



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/02774/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 23 January 2018

**Decision & Reasons
Promulgated
On 29 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROMM

Between

**PAMELA CHANDRA VICTOR EMMANUEL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - MANILA

Respondent

Representation:

For the Appellant: Ms K Wass, Counsel,

For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

1. The appellant is a citizen of Malaysia. She married Mr Yogaratnam Ramesh, a Sri Lankan national, during a visit to the UK in 2008. A Hindu ceremony was conducted on 31 August 2008 but the marriage was only registered on 22 April 2013. Mr Ramesh had come to the UK in April 2001, seeking asylum. He was not recognised as a refugee but, in April 2013, he was granted discretionary leave for three years. He was granted a further three years' discretionary leave on 23 October 2015. When this expires he will be eligible to apply for indefinite leave to remain.
2. On 15 December 2015, the appellant made her application for entry clearance. This was considered and refused on 13 January 2016 for the

following reasons: (1) the sponsor was not either British, settled or a refugee, so the requirement of paragraph E-ECP.2.1 of the rules was not met, and, (2) the application did not raise any exceptional circumstances to warrant a grant of leave to enter outside the rules. The appellant appealed but the decision was maintained on review by the entry clearance manager.

3. At the hearing before Judge of the First-tier Tribunal Farmer, held at Hatton Cross on 22 May 2017, it was argued there were exceptional circumstances to justify allowing the appeal outside the rules. Had a decision been made on Mr Ramesh's case under the policy dealing with 'legacy' claims prior to July 2011 he would have been granted indefinite leave to remain. Judge Farmer was not persuaded by this argument and held there were no exceptional circumstances. She dismissed the appeal.
4. Permission to appeal was granted by the First-tier Tribunal because it was arguable the Judge had erred "*by not engaging with the five questions raised by Lord Bingham in the case of Razgar*¹".
5. I heard submissions from the representatives on the issue of whether the Judge's approach to the question of family life was erroneous.
6. Ms Wass argued that, had the Judge taken a structured approach and followed the *Razgar* steps, it was possible she might have reached a different conclusion. She argued the Judge had failed to conduct a proportionality balancing exercise. She had looked at the position of the sponsor, Mr Ramesh, not the appellant. She had not considered the fact that all the requirements of Appendix FM of the rules were met apart from the requirement for the sponsor to be settled or a refugee. If the Judge had balanced the factors out, she might have concluded the public interest did not outweigh the appellant's family life.
7. Mr Nath argued the Judge did not need to set out the *Razgar* steps. He pointed out the Judge had recorded that the case was only argued outside the rules (see [11]). She had conducted a proportionality assessment in which she had considered the factors in favour of the appellant. The decision was one which it was open to the Judge to make. She had referred to *R (Agyarko) v SSHD* [2017] UKSC 11 at [20] and she must have had the 'insurmountable obstacles' test in mind.
8. Ms Wass disagreed that the decision contains a balancing exercise and argued the Judge was simply searching for exceptional circumstances. In doing so she had omitted to balance all the factors.
9. I reserved my decision as to whether the decision of the First-tier Tribunal contained a material error of law.
10. Having done so, I have concluded the decision does not contain any material error of law and shall stand. My reasons are as follows.

¹ [2004] UKHL 27; [2004] 2 AC 368.

11. The task of the Judge can best be explained by borrowing the following passage from the decision of McCloskey J in *Kaur (children's best interests/public interest interface)* [2017] UKUT 00014 (IAC):

"32. As the decision in Hesham Ali makes clear, the fundamental task for tribunals in appeals involving recourse to Article 8 of the Convention is, having made appropriate findings of fact, to identify the public interest engaged, to correctly measure its strength and, ultimately, to determine whether the private and family life factors advanced by the appellant outweigh the public interest to the extent that the impugned decision is disproportionate. While this is the general approach, in the particular context of deportation the public interest is especially potent and will be outweighed only by an Article 8 claim which is "*very strong indeed - very compelling*": per Lord Reed at [50]. Furthermore, in all cases the tribunal will give appropriate weight to the decision maker's reasons for the proposed course of action: per Lord Reed at [44], reaffirming Huang v Secretary of State for the Home Department [2007] UKHL 11, per Lord Bingham at [16].

33. Given the recent vintage of the decision in Hesham Ali and having regard to the recurring challenges encountered by judges at the first tier of decision making in immigration appeals, it is appropriate to highlight the short concurring judgment of Lord Thomas LCJ. In a welcome contribution, the Lord Chief Justice, echoing the jurisprudence of this Tribunal, emphasises the importance of making clear findings on material issues of fact. The next requirement on Judges is to "*set out in clear and succinct terms their reasoning*", with particular reference to [37] - [38], [46] and [50] of the judgment of Lord Reed. Lord Thomas then advocates the adoption of the "balance sheet" approach. This is a self-evidently important stage in the judicial decision making. It involves the identification of the material facts and factors belonging to the two basic sides of the equation. This serves as a timely reminder to First-tier Tribunal Judges to continue doing what one already finds in the strongest judgments. ..."

12. In *R (on the application of Agyarko) v SSHD* [2017] UKSC 11, the Supreme Court explained that the ultimate question in article 8 cases is whether a fair balance has been struck between the competing public and individual interests involved, applying a proportionality test. The rules and IDIs do not depart from that position and are compatible with article 8. Appendix FM is said to reflect how the balance will be struck under article 8 so that if an applicant fails to meet the rules, it should only be in genuinely exceptional circumstances that there would be a breach of article 8. In this context, 'exceptional' does not mean something unique or unusual but means "*something very compelling*" which is capable of outweighing the public interest.
13. Turning to Judge Farmer's decision, I note the following. It is plain that, on the undisputed facts of the case, the appellant did not meet the requirements of Appendix FM because her partner's leave did not fall within the available categories provided for in paragraph GEN.1.3. Unsurprisingly, therefore, the Judge recorded that counsel for the appellant primarily sought to argue the article 8 case outside the rules (see [10] - [11]). The submission made was that the facts of the case were "*exceptional in that the refusal would result in unjustifiably harsh*

consequences for the couple such that refusal would not be proportionate". The basis for that submission was that the sponsor's status had been determined by a change of policy outside of his control.

14. I note from this that the Judge started her consideration from the point that the rules could not be met and premised the remainder of her decision on a correct understanding of the need to show that there were genuinely exceptional circumstances capable of outweighing the public interest. Moreover, the case was argued on the basis that the very compelling feature of the case related to the sponsor's bad luck as to the change of policy, which meant he could not immediately settle in the UK.
15. As for the absence of any mention of the *Razgar* steps, I cannot see any material error. The determinative issue, as in most appeals, was the proportionality of the decision and I have already laboured the point that Judge Farmer's understanding of the meaning of exceptional circumstances was correct.
16. Ms Wass argued the Judge failed to have regard to the fact the remainder of the rules were met. However, Judge Farmer notes this at [13].
17. Paragraphs [15] to [18] deal with a rather exotic submission made to the Judge concerning the principle in *Chikwamba* [2008] UKHL 40. Ms Wass did not make any submissions on this point. She agreed that the case had no application in this appeal in which the appellant was not seeking to resist removal but was applying for leave to enter from abroad.
18. Paragraphs [19] to [21] set out the Judge's conclusions on proportionality. She noted the long period of time the couple had lived apart and also the visits made by the sponsor to the appellant, presumably in Malaysia. She concluded it was a matter of choice for the sponsor to remain in the UK rather than join his partner in Malaysia. This was a conclusion Judge Farmer was plainly entitled to reach on these facts. It is clear she conducted a balancing exercise of the relevant factors and found the appellant's interests were outweighed.
19. There is no error of law in the First-tier Tribunal's decision to dismiss the appeal and the decision shall stand. The appellant's appeal is dismissed.

Notice of Decision

The Judge of the First-tier Tribunal did not make a material error of law and her decision dismissing the appeal is upheld.

No anonymity direction is made.

Signed

Date 23 January 2018

Deputy Upper Tribunal Judge Froom