Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/46661/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th November 2015	**On 22nd February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MRS. KAITHIRY PARANEETHARAN
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr C Avery, Senior Home Officer Presenting Officer
For the Respondent: Mr T N Paramjorthy instructed by S Satha & Co Solicitors

DECISION AND REASONS

1. This appeal comes back before me as a resumed hearing following an earlier hearing on 11th September 2015. For the reasons set out in my decision promulgated on 5th November 2015 I found an error of law in the decision of First-tier Tribunal Judge Moore.

2. The appellant in these proceedings is the Secretary of State but I continue to refer to the parties as they were before the First-tier Tribunal.

3. To summarise the background, the appeal against the respondent's decision to refuse the appellant's application for leave to remain in the UK on the basis of her relationship, and on Private life grounds, was allowed by the First-tier Tribunal. Although the decision of First-tier Tribunal Judge Moore was set aside, a number of findings of fact were preserved, as set out in my error of law decision at [33]. For convenience I reproduce those preserved findings as follows:

a. *[25] The appellant has established a considerable family life with her husband in the United Kingdom. She has resided in the United Kingdom for nearly six years, whilst her husband has been in the United Kingdom for nearly nine years. They married each other on 9th November 2008 and have been living together in the same household for the nearly six years that have passed. Since April 2014 they both lived together in a mortgaged property that is owned by the appellant's husband.*

b. *[28] The husband of the appellant entered the United Kingdom in December 2005 and claimed asylum within one week of his arrival. Through no fault of his own, there was a substantial delay in his claim and ultimately the husband was granted discretionary leave to remain on Article 8 grounds and in light of the delay, on 28th February 2013.*

c. *[28] The appellant has no family of her own living in the United Kingdom, however, her husband has two sisters who live in the United Kingdom whom the appellant and her husband see regularly three or four times a month. The father of the husband also lives in the United Kingdom.*

d. *[29] Both the appellant and her husband are in employment in the United Kingdom. The appellant has been working as an accounts assistant eighteen hours per week on a part time basis for the past five years, whilst her husband works for the same company as an IT consultant on a full time basis and has done so since he was granted discretionary leave and became entitled to work. He receives a significant salary of approximately £42, 499 per annum whilst the appellant has an annual income of approximately £8,080.*

e. *[35] The relationship developed between the appellant and her husband was done so at a time when they were in the United Kingdom lawfully.*

4. At the resumed hearing neither party sought to disagree with my provisional view as to the findings of fact that were to be preserved. Directions were issued to the parties in advance of the hearing before me, requiring the parties to file and serve any further evidence to be relied upon no later than 14 days before the hearing. No further evidence was filed and served by the appellant in accordance with the directions made. At the start of the hearing, Mr Paramjorthy made an application to admit new evidence not previously relied on. He sought permission to rely upon a letter dated 27th November 2015 signed by the appellant's father-in-law and a statement of the appellant comprising of 8 short paragraphs signed by her on 30th November 2015. I was also provided with a letter issued by the University College London Hospital, Ultrasound Screening Unit following an examination of the appellant on 16th November 2015. The letter confirms that the appellant is now pregnant and gives a gestational age of 12 weeks and 2 days, with an expected date of delivery on 28th May 2016. On behalf of the respondent, Mr Avery did not object to the documents being adduced by the appellant, and so I admitted them as evidence before me.

5. The letter from the appellant's father-in-law confirms that he lives with his son and the appellant at their property, and that the appellant looks after him "like my own daughter". He states that he has problems walking properly following an accident in Sri Lanka and that because of a *knee* problem he was unable to attend to give evidence before me. He summaries that it would be heart-breaking for the appellant and her husband to be split apart from each other and they:

> *"..have strong tie to friends and family here and they work together and have worked very hard to build up their life here in the UK. They are both kind and genuine people of exceptional character…"*

6. The appellant's witness statement signed on 30th November 2015 confirms that she is now three months pregnant and that her husband is the father. She states that her husband cannot and will not return to Sri Lanka and the thought of her being removed to Sri Lanka is destroying them. She states that they have

established a considerable private and family life here in the UK, and to give up everything and return to Sri Lanka, seems unfair and disproportionate. She is distraught at the thought of leaving the UK, and she confirms the very special bond that she has with her father-in-law, who relies upon her for moral support.

7. Mr Paramjorthy indicated that no further oral evidence was to be called on behalf of the appellant and I proceeded to hear submissions from the parties which I summarise below.

8. Mr Paramjorthy concedes that the appellant is unable to meet the requirements of Appendix FM and paragraph 276ADE(1) of the Immigration Rules. He accepts that the correct test is set out at paragraph [29] of my error of law decision, and submits that there are exceptional circumstances in this case to support the Article 8 claim in circumstances where the appellant cannot succeed under the immigration rules. He identifies those exceptional factors as being the husband's long residence in the UK, and the procedural delays in deciding his case before the grant of discretionary leave to remain was made to him. Mr Paramjorthy also points to the history of the relationship between the appellant and her husband. They had met and married in 2008 and underwent a civil marriage ceremony in 2011, all at a time when they were both in the UK lawfully. Mr Paramjorthy concedes that whilst it is right to say that their immigration status at that time was precarious, they were entitled to get on with their lives and they have built a considerable and admirable private life in the UK. He submits that neither the appellant nor her husband are a burden on the tax-payer and whilst the specified evidence required to establish that the other requirements of the immigration rules are met, is not before me, the respondent did not challenge the fact that the appellant and her husband could meet the maintenance and accommodation requirements. He submits that when one considers all matters cumulatively, there are exceptional circumstances in this case to support the Article 8 claim outside of the immigration rules.

9. On behalf of the respondent, Mr Avery reminds me that the test is one of 'exceptionality' and he submits that the test is simply not met. He submits that the immigration status of the appellant's husband remains precarious and it cannot be said that the grant of indefinite leave to remain is a foregone conclusion. Mr Avery submits there is no evidence to establish any compelling, let alone exceptional reason why family life between the appellant and her husband cannot continue outside the UK.

Decision

10. In reaching my decision, I have had regard to the preserved findings of fact that I have referred to in this decision, together with the evidence of the appellant and her husband as set out in their witness statements before the First-tier Tribunal, and the further evidence adduced before me at the resumed hearing.

11. I remind myself of the immigration history of the appellant and her husband. The appellant entered the UK on 10th September 2008 as a student. In July 2011, she was granted leave to remain in the UK as a student until 24th September 2013. Shortly after her arrival in the UK, the appellant formed a relationship with her husband, who at the time, was awaiting a decision upon an outstanding asylum claim. On 9th November 2008, the appellant and her husband entered into a Hindu marriage ceremony and on 7th February 2011 they registered their marriage. On 28th February 2013, the appellant's husband was granted discretionary leave to remain in the United Kingdom on Article 8 grounds. On 20th September 2013, the appellant made an application for leave to remain in the UK on the basis of her marriage and on Article 8 grounds.

12. The burden of proof is upon the appellant to show, on the balance of probabilities, that there she has established a family and/or private life in the UK and that her removal from the UK as a result of the respondent's decision would interfere with those rights. It is then for the respondent to justify any interference caused. The

respondent's decision must be in accordance with the law and must be a proportionate response in all the circumstances.

13. Where, as here, the appellant does not meet the requirements of the rules, it is necessary to go on to make an assessment of the Article 8 claim. Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. In a case that concerns family life as well as immigration the extent of the United Kingdom's obligations to admit to its territory, relatives of persons residing here vary according to the particular circumstances of the persons involved, and the general interest. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties to the UK and whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, and whether there are factors of immigration control or considerations of public order weighing in favour of removal. Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would, from the outset be precarious. Where this is the case, the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances.

14. Looking at the matter through the five questions set out by Lord Bingham in **Razgar [2004] UKHL 27**, I would answer them therefore as follows;

    a. The appellant has established a considerable family life with her husband in the United Kingdom. That is a finding of fact that has been preserved.

    b. Any interference will have consequences of such gravity as potentially to engage the operation of article 8. It is uncontroversial that removal of the appellant shall interfere with her and her husband's right to respect for family life. It is now well established that in an Article 8 balancing exercise, the rights of all those closely affected, not only those of the appellant, have

to be considered. I have no hesitation in finding that on the facts of this case, the decision to remove the appellant interferes with her and her husband's private and family lives, and the interference is of sufficient gravity potentially to engage the operation of Article 8. None of that was seriously disputed before me.

c. Such interference would be in accordance with law. Again, that was not disputed before me.

d. Such interference is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country. As Strasbourg and domestic jurisprudence has consistently emphasized, states are entitled to have regard to need for immigration control. It is an unfortunate reality of life that the UK cannot undertake to allow all members of a family to join together in the UK, even those members who can show emotional and financial dependency, without creating unsupportable burdens.

15. The real issue in this appeal is whether such interference is proportionate to the legitimate public end sought to be achieved. I accept that it is possible that a case might be found to be exceptional for the purposes of an assessment under Article 8, even where the requirements of the immigration rules are not met. However, the provisions of the rules is relevant to the evaluation of proportionality and the fact that the immigration rules cannot be met, is a factor to be taken into account. In order to show that despite an inability to meet the requirements of the immigration rules, removal in such a case would nonetheless be disproportionate, the appellant, and the Tribunal must identify other non-standard and particular features of the case, that are of an exceptional nature to show that removal would be disproportionate.

16. In this case, the appellant is unable to meet the requirements of the immigration rules because to qualify under the rules, her husband must either be a British

Citizen, present and settled in the UK, or be in the UK with refugee leave or humanitarian protection. The fair balance required to be struck pursuant to Article 8 between individual interests protected by that provision, and the general public interest typically involves bringing into account certain public interest considerations. In so doing the respondent has, in the rules, made provision for partners of those that are British Citizens present and settled in the UK, or in the UK with refugee leave or humanitarian protection. The categories identified in the rules protect the right to a family life with those who have a lawful basis upon which they may remain in the UK indefinitely. In my judgment the respondent has sought to formulate the requirements of the relevant Rules in such a way as to reflect a fair balance of interests under Article 8, and so the Rules themselves will provide significant evidence about the relevant public interest considerations which should be brought into account, when a Court or Tribunal seeks to strike the proper balance of interests under Article 8 in making its own decision. The gap between the rules, and what Article 8 may require in this case is comparatively narrow, and in my judgment, the weight to be given to the public interest consideration expressed in the rules, is therefore greater.

17. I must also have regard to **ss.117A-117C Nationality, Immigration and Asylum Act 2002** ("the 2002 Act") and in particular to the considerations listed in s117B.

> **117B: Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

That is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

…..

18. In **AM (s117B) Malawi [2015] UKUT 260 (IAC)** the Upper Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either sll7B (2) or (3) of the 2001 Act, whatever the degree of their fluency in English, or the strength of their financial resources. I acknowledge the employment of the appellant and her husband, but the fact that they are both in employment and not a financial burden on the taxpayer gives the appellant no positive right to a grant of leave to remain in the UK.

19. Whilst it is true that the relationship between the appellant and her husband developed when they were both in the UK lawfully, the appellant and her husband entered into their marriage at a time when neither of them had any settled status in the UK. The appellant was in the UK as a student with limited leave to remain, knowing that she might not be permitted to remain in the UK in the long term. The appellant's husband was awaiting a decision upon an outstanding asylum claim and neither the appellant nor her husband could have had any settled expectation that they would be permitted to remain in the UK together, in the long term. Little weight can be given to the private life established by the appellant at a time when her immigration status has been precarious.

20. In my judgment, the fact that the appellant's husband has been granted discretionary leave to remain in the UK cannot of itself, make it unreasonable for him to return to Sri Lanka. Whilst the grant to him of discretionary leave to remain in the UK recognises the delays in making a decision upon his asylum claim, there is no evidence before me that he is at any risk upon return to Sri Lanka and could not return to Sri Lanka, either permanently or for a short period whilst the applicant makes an application for entry clearance. The previous finding of the First-tier Tribunal that the appellant's husband was granted discretionary leave to remain on Article 8 grounds and in light of the delay, on 28th February 2013 has been preserved. I find that any reluctance on the part of the husband to return to Sri Lanka is one of choice rather than an inability to return. I accept the submission made by Mr. Avery that the immigration status of the appellant's husband remains precarious and it cannot be said that the grant of indefinite leave to remain is a foregone conclusion.

21. The appellant states in her witness statement of 10th February 2014 that her mother and father still live in Sri Lanka, and whilst she has not visited them since her arrival in the UK, she has contact with them about once a month. I find that the appellant would have the support of her family in the event that she returned to Sri Lanka, whether for a short period to make an application for entry clearance as a spouse, or in the long term, should the appellant and her husband decide to return to Sri Lanka.

22. In my judgment, the appellant's pregnancy and her reliance upon the support of her husband do not amount to factors that are of a compelling or exceptional nature to show that removal would be disproportionate on Article 8 grounds.

23. Overall, I find that the interference to the appellant's Article 8 right to a family and private life is proportionate to the legitimate public end sought to be achieved.

Notice of Decision

24. The appeal is dismissed.

25. No anonymity direction has been sought and none is made.

Signed Date

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Mandalia