



**Upper Tribunal
(Immigration and Asylum Chamber)**
OA/17638/2013

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

**Determination
Promulgated**

On 25 February 2015

On 5 March 2015

Prepared 25 February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

ENTRY CLEARANCE OFFICER CHENNAI

Appellant

And

RATHEES NANTHAN

Respondent

Representation:

For the Appellant: Ms Vidvadhanan, Senior Home Office
Presenting Officer

For the Respondent: No attendance

DECISION AND REASONS

1. The Respondent, born on 25 March 1983 is a citizen of Sri Lanka. On 12 March 2013 he applied for a grant of entry clearance as the partner of a British citizen pursuant to paragraph EC-P.1.1 of Appendix FM to the Immigration Rules. That application was refused on 26 August 2013 on the basis the Appellant was not satisfied that the Respondent met the requirements of paragraph EC-P.1.1 (c, (d), 2.6 2.7 and 2.10 of Appendix FM of the Immigration Rules. The application was also refused by reference to paragraph 320(11) because it was said the Respondent's past immigration history showed that he had contrived in a

significant way to frustrate the intentions of the Immigration Rules. In short the Appellant took a number of points against the Respondent.

2. The ECM reviewed the refusal in the light of the grounds of appeal, and evidence filed in support, on 12 March 2014. He maintained the overall decision to refuse the application, and each of the bases upon which that had been reached.
3. The appeal was heard by First Tier Tribunal Judge Cohen at Taylor House on 2 October 2014, and in a Decision promulgated on 21 October 2014 it was allowed under the Immigration Rules.
4. By a decision of First Tier Tribunal Judge Saffer of 13 January 2015 the Appellant was granted permission to appeal to the Upper Tribunal on the basis it was arguable the Judge had fallen into error, if, as the Appellant asserted, he had told the parties at the hearing that he intended to dismiss the appeal.
5. The Respondent filed no Rule 24 Notice. Neither party has applied for permission to rely upon further evidence pursuant to Rule 15(2A) of the Upper Tribunal Procedure Rules 2008.
6. Thus the matter comes before me.

The hearing

7. When the appeal was called on for hearing neither the sponsor, nor any other representative for the Respondent was present. No application for an adjournment had been received on the Respondent's behalf, and no explanation offered for the failure to attend.
8. By letter dated 20 February 2015 the Respondent's solicitors had advised the Upper Tribunal that despite a number of attempts to gain instructions they had received none, and would not be representing him further, and wished to be removed from the record as acting for him. In the circumstances I was satisfied that the Respondent had been properly served with notice of the hearing.
9. I could see no useful purpose being served by the Upper Tribunal adjourning the appeal of its own motion in these circumstances and I proceeded to hear the appeal in the absence of any representation for him.

Error of law?

10. The Judge's decision was to allow the appeal under the Immigration Rules, although in the final sentence of paragraph 19 of the Decision he stated that he dismissed the appeal under the Immigration Rules. On any view something went awry.
11. When the Decision is read as a whole it becomes clear that it is the final sentence to paragraph 19 of the Decision

which is out of step with the rest of the text. If that was the end of the matter, then I would be satisfied that the Judge had simply made an unfortunate typographical error in the course of writing paragraph 19, and there would be no material error of law disclosed that required me to set aside the decision on the appeal and remake it.

12. There is however a good deal more to the story than that. In the application for permission the Appellant asserted that the Respondent had conceded at the hearing that he could not meet the requirements of Appendix FM and that the appeal had to be dismissed under the Immigration Rules, and, that the Judge had accepted that concession, and, then stated in consequence to the parties that he would dismiss the appeal.
13. The Respondent has filed no Rule 24 response to the grant of permission, and thus has offered no challenge to the Appellant's assertions.
14. There is very limited assistance to be derived from the almost entirely illegible record of proceedings written by the Judge during the course of the hearing, save that towards its end there appears to be a record of a submission by the HOPO that the requirements of Appendix FM were not met. The skeleton argument filed by Counsel for the Respondent was referred to. The notes appear to conclude as follows;
"Reserved. Dismissed but strong findings of fact."
15. The grant of permission to appeal required the Appellant to produce the notes of the hearing prepared by the HOPO. Those are placed before me. They are dated the same date as the hearing, and I am satisfied that they were prepared contemporaneously and that they are consistent with both the legible parts of the ROP and the complaints made in the grounds to the application for permission. They note that a concession was made by Counsel for the Respondent in the skeleton argument prepared for the hearing, which was not withdrawn. They note that *"after much discussion"* the Judge decided to dismiss the appeal and make positive findings on the genuineness of the marriage, because at face value the sponsor's funds would meet the requirements in the event of a fresh application.
16. What then was the concession referred to? At paragraph 6 of an undated skeleton argument prepared by Counsel for the Respondent for the purpose of the hearing before the Judge, there is in plain terms the concession that the Respondent did not meet the evidential requirements of the Immigration Rules when making his application, and that his appeal under the Immigration Rules must therefore be dismissed.
17. Looking at this material in the round I accept therefore that the HOPO's understanding was that the appeal was to

be dismissed, not merely under the Immigration Rules, but also on Article 8 grounds, although positive findings were to be made as to whether the claimant and sponsor had entered into a legally valid marriage that was subsisting at the date of decision, in the expectation that the Appellant would make a fresh application for entry clearance filing the requisite evidence to show that he met the requirements of the Immigration Rules. I also accept that this understanding was the result of what the Judge said in the course of the hearing, and that this was his intention at the time, as recorded in the notes he made of the hearing.

18. In these circumstances I am satisfied that the Judge did fall into a material error of law, requiring his decision to be set aside. I have considered with the Appellant whether this is one of those appeals which should simply be remitted to the First Tier Tribunal for a fresh hearing, but in the circumstances of this appeal I am not satisfied that this is the expedient course, or that it is required by the Presidential guidance, and I shall remake the decision myself.

The decision remade

19. The Respondent has taken no step to withdraw the concession made on his behalf by Counsel on 2 October 2014. I am satisfied that it was properly made by experienced Counsel, and I accept it. The appeal must be dismissed under the Immigration Rules.
20. Whilst I have no intention of disturbing the findings of fact made in the favour of the Respondent and the sponsor in relation to the issues of whether their marriage was a legally valid one, and whether it was a genuine and subsisting marriage at the date of the refusal of entry clearance; the decision does disclose a clear error of material fact on the part of the Judge in relation to the immigration history which goes to the heart of his findings in relation to the application of paragraph 320(11).
21. Whereas the Judge states in paragraph 14 that the Respondent voluntarily returned to Sri Lanka in 2011, it had been conceded by the Respondent in his witness statement made for the purpose of the appeal in the face of the immigration history relied upon by the Appellant, that he had not. Thus the Respondent conceded that he had been detained in September 2011 pending removal and that he had then been the subject of a forced return at public expense. If the Judge was making a finding of fact in this respect, he had no basis upon which to go behind the Respondent's own concession, and was plainly wrong to do so.
22. Judge Cohen went on in paragraph 14 of his Decision to reject the suggestion that the Respondent could in any way

be regarded as having previously contrived in a significant way to frustrate the intentions of the Immigration Rules. His erroneous finding upon voluntary removal was plainly a key part of his reasoning in that respect, going to the heart of the issue. Thus this error of fact was one that amounted to an error of law.

23. The Judge's approach to the proportionality of the removal also appears however to have been based upon the fact that Sri Lanka was in a state of civil war, the dates of which are not identified by the Judge, and in relation to which he makes no findings of fact as to the impact of war upon either the Respondent or his family. The Judge appears to have overlooked the failure of the Respondent to make any timeous and well founded claim for asylum, Article 3 protection, or humanitarian protection during the currency of that war.
24. Moreover the Judge gave no consideration to the applicable Entry Clearance Guidance at the date of decision, and made no reference to the decision in PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440, so the impression is given of an entirely free-wheeling approach to the issue of whether the application was properly refused by reference to paragraph 320(11). It is abundantly plain in my judgement that the Judge's approach to paragraph 320(11) was so obviously flawed as to be entirely unsustainable.
25. The ECO put in issue from the outset that in his judgement the Respondent's conduct between 2002 and his detention in September 2011 was such as to contrive to frustrate the intentions of the Immigration Rules. The Respondent offered no explanation for that conduct in his witness statement prepared for the purpose of the appeal, dated 17 September 2014 [ApB p10]. He was the only one who could explain his actions, and justify them. The sponsor could not do so. Thus no matter what view the Judge formed of her, she could not assist in relation to the Respondent's state of mind during the relevant period.
26. The Respondent having failed to seek to explain or justify his actions, I am unable to see any proper basis upon which any decision maker could reach a different decision upon the issue raised by the reliance upon paragraph 320(11) to that which both the ECO and ECM had reached. The Respondent never had any grant of leave in the UK. He has not challenged the assertions that; his application for ILR made in October 2002 was entirely without merit, based upon a story that the Tribunal rejected as false after having had the benefit of hearing his oral evidence, and thus a frivolous application made for the sole purpose of delaying removal. Once his appeal rights were exhausted in June 2003 he did not leave the UK voluntarily, but simply went

to ground. The representations submitted on his behalf in 2010, and in 2011 did not rely upon the relationship that was the subject of the application for entry clearance – even though it was said to predate them. They found no favour with the Appellant, and whatever their content, were not considered sufficiently weighty to be the foundation of any challenge by way of judicial review application, or appeal to the Tribunal, to the decision to remove him. Moreover they were not sufficient to be found an application for bail, once the decision was taken to detain him pending removal.

27. That then is the context in which the Judge ought to have approached any consideration of an Article 8 appeal outside the Immigration Rules.
28. As the Judge appears to have discussed with the parties during the course of the hearing, it was open to the Respondent to make a fresh application for entry clearance, in which, barring any issues arising from the application of paragraph 320(11) he could hope to demonstrate that he met the requirements of Appendix FM. The proportionality of the decision to refuse entry clearance has to be viewed in the context that the Respondent was asserting that he could meet those requirements, and that he was not asserting that there would be such a serious period of delay in the ECO's consideration of his application that it was disproportionate to require him to make it.
29. To the extent that the Respondent was arguing that he should not be put to the trouble and expense of making a fresh application, there is no obvious reason why he should be relieved of the obligation.
30. There are no children affected by the decision under appeal.
31. In my consideration of the Article 8 appeal I have to determine the following separate questions:
 - Is there an interference with the right to respect for private life (which includes the right to physical and moral integrity) and family life?
 - If so will such interference have consequences of such gravity as to potentially engage Article 8?
 - Is that interference in accordance with the law?
 - Does that interference have legitimate aims?
 - Is the interference proportionate in a democratic society to the legitimate aim to be achieved?
32. Since the Judge accepted that the sponsor and the Respondent enjoyed a legally valid, and genuinely subsisting marriage at the date of decision it follows that the Respondent and the sponsor have established that a "family life" between them existed at that date. I am content to proceed on the basis that the decision would have such consequences as to potentially engage Article 8,

although it plainly did not affect the status quo at that date.

33. As set out above I am satisfied that the decision was made in accordance with the law. There can be no issue that the decision under appeal was made by the Appellant in the pursuit of a legitimate aim; the protection of the economic security of the UK, and the maintenance of public confidence in immigration controls.
34. Nevertheless, given the nature of the failures to meet the requirements of the Immigration Rules it is extremely difficult to see any basis upon which the Respondent should nonetheless be entitled to succeed in his appeal on Article 8 grounds. The marriage was entered into when both parties would have been well aware that there was a very real prospect that the Respondent would not meet the requirements of the Immigration Rules for a grant of entry clearance. If the sponsor nevertheless entered a marriage with the Respondent, having taken the decision that she was not prepared to live with him in Sri Lanka, then that was their choice. It is not a choice that the Appellant is required to respect.
35. Moreover the refusal of entry clearance for the purpose of settlement did not affect the ability of the sponsor to visit the Respondent in Sri Lanka. The decision only prevented the Respondent from entry into the UK for settlement. If, and when, his circumstances changed materially he would be entitled to make a fresh application.
36. The evidence did not establish that the sponsor or the Respondent were unable to access any care they required in Sri Lanka, nor that they would suffer any lack of safety in the event they sought to live there together.
37. Accordingly I am not satisfied that the Judge's findings permit a conclusion that the Respondent is entitled to a discretionary grant of entry clearance outside the Immigration Rules. The mere fact that the sponsor is a British citizen does not entitle her to insist that entry clearance be granted to the Respondent, even though he does not meet the requirements of the Immigration Rules; MM & Others [2014] EWCA Civ 985.
38. In my judgement the evidence falls well short of establishing that there were at the date of decision any compelling compassionate circumstances that meant the refusal to grant to the Respondent entry clearance led to an unjustifiably harsh outcome.

DECISION

The Decision of the First Tier Tribunal which was promulgated on 21 October 2014 did involve the making of an error of law.

The decision to allow the appeal under the Immigration Rules is accordingly set aside.

I remake the Decision on the appeal so as to dismiss the appeal under the Immigration Rules and on Article 8 grounds.

Direction regarding anonymity - Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity direction was made by the First Tier Tribunal, and none is sought from the Upper Tribunal. There is no good reason for the Upper Tribunal to make one of its own motion.

Deputy Upper Tribunal Judge JM Holmes
Dated 25 February 2015