husband is settled law abiding British citizen who has lived here for thirteen years. I do not consider it reasonable in all the circumstances to expect him – **EB (Kosovo) [2008] UKHL 41** to relocate to Sri Lanka or for her to apply in the country to join him. There is no question here of the public interest in effective immigration control being compromised by the grant of leave."*

27. The judge then went on to find at paragraph 13:

> *"Taking all the evidence into account I find the decision is not necessary and justified and is thus disproportionate to the aim to be achieved by the State".*

28. I find that the judge has considered the immigration rules and taken into account the factors directed by statue which should be considered and in all the circumstances find in the appellant's favour. The respondent has in effect disagreed with the judge's findings.

29. I therefore find no error of law which would make a material difference and the determination shall stand.

Signed Date 9th January 2015

Deputy Upper Tribunal Judge Rimington