UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: IA/06981/2014**

THE IMMIGRATION ACTS

Heard at: Field House	**Determination & Reasons Promulgated**
On: 19 November 2014	**On: 15 December 2014**

Before

Deputy Upper Tribunal Judge Mailer

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS ERANDATHIE JAYASUNDARA MUIYANSELAGE
NO ANONYMITY DIRECTION MADE

Respondent

Representation

For the Appellant: **Mr P Nath, Senior Home Office Presenting Officer**
For the Respondent: **Mr A Seelhof, A. Seelhof Solicitors**

DETERMINATION AND REASONS

1. For the sake of convenience I shall refer to the appellant as "the secretary of state" and to the respondent as "the claimant."
2. The claimant is a national of Sri Lanka, born on 9 September 1960. Her appeal against the decision of the respondent refusing her further leave to remain as the spouse of a person present and settled in the UK was allowed by the First-tier Tribunal Judge Colvin in a determination promulgated on 4 September 2014. She dismissed the appeal under the Immigration Rules but allowed it on human rights grounds (Article 8). She considered as a preliminary issue whether she had jurisdiction to hear the appeal, which is considered below.

3. The evidence before her established that the claimant entered the UK as a Tier 5 Migrant, as the private servant in a diplomatic household, with the Singapore High Commission, valid until 26 November 2013.
4. She claimed that they did not treat her well and so she left her employment on 7 November 2012.
5. The secretary of state subsequently received notification from the Singapore High Commission that the claimant had ceased to be employed. A decision was then taken to curtail her leave to enter so as to expire on 29 April 2013.
6. The variation of leave notice dated 28 February 2013 was addressed to the appellant at the Singapore High Commission.
7. The claimant married her husband, a British citizen, on 9 July 2014. She began living with him in January 2013 and has continued to live with him.
8. They decided to get married so that they could stay together. They had problems arranging the wedding. She ended up having to put in her application before the wedding. Eventually, the Home Office provided copies of her passport so that they were able to marry on 9 July 2014 [4].
9. Her husband receives Disability Allowance and owns his home. She has taken courses accredited by the British Council at the A2-B1 level of the English language, above the level required in Appendix O of the Immigration Rules. She was unable to take any of the tests specified in that appendix without her passport, which was being held by the Home Office [5].
10. Under cross-examination she said that she left her employment with the diplomatic family on 7 November 2012 and went to live with a friend. She did not inform the Home Office of her new address [6].
11. Her husband gave evidence. He is 68 years old; he lost his partner of 39 years about eight months before he met the claimant. He was at a low point in his life. He invited the claimant to move in in January 2013 after she had problems with her employer.
12. Judge Colvin considered as a preliminary issue whether the secretary of state's curtailment notice was valid. It was accepted that the curtailment notice was not communicated to the claimant and had not come to her attention. She found that the Singapore High Commission where the secretary of state sent the notice of curtailment, had not been authorised to receive that notice on her behalf, so as to make it effective. The commission had ceased acting as her sponsor at the time that it was sent [18].
13. Judge Colvin thus found that the claimant's leave to remain had not been validly terminated with the result that she had leave to remain at the time that she made her application for further leave to remain as a spouse.
14. Two issues were raised by the secretary of state as to her claim under Appendix FM. The first was whether their relationship was genuine and subsisting. The second issue related to the English language test.

15. The Judge found that their relationship was genuine and subsisting [21].
16. The claimant spoke English at the hearing. This is the common language between her and her husband. She also completed an English language course from December 2013 to June 2014, passing a pre-intermediate exam with a score of 132/200 at the Golders Green College. The Judge accepted that this was at a higher level than the CEFR A1 level required under Appendix FM [22].
17. However, Judge Colvin found that she had not passed the test with a provider approved by the secretary of state even though Golders Green College was accredited by the British Council. She had not been able to do the test with such provider as she had been unable to produce her passport, which was with the Home Office [22].
18. Judge Colvin was satisfied that the claimant had shown on the balance of probabilities that she has the required speaking and listening English language skills to the required level of A1. However, this had not been undertaken with an approved provider. She found that she had no discretion. A "near miss" approach could not be applied.
19. She accordingly found that the claimant had not fulfilled this requirement under Appendix FM. She dismissed the appeal under the rules - solely on the basis of her not being able to provide an English language test result with an approved provider in the absence of her passport currently held by the Home Office and despite the fact that she had already attained a successful test in the English language higher than the level required under Appendix FM [24].
20. Judge Colvin then assessed her claim under Article 8 (Family Life). She referred to and directed herself in accordance with recent relevant decisions, including Shahzad (Art 8: Legitimate Aim) [2014] UKUT 00085, namely, 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 [25].
21. She considered that the evidence in this case "....means that there are arguably good grounds to consider Article 8 more generally in terms of compelling circumstances".
22. The principal ground is that she is married to a person who requires a carer because of his medical condition. It is accepted that she is undertaking this role. That is a matter not sufficiently recognised under the "new rules". There would be nothing gained in terms of the wider public interest in requiring her to return to Sri Lanka in order to make a spouse application, after taking into account the costs involved and the hardship that would be caused to her husband in terms of his daily caring needs in her absence. [26]

23. That remained her view after taking into account the public interest provisions under s.117B of the Nationality, Immigration and asylum Act 2002.
24. She accordingly allowed the appeal under Article 8.
25. On 15 October 2014, First-tier Tribunal Judge T R P Hollingworth granted the secretary of state permission to appeal. It was arguable that the preliminary decision regarding the issue of the curtailment of the notice "is flawed." The onus 'was clearly on the appellant' to inform the Home Office of any material change in her circumstances.
26. It was also arguable that "...an inadequate evaluation of Article 8 has been made attaching insufficient weight to the issue of exceptional circumstance given that the claimant would have no legitimate expectation of remaining in this country at the conclusion of her leave".

Hearing on 19 November 2014

27. Mr Nath contended that the secretary of state had properly served the curtailment notice at the claimant's last known address she held for the claimant. The onus was not on the secretary of state to trace the claimant where she had shown a blatant attempt to evade the immigration authorities by failing to keep in contact with them. Accordingly, her leave did not continue.
28. Further, the Judge failed to identify why her circumstances were compelling, and thus amounting to exceptional circumstances warranting a grant of leave outside the rules. The Tribunal had failed to provide adequate reasons. Her stay had always been temporary. She had been fully aware that her stay was precarious. There were no insurmountable obstacles to her partner relocating to Sri Lanka to continue family life there. If he remained here, they could communicate with each other using modern methods and visits. It would be proportionate for her to return to Sri Lanka to obtain the appropriate entry clearance.
29. Mr Seelhof submitted that the Immigration (Notices) Regulations 2003 did not apply to the claimant's situation. The notice of curtailment had not been validly served upon the claimant. There is nothing in the notice regulations about deemed service.
30. The secretary of state has to be able to prove that notice of such a decision was communicated to the claimant in order for it to be effective. Such communication will be effective if made to a person authorised to receive it on that person's behalf. The Upper Tribunal in Syed (Curtailment of Leave – Notice) [2013] UKUT 00144 (IAC) held that there was no statutory instrument under the 1971 Immigration Act dealing with the means of giving notice for the purposes of s. 4(1) of a decision under that Act, which is not an immigration decision.
31. The secretary of state accordingly has to be able to prove that notice of such a decision was communicated to the person concerned. In order for it

to be effective. Communication will be effective if made to a person authorised to receive it on that person's behalf Hosier v Goodall [1962] 1 All ER 30

32. In Hosier, the notice was sent to the defendant's residence by registered post. This was notice of an intended prosecution. He was in hospital to the knowledge of the police. The notice was received by his wife. It was not communicated to the defendant.
33. Lord Parker CJ found that the appellant who was in hospital was being brought letters by his wife and was reading them. His wife had accepted the registered letter containing the notice of intended prosecution, opened it, but chose not to show it to him as he would be worried. Accordingly, the notice was sent to his home address and was taken in by his wife. It was thus "an irresistible inference" that the wife was fully authorised to take it in and deal with the registered letter, and that the receipt by her was in fact receipt by the defendant in that case.
34. Mr Seelhof submitted that there was no such inference capable of being drawn in this case. During the course of the hearing, the representatives at my request, considered whether there had been any conditions that accompanied the grant of the claimant's visa requiring her to inform the Home Office of a change of circumstances, including any change to her address.
35. It was accepted that no such conditions applied in her case. There was nothing specific in the rules relating to the claimant. The relationship in her case was between her employer, the High Commission, and the Home Office. The obligation regarding a change in circumstances rested with the High Commission. It was in fact the High Commission who notified the secretary of state that the claimant had left employment.
36. Mr Seelhof thus submitted accordingly that the First-tier Judge had been entitled to come to the conclusion she arrived at.
37. With regard to the Article 8 claim, the Judge had regard to that claim on the basis of her having found with regard to Appendix FM, that all the requirements had been met apart from the failure to provide an English test certificate. The Judge took into account that the claimant had been unable to do the test in accordance with the rules as she had no passport available at the time, which the appropriate test centre required before administering the test. The circumstances relating to the appellant included the interests of her husband.
38. The Judge accordingly found that it would be disproportionate to expect her to have to go through the process suggested by the secretary of state, particularly having regard to the fact that she spoke English to a higher level than that required. In that respect, the Judge had regard to the fact that she gave oral evidence without an interpreter. [4]

39. Further, her husband's circumstances, including his health problems such as lumbar spinal stenosis, coronary artery disease, left ventricular heart disease and depression resulted in his need for a carer for most of the time [5].
40. Her husband confirmed that he received disability living allowance and has severe disablement allowance as well. He confirmed his health problems described by the claimant. He also confirmed that the claimant is his carer.
41. The cross examination recorded at paragraph 8 did not challenge that evidence.
42. Mr Seelhof also relied on the recent decision from the Administrative Court in Ganesabalan [2014] EWHC 2712 (Admin). Appendix FM and Rule 276ADE are not a "complete code" as far as Article 8 compatibility is concerned.
43. He relied on MF (Nigeria) v SSHD [2013] EWCA Civ 1192 and MM (Lebanon) v SSHD [2014] EWCA Civ 985, where the Court of Appeal endorsed the approach in MF that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. It was necessary to apply a proportionality test. In MM the Court of Appeal described the proportionality test guided by the Huang and UK and Strasbourg case law (paragraph 130).
44. Mr Seelhof produced the original of the English language course showing that the claimant passed the pre-intermediate exam and scored 132-200 (CEFR A2-B1). The course is accredited by the British Council as noted and set out in the certificate itself.

Assessment

45. The secretary of state asserted that the claimant had no right of appeal following the refusal of her application, made on 25 November 2013 for leave to remain as the spouse of a person present and settled in the UK. It is contended that her leave to remain had expired on 29 April 2013. She thus did not have any leave to remain at the date of her application and accordingly had no right of appeal against the refusal.
46. I have had regard to Judge Hollingworth's comments at paragraph 2 of his decision granting the secretary of state permission to appeal. He stated that the onus was clearly on the claimant to inform the Home Office of any material changes in her circumstances. However, as already indicated, the basis for such broad assertion has not been shown to relate to the claimant.
47. I have had regard to the decision in Syed, supra. Mr Nath has submitted that the High Commission in this case was the "person" authorised to receive the decision on behalf of the claimant. However, no evidence or any documentation has been produced seeking to justify that assertion. The

claimant had already left her employment. The relationship with the High Commission had accordingly come to an end.

48. In order to justify the assertion that the communication was effective it would have to be shown that the High Commission was the person authorised to receive it on the claimant's behalf.

49. I have had regard to the decision before the Queen's Bench Division in Hosier, supra. I do not find that it was "an irresistible inference" that the High Commission was fully authorised to receive and deal with the curtailment notice.

50. I accordingly find that the claimant's leave has not been shown to have been lawfully curtailed. I find that the notice of curtailment of her leave had not been validly served upon her. Accordingly her leave continued until 26 November 2013. She thus made her application in time.

51. The claimant's passport was at all material times being held by the Home Office and she had accordingly not been able to sit a test listed by one of the providers in the appendix to the rules.

52. She did however attend courses accredited by the British Council of the Higher A2-B1 level and passed the associated examination. She also gave evidence in English and she communicates in English with her husband.

53. Insofar as the Article 8 claim is concerned, Judge Colvin has adequately directed herself [25]. She found on the evidence that there were compelling circumstances justifying the consideration of "Article 8 more generally." There were matters raised that had not been sufficiently recognised under the new rules. She also found that there was not anything to be gained in terms of a wider public interest requiring her to return to Sri Lanka to make a spouse application; she had regard to the cost involved and the hardship that would be caused to her husband who required daily care for his needs.

54. She properly took into account the provisions of s.117B of the 2002 Act, finding on the available evidence that there were no public interest provisions applicable in her case.

55. The Judge found that her claim failed by reference to the applicable immigration rules. In the reasons for refusal, the secretary of state simply stated that it had been decided that her application did not raise or contain any exceptional circumstances consistent with the right to respect for family and private life contained in Article 8 warranting consideration by her of a grant of leave outside the rules. The secretary of state did not provide any reasons for that assertion.

56. Appendix FM and Rule 276ADE are not a complete code insofar as Article 8 compatibility is concerned: Ganesabalan, supra, at paragraph 10. In MM (Lebanon), supra, the Court of Appeal held that if the relevant group of immigration rules is not a complete code then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law.

57. The Immigration Directorate instructions relating to family members under the immigration rules, dated December 2012, provide that "exceptional" does not mean "unusual" or unique. They mean circumstances in which the refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate.

58. The secretary of state contends that the Tribunal failed to provide adequate reasons why the claimant's circumstances are either compelling or exceptional. There are in particular no insurmountable obstacles to her partner relocating to Sri Lanka to continue family life there.

59. The Judge had earlier considered all the relevant evidence in this respect at paragraphs 21 to 23. She set out the medical evidence produced in respect of Mr Kapadia, the claimant's husband and his need for a carer being in attendance. Judge Colvin has summarised the basis for her findings at paragraph 26 of the determination. She also had regard to the evidence that the financial requirements under Appendix FM have been met. In addition, the claimant had been in the UK lawfully since she met and married her husband.

60. She noted that the appellant had been unable to provide an English language test result for the purposes of Appendix FM with an approved provider as her passport was currently held by the Home Office. However, she had obtained a successful test result in the English language which was at a higher level than that required under Appendix FM.

61. Having regard to all those circumstances, the Judge found that nothing would be gained in terms of the wider public interest in requiring her to return to Sri Lanka to make an application for entry clearance.

62. She has provided adequate reasons for her conclusions. These were findings which were available to her on the evidence produced. There is nothing irrational or perverse in the findings.

Decision

The decision of the First-tier Tribunal Judge did not involve the making of any material error on a point of law. The determination shall accordingly stand.

No anonymity direction made.

Signed Date 12 December 2014

C R Mailer
Deputy Upper Tribunal Judge