Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11055/2015

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision & Reasons Promulgated**
On: 20th September 2017	**On: 26th September 2017**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

And

Asha Ransirigamage
(no anonymity direction made)

Respondent

Representation:
For the Appellant: Mr A. McVeety , Senior Home Office Presenting Officer
For the Respondent: Mr Z. Fogg, Sponsor

DETERMINATION AND REASONS

1. The Respondent is a national of Sri Lanka born on the 11th December 1966. On the 20th December 2016 the First-tier Tribunal (Judge Lloyd) allowed her appeal on human rights grounds. The Secretary of State for the Home Department now has permission to appeal against that decision.

Ground 1

2. The principle submission made in the grounds is that the determination is a nullity, since Ms Ransirigamage had no right of appeal. The grounds themselves contend that there had been no human rights claim to reject, and therefore no right of appeal arose under s82(1)(b) of the Nationality Immigration and Asylum Act 2002 (as amended). This is because, the grounds assert, the Secretary of State had refused to treat Ms Ransirigamage's representations as a 'fresh claim' and that, therefore, no right of appeal arose. In granting permission, First-tier Tribunal Pullig took a different view. He correctly pointed out that this claim had been certified as 'clearly unfounded' under s94(1) of the same Act and that the effect of that was that there would be no *in-country* right of appeal. He granted permission on that basis.

3. In fact, as Mr McVeety conceded, permission should neither have been sought nor granted on the jurisdiction point. The decision under appeal is dated 29th April 2015. It is clearly a refusal of a human rights claim, which is certified under s94(1). There was no in-country right of appeal. There was however an out-of-country right, and it was that fact that was no doubt uppermost in Judge Lloyd's mind when he heard the appeal in the absence of Ms Ransirigamage, noting at paragraph 3 of his decision that she was *in Sri Lanka*. Ground 1 is misconceived.

Ground 2

4. In the alternative the Secretary of State takes issue with the findings of fact made by Judge Lloyd, and the weight that was attached to certain matters in his proportionality balancing exercise. As will become apparent the appeal in fact turns on a narrow issue, but to address this ground it is necessary for me to set out some of the background to this case.

The History

5. Ms Ransirigamage arrived in the UK on the 26th February 2009 as a Domestic Worker in a private household. On five subsequent occasions she sought to vary that leave so as to extend it, and every application was granted. The last grant was issued on the 11th April 2014, and this had been due to run until the 11th April 2015. On the 6th February 2015 Ms Ransirigamage had been "encountered on an enforcement visit". She was detained and her leave curtailed. The reason given for the curtailment, as recorded in a bail summary dated

20th May 2015 and in a letter from UKVI to the Rt Hon David Jones MP, was that she had been found to be working for an employer other than the one identified on her visa. With that decision to curtail Ms Ransirigamage went overnight from being someone who had established six years of continuous lawful leave in the UK, to being a detainee facing removal.

6. Since there was no right of appeal against the decision to curtail, Ms Ransirigamage's first move was to make a human rights claim. The basis of this claim, made on the 21st February 2015, was that she was in a genuine and subsisting relationship with her British partner, Mr Zachary Fogg. She was granted bail on the 23rd February 2015 but on the 29th April 2015, as we know, her claim was rejected. The Secretary of State accepted that Ms Ransirigamage met the 'suitability' requirements for leave to remain under Appendix FM, but rejected her claim on the basis that she had provided insufficient evidence to establish that Mr Fogg was her partner, or, in the absence of his passport, that he was British. Since the claim was certified (see above) there was no in-country right of appeal. Shortly after the refusal was served Ms Ransirigamage was re-detained and served with removal directions.

7. She thereafter sought to resist removal in two ways.

8. First, she lodged an application for permission to judicially review the decision. She argued that the Secretary of State had acted irrationally in rejecting the evidence relating to Mr Fogg. The Secretary of State should have taken into account the fact that the First-tier Tribunal had accepted him as a surety in her bail hearing where his original passport had been seen by a HOPO and accepted as genuine, and that the decision-maker had failed to consider the material fact that the application had been prepared at short notice, Ms Ransirigamage being detained at the time. A copy of Mr Fogg's passport had been submitted with the application and the decision-maker had not acknowledged that. Permission to judicially review the decision was refused by Upper Tribunal Judge Gleeson on the 29th May 2015. Judge Gleeson found that on the limited evidence provided to the Secretary of State she had been entitled to take the decision she had, which fell within the range of reasonable responses. Judge Gleeson also noted that Ms Ransirigamage had an alternative remedy, namely an out of country right of appeal. Subsequent representations on the Article 8 claim were made and although an application for a stay on removal was granted by HHJ David Cooke (sitting as a Judge of the Upper Tribunal on the 5th August 2015) these representatations were rejected and the decision to remove was maintained.

9. Second, Ms Ransirigamage claimed asylum. This claim was rejected and certified on the 26th June 2015 and no issue is taken with that

decision today. Ms Ransirigamage has not sought to exercise an out of country right of appeal against that decision.

10. After losing this eight month battle to avoid removal from the United Kingdom, Ms Ransirigamage made a voluntary departure to Sri Lanka in October 2015 and once there, lodged her out-of-country appeal.

Decision of the First-tier Tribunal

11. So it was that when the appeal came before First-tier Tribunal Lloyd in April 2017 he had to decide whether Ms Ransirigamage was entitled to leave to remain in the United Kingdom on human rights grounds (s94(9) 2002 Act applies). He properly directed himself that in reaching that decision he must have regard to the Immigration Rules, and that the extent to which those rules could be met would be a "very relevant factor" in determining whether a refusal of leave was proportionate. It will be observed from the history set out above that although there was no right of appeal against the decision to curtail leave taken in February 2015, that decision assumed great significance in the balancing exercise. If it could be shown that the decision to curtail had been wrong, this was a matter that would weigh heavily in Ms Ransirigamage's side of the scales, assuming Article 8 was engaged.

12. In the absence of Ms Ransirigamage the Tribunal heard evidence from Mr Fogg. Having had regard to his credible testimony, as well as the documentary evidence, the Tribunal found as fact that he had been in a genuine and subsisting relationship with Ms Ransirigamage for several years. They had met in 2009 and had formed a relationship. He had helped her bring a case in the Employment Tribunal against her original employer, had lived with her in the UK and since her departure had travelled to Sri Lanka to visit her. The Tribunal accepted that Mr Fogg is a British citizen. Ms Ransirigamage therefore qualified as a 'partner' under the terms of Appendix FM.

13. The determination does not deal head on with whether the couple could hope to meet the financial requirements then contained in paragraph E-LTRP.3.1. I assume that this is because it was conceded that they could not. Although Mr Fogg had been employed for a number of years he had ceased employment in March 2015 in order to set up his own business. There does not appear to be any dispute that the application made (when Ms Ransirigamage was in detention) had not been supported by the 'specified evidence' as required by Appendix FM-SE. Although she had been earning a good income when she was employed, that employment had ceased with the curtailment of her visa. It is presumably for this reason that the Tribunal then turned to assess whether there were "insurmountable obstacles" to the family life continuing in Sri Lanka. Before me Mr McVeety agreed

that the Tribunal appears here to have had in mind the test set out in EX.1 (and elaborated in EX.2) of Appendix FM, which requires applicants to demonstrate that there are "very significant obstacles" to family life continuing abroad. He submitted, and I agree, that nothing turns on this point: on the findings of fact made, the appellant could not demonstrate either test to be met. The Tribunal found that Mr Fogg might have difficulties adjusting to life in Sri Lanka, and would have to make alternative arrangements to meet his caring/family responsibilities here, but he had been to Sri Lanka on a number of occasions and none of these trips had proved particularly difficult for him.

14. The Tribunal therefore found that the requirements of Appendix FM could not be met. Noting that the provisions therein are not a 'complete code' for the consideration of Article 8 family life, the Tribunal went on to consider Article 8 'outside of the rules'.

15. The Tribunal reiterated its finding that Ms Ransirigamage had a family life in the UK with Mr Fogg. She had lived here lawfully for 6 years and had established a private life. The decision to refuse leave interfered with those Article 8 rights. The interference was in accordance with the law and necessary in a democratic society. Having made those clear findings the Tribunal went on to consider proportionality. It directed itself to the 'public interest' factors in ss117A-D of the 2002 Act (as amended). In respect of these it found that Ms Ransirigamage spoke English and that she was financially independent. What weighed against her was the public interest in maintaining immigration control. In this regard the Tribunal referred back to the issue of the curtailment. It concluded, at paragraph 48, that Ms Ransirigamage had in fact met the requirements of the rules when her visa was curtailed. For that reason "the public interest in maintaining firm immigration control is less potent than in other contexts". Considering all of these matters in the round, the Tribunal concluded that the decision could not be shown to be proportionate and the appeal then was allowed.

16. It is clear from paragraph 48 that the issue of the curtailment weighed heavily in the proportionality balancing exercise. What then, were the Tribunal's findings on this matter?

17. As I set out above, the information provided on a bail summary in April 2015 and in a letter to Mr Fogg's MP in August 2015 was that the sole reason for curtailment had been that Ms Ransirigamage had been working for an employer other than that identified when she had made her application for leave. Judge Lloyd noted that some of the documents before him had hinted at other reasons: there was an allegation that Ms Ransirigamage had been studying when she was not permitted to do so, that she had been working 'cash in hand' and that she had manipulated an elderly male into producing false

payslips. All of these accusations were rejected on the facts by Judge Lloyd[1], and before me Mr McVeety confirmed that those findings were not challenged. The only issue left before the First-tier Tribunal was a) whether Ms Ransirigamage had in fact been working for a different employer and b) whether that mattered.

18. The findings of the Tribunal are set out at paragraphs 33-38. In summary, it records that Ms Ransirigamage was working for a Mr Mangall in February 2015 when her visa was curtailed. She had been working for him since November 2013 and the Home Office had been notified of this in February 2014, two months before it had issued her with further leave to remain. The terms of the operative rule (paragraph 159A) at the time, read with the Secretary of State's policy, were that she had been entitled to change employer. The Secretary of State had been aware that she was not 'living-in' with her employer; Ms Ransirigamage had, in at least the preceding application for further leave, given as her address the home she shared with Mr Fogg. Having made these findings the Tribunal in effect found that the Secretary of State had been wrong when she curtailed Ms Ransirigamage's leave as a domestic worker in February 2015. That was clearly a matter than attracted substantial weight in the balancing exercise, since all of the woes to have befallen her since that date had flowed from that decision.

The Challenge

19. The grounds make several points about the First-tier Tribunal approach to the curtailment.

20. First, issue is taken with the finding that Mr Mangall notified the Secretary of State, prior to her last grant of leave, that Ms Ransirigamage was working for him. It is submitted that the First-tier Tribunal "failed to identify the evidence" on that point.

21. Paragraph 37 of the determination identifies the evidence as a letter sent by Mr Mangall on the 22nd February 2014. That letter is in the file. It is from Lester Mangall and is addressed to the UKBA at a PO Box in Durham. Mr Mangall writes to confirm that Ms Ransirigamage has been employed by him as a domestic worker since November 2013 and that the terms of her employment comply with UK employment legislation in respect of the minimum wage. The file also contains a document entitled 'confirmation of employment' relating to the contract between Mr Mangall and Ms Ransirigamage.

[1] The findings of fact made by the First-tier Tribunal were that the elderly gentleman in question (Mr Mangall) had been genuinely employing Ms Ransirigamage as his carer. He had written a number of letters in her support and had in fact stood £50,000 surety for her at one of her bail hearings; his offer of employment to her stands to this day. Ms Ransirigamage had been lawfully studying 6 hours per week on an ESOL course that she was required to undertake in order to make a further application for leave to remain. As for the allegation of 'cash in hand' work, there was not the evidence to support it.

He has signed and dated it on the 24th February 2014; due to the proximity in dates, and the papers in the file, I infer that it was sent to the Home Office with the notification that she was working for him. I note from the Secretary of State's chronology that Ms Ransirigamage was last granted leave to remain as a domestic worker after this letter was sent, on the 11th April 2014. I find that the First-tier Tribunal was entitled to find that the Secretary of State had at that point been notified that Ms Ransirigamage was working for Mr Mangall. The findings were open to the Tribunal on the evidence before it, the evidence was clearly identified in the decision and there is no merit in this ground.

22. In light of that finding I need not therefore address Mr Fogg's very well researched and presented submissions about the then-operative rules and guidance in any great detail save to note the following. As long ago as 2015 Mr Fogg took advice from Kalayaan, an organisation with specialist knowledge of the rules relating to domestic workers in the UK (it is a registered charity whose stated purpose is to defend the legal rights of migrant workers). Their advice to him was that domestic workers who obtained leave in that capacity prior to the 5th April 2012 were entitled to switch employers, as long as the relevant legal rights were met (ie as to minimum wage etc) and they continued to meet the requirements of the rule. This advice would appear to be borne out by the Secretary of State's published guidance on the point[2]. Under the heading "Domestic Workers who applied before 5 April 2012" it says the following:

> "Different rules apply to you if you're a domestic worker who applied for entry to the UK on or before 5 April 2012. You can:
>
> - Extend your stay in the UK every 12 months
> - Apply to settle permanently in the UK after 5 years
> - Bring your partner and children under 18
> - *Move to a similar job in the UK*"

(emphasis added)

23. In light of that guidance, and the finding of fact that the Secretary of State had been notified that there was a new employer, I am satisfied that the First-tier Tribunal had been entitled to conclude that the decision to curtail Ms Ransirigamage's leave, for the reason given, was wrong. On the balance of probabilities she had not been working in breach of the conditions attached to her visa for the reasons given.

24. This brings me to the second challenge on the facts. It is submitted that even if Mr Mangall had notified the Secretary of State

[2] 'Domestic Workers in a Private Household Visa'

that he was employing Ms Ransirigamage, she was nevertheless in breach because she had long since left her original employer. This would appear to be an entirely new issue, not raised in the curtailment or before the First-tier Tribunal. It is therefore wholly inappropriate that it is now raised as a ground of appeal. In any event I am satisfied that it takes the Secretary of State's case nowhere. It is apparent from the papers before me that Ms Ransirigamage did indeed leave the employment that she had originally come to the UK to take, having taken her employer to the Employment Tribunal for various breaches including failing to pay her the minimum wage. She had then worked as a carer for Mr Fogg's mother and had then moved to work for Mr Mangall. Since she was renewing her leave every year it is clear that the Secretary of State had been informed about all of that: indeed the file contains a number of application forms, letters of employment and contracts that bear that out.

25. The final challenge to the findings relates to the undisputed fact that Ms Ransirigamage was not living under the same roof as Mr Mangall at the date of the enforcement visit. The grounds suggest that it was this breach of conditions that led to the curtailment. Again, this appears to be an entirely new point: on the evidence before me, that was not the reason given at the time. The curtailment notice itself simply refers to an unspecified breach of conditions but as is clear from the letter to the MP, the bail summary and indeed the determination, that the reason given was the switch in employer. Even if accommodation was a reason that had previously been cited it was not one that could properly have led to a decision to curtail, given the terms of the Secretary of State's policy at the time. Under the heading 'maintenance and accommodation' [WRK.2.1.6] it reads:

> "**domestic workers are not required to live in the same dwelling as the employer**. However, if this is not the case, care should be taken to ensure that either the employer intends to pay for the accommodation or that the domestic worker's wages are sufficient to cover the expense…"

26. As Mr Fogg points out, Ms Ransirigamage had made it perfectly plain that she was not living with her employers in at least her last two applications, since she had declared herself to be living with him. Presumably it was never raised as an issue by the caseowners who processed those applications because of the terms of this policy. It was not taken as a point then, and it should not be taken as a point now.

Conclusions

27. For the reasons I have given none of the grounds of appeal have any merit and the decision of the First-tier Tribunal is upheld. There

is an undisturbed finding of fact that the Secretary of State was wrong to have curtailed Ms Ransirigamage's leave in February 2015. Although a number of justifications appear to have been put forward at various times for the curtailment, all have been rejected as factually wrong and/or contrary to published policy. The First-tier Tribunal was plainly entitled to find that this was a matter that substantially reduced the public interest in refusing leave, so as to render the decision disproportionate. On the 5th February 2015 Ms Ransirigamage had accrued six years continuous lawful leave in a category that permitted her to apply for indefinite leave to remain. It was, I am told, for that reason that she was undertaking ESOL study, because she needed to pass a further English language test and the 'life in the UK' exam before she could apply. Unfortunately, she did not get to complete that study, nor make her application. What instead followed, on the 6th February 2015, was arrest, detention, threatened removal, a protracted legal battle and a two year separation from her partner. In my view that very substantial interference with her family life should be remedied - at the very least - by an immediate grant of entry clearance.

Decision

28. The determination of the First-tier Tribunal does not contain an error of law and it is upheld.

29. There is no order for anonymity.

Upper Tribunal Judge Bruce
22nd September 2017