



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/50971/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 8th January 2016**

**Determination
Promulgated
On 1st June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS. ARULCHELVI MANGALESWARAN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms A Everritt; Home Office Presenting Officer
For the Respondent: Ms K Wass; Counsel instructed by Sri Kanth & Co
Solicitors

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Fowell promulgated on 1st July 2015 in which he allowed an

appeal against a decision made by the Secretary of State on 2nd December 2014 to refuse an application made by Mrs Magaleswaran for leave to remain in the UK on the basis of her family and private life in the UK with her husband, Mr Mangaleswaran.

2. The appellant before me, is the Secretary of State for the Home Department and the respondent to this appeal, is Mrs Arulchelvi Mangaleswaran. However for ease of reference, in the course of this decision I shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this decision, refer to Mrs Mangaleswaran as the appellant and the Secretary of State as the respondent.

3. The appellant is a Sri Lankan. The background to the decision of the First-tier Tribunal is set out at paragraphs [2] to [11] of the decision of the First-tier Tribunal. Importantly, at paragraph [8] of his decision the Judge sets out the relevant passage of a previous decision made by Immigration Judge Maciel, following a previous refusal by the respondent of an application made by the appellant in February 2012 for a variation of her leave to remain. Immigration Judge Maciel found that the appellant's husband, a Sri Lankan national, does not have an objectively well founded fear of persecution upon return to Sri Lanka. However, he found that even if the appellant were removed to Sri Lanka, her husband would not return with her. The appellant's husband was emphatic that he would not return to Sri Lanka. Immigration Judge Maciel found that this is not simply a matter of choice as to where the couple will live, but that the appellant's husband will not return to Sri Lanka regardless of whether his wife will have to return on her own, as he holds a subjective fear of return. Immigration Judge Maciel found that refusal to grant the appellant leave to remain amounts to an interference in the couple's right to a family life. Following that decision, the appellant was granted a residence permit on 3rd January 2014 giving her limited leave to remain until 12th October 2014.

4. Notwithstanding his evidence before Immigration Judge Maciel, the appellant's husband did return to Sri Lanka in May 2014 with the appellant. At paragraphs [12] to [15] of his decision, First-tier Tribunal Judge Fowell sets out the evidence heard from the appellant and her husband, and at paragraphs [19] to [24] of the decision, the Judge has set out his findings and conclusions.

The decision of First-tier Tribunal Judge Fowell

5. At paragraphs [19] and [20] of his decision, the Judge notes the proper approach to previous determinations and records that the only circumstance which has altered from the previous appeal hearing is the trip to Sri Lanka that has taken place in May 2014 and that was referred to in the evidence. The Judge accepted the submission made on behalf of the appellant that the events that had occurred in Sri Lanka during that visit bolstered, rather than weakened, the appellant's case.
6. The Judge states at paragraphs [21] to [24] of his decision:

"21. I accept the evidence given by the appellant and her husband and found that they were both credible witnesses. Their accounts were detailed, plausible and mutually supportive. I accept their account of the interviews and other events in Sri Lanka, and I find that Mr Mangalasaran remains subject to the same subjective fear of return.

22. In reaching that conclusion I note the country guidance case of GJ, referred to above. The Upper Tribunal in that case considered evidence that individuals had been ill-treated on return to Sri Lanka but did not accept therefore [sic] that all Tamils are at risk on return. They concluded that the focus of the Sri Lankan government's concern has changed since the civil war ended in May 2009; the LTTE is a spent force and their present objective is to identify Tamil activists in the Diaspora who were working for Tamil separatism and to undermine the government. It noted that if a person is detained by the Sri Lankan security services there remains a real risk of ill treatment or harm

requiring international protection. This is not to say that Mr Mangaleswaran's fear is objectively justified – that is not an issue I need to determine but it does at least lend some colour to his fear, and supports my view that it is genuine rather than affected for the purpose of this appeal.

23. The appellant's legal position has also changed in that on the last occasion her husband had only discretionary leave and so she could not meet the requirements of the Immigration Rules, even if there were insurmountable obstacles to their return to Sri Lanka. Accordingly no finding was made on that that issue. Given the above, and the fact that she would be required to return alone, I find that this must inevitably act as an insurmountable obstacle to continuing her relationship in Sri Lanka.

24. It is not therefore necessary to consider her rights under Article 8 ECHR separately, and there are no compelling circumstances to suggest that the "insurmountable obstacles" test does not properly reflect their rights under Article 8, as required by Secretary of State for the Home Department v SS (Congo) [2015] EWCA Civ 387. For completeness however, if it were necessary to do so, I can see no basis to depart from the previous assessment made and quoted above.

The grounds of appeal and the hearing before me

7. Permission to appeal was granted by First-tier Tribunal Judge Saffer on 30th October 2015. The matter comes before me to consider whether or not the decision of First-tier Tribunal Judge Fowell involved the making of a material error of law, and if so, to re-make the decision.
8. The respondent submits that the Judge appears to have allowed the appeal under paragraph EX.1(b) of Appendix FM of the Immigration Rules having found that there are insurmountable obstacles to the appellant's partner returning to Sri Lanka on the basis that he has a fear of the Sri Lankan authorities. However, both Immigration Judge Maciel, at paragraph [18] of his decision, and First-tier Tribunal Judge

Fowell, at paragraph [22] of his decision, found that the appellant's husband does not have an objectively well-founded fear of persecution upon return to Sri Lanka. The respondent submits that with that in mind, the Judge has failed to give adequate reasons for his finding that there are insurmountable obstacles to the appellant and her husband continuing their relationship together in Sri Lanka.

9. Mrs Everitt submits that whilst the appellant's husband may have a subjective fear of return to Sri Lanka, the fact that he may be unwilling to return to Sri Lanka in the absence of an objectively well-founded fear of persecution, is not enough to amount to insurmountable obstacles that prevent the appellant and her husband from continuing their relationship in Sri Lanka. She submits that the "insurmountable obstacles" test establishes a high threshold and that in this case, there is no evidence that the appellant's husband would now be at risk upon return. She submits that the appellant's husband does not fall within one of the risk categories identified in the country guidance decision of **GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC)**. She submits that the Judge erred at paragraph [22] of his decision that he did not need to determine whether Mr Mangaleswaran's fear is objectively justified and that the appellant's husband's claim that he will not return to Sri Lanka with his wife, is essentially a matter of choice.
10. The appellant has filed a rule 24 response, the content of which was adopted by Ms Wass. She submits that the Judge carefully considered the reasons why the appellant's husband would refuse to return to Sri Lanka and that it was open to the Judge to find that following the events of May 2014, the appellant's husband will not return to Sri Lanka. She submits that the fact that he will not return to Sri Lanka is capable of being an insurmountable obstacle that prevents the appellant and her husband from continuing their relationship in Sri Lanka. In the alternative, she submits that if it were necessary to

determine whether the appellant's husband has a well-founded fear of persecution, I should find that the fear is objectively well founded.

Discussion

11. The issue for me to decide is whether or not the Judge was entitled to conclude that there are insurmountable obstacles to the appellant and her husband continuing their relationship in Sri Lanka.
12. In that respect I follow the guidance of the Court of Appeal in **R & ors (Iran) v SSHD [2005] EWCA Civ 982**. The Court of Appeal held that a finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence. A finding that is "perverse" embraces findings that are irrational or unreasonable in the *Wednesbury* sense, and findings of fact that are wholly unsupported by the evidence. On appeal, the Upper Tribunal should not overturn a judgment at first instance, unless it really could not understand the original judge's thought process when he was making material findings. I apply that guidance to my consideration of the decision in this appeal.
13. I have also had regard to the decision of the Upper Tribunal in **Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 IAC** where it was stated in the head note that:

"Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which the appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge."
14. It is useful to set out the requirements of paragraph EX.1.(b) of Appendix FM insofar as it is material to this appeal.

EX.1. This paragraph applies if

....

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

15. The phrase "insurmountable obstacles" as used in EX1 of the Rules has been described as significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside of the UK. The phrase "used in the Rules" is to be interpreted in a sensible and practical way rather than an overly literal way and in the decision of **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640** it was held that the term "insurmountable obstacles" in provisions such as EX1 are not obstacles which are impossible to surmount and that they concern the practical possibilities of relocation (see *MF (Article 8 - new Rules) Nigeria [2012] UKUT 393* and *Izuazu (Article 8 - new Rules) [2013] UKUT 45*).
16. There is no doubt that the Judge accepted the evidence of the appellant and her husband as to what happened to the appellant's husband when they returned to Sri Lanka in May 2014. The Judge, at paragraph [20] accepted that those events bolstered, rather than weakened, the appellants case and the close interest paid to the appellant's husband had only served to increase his subjective fear.
17. At paragraph [22] the Judge refers to the country guidance decision of **GJ** and appears to accept, as did Immigration Judge Maciel previously, that the appellant's husband has a subjective fear of return to Sri Lanka. However, the Judge did not consider it necessary to determine whether Mr. Mangaleswaran's fear is objectively justified. In my judgement, in failing to determine whether Mr. Mangaleswaran's fear is objectively justified, the Judge erred in law. The appellant and her husband are Sri Lankan nationals. Mr. Mangaleswaran has indefinite leave to remain in

the UK. The entire thrust of the appellant's claim that there are insurmountable obstacles to family life between the appellant and her husband continuing outside the UK appears to have been the fear that her husband has of return to Sri Lanka. Mr. Mangaleswaran clearly has a subjective fear, but whether there are insurmountable obstacles to the family life continuing in Sri Lanka would require an assessment of whether that subjective fear is objectively well founded.

18. The question for the First-tier Tribunal Judge was therefore whether the subjective fear held by the appellant's husband was objectively well founded. Immigration Judge Maciel had previously found, having considered the country guidance case of **GJ** that the appellants husband does not have an objectively well-founded fear of persecution upon return to Sri Lanka. At paragraph [22] of his decision, First-tier Tribunal Judge Fowell appears to proceed upon the basis that the matters referred to in **GJ** provide some support for the account given by the appellant and her husband of the difficulties that the appellant's husband encountered when they returned to Sri Lanka in May 2014. If the husband's fear of return is objectively well founded that is plainly capable of establishing that there are insurmountable obstacles to family life continuing outside the UK. If the husband's fear of return is not objectively well founded, in my judgement the Judge has failed to give any reasons for his conclusion that the appellant would be required to return to Sri Lanka alone, and there are insurmountable obstacles to continuing the relationship in Sri Lanka. The fact that the appellant's husband might again be emphatic that he will not return to Sri Lanka, is not in my judgement enough to establish that there would be very significant difficulties faced by the appellant and her husband in continuing their family life together outside the UK, and which could not be overcome or would entail very serious hardship for the appellant and her husband, as required under EX.1(b).

19. For the above reasons, in my judgement the decision of the First-tier Tribunal to allow the appeal involved the making of an error of law. That decision is set aside.

Re-making the decision

20. Directions were issued to the parties in advance of the hearing before me requiring the parties to prepare for the hearing on the basis that, if the Upper Tribunal decides to set aside the determination of the First-tier Tribunal, any further evidence, including supplementary oral evidence, that the Upper Tribunal may need to consider if it decides to re-make the decision, can be so considered at that hearing. No further evidence was relied upon by the appellant and there was no application made pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.
21. At the hearing before me, Ms Wass submitted that I should find that the appellant's husband has an objectively well-founded fear of return to Sri Lanka such that there are insurmountable obstacles to the couple continuing their relationship in Sri Lanka.
22. In remaking the decision, I have had regard to the evidence that is set out at paragraphs [13] to [14] of the decision of the First-tier Tribunal Judge and his finding at paragraph [21] that both the appellant and her husband are credible witnesses and accepting their account of events in May 2014.
23. **GJ and Others (Post civil war returnees)** has established that the focus of the Sri Lankan government's concern has changed since the civil war ended in May 2009 and that the government's present objective is to identify Tamil activists in the diaspora who were working for Tamil separatism and to destabilise the unitary Sri Lankan state. It was also accepted that the risk for those in whom the Sri Lankan authorities were interested, existed not necessarily at the airport but

after the arrival in their home area where their arrival would be verified by the CID or police within days. That said, the head note of **GJ** confirms that individuals who are perceived to be a threat to the integrity of Sri Lanka as a single state because they are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora were those who would be at risk. The Sri Lankan authorities' approach is based on the sophisticated intelligence basis to activities within Sri Lanka and in the diaspora and they are aware that many Sri Lankans travel abroad as economic migrants.

24. The appellant and her husband were interviewed at the airport when they returned in May 2014. The appellant was interviewed for about 15 minutes and her husband for about an hour. The army had attended the appellant's mother-in-law's house to look for them and her mother-in-law had paid a bribe for the soldiers to go away. The appellant and her husband had travelled to India with her mother-in-law and encountered no problems in leaving, but when they returned a few days later, the three of them were interviewed again. The appellant's husband had said that if they called him for interview, he would attend, and they allowed him to go. The appellant and her husband gave the same address as previously. They left for the UK the following day. At the airport the appellant's husband was asked if he would be returning, and he said yes, because of his mother's illness, and so they let them go.

25. I have had regard to the risk categories identified in **CG** and considered whether there is anything within the additional evidence arising from the events of May 2014 that undermine the previous finding of Immigration Judge Maciel that the appellant's husband does not have an objective fear of persecution upon return to Sri Lanka. The head note in **CG** identifies the risk categories:

(7) The current categories of persons at real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise, are:

(a) Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have a significant role in relation to post- conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka.

(b) Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who are associated with publications critical of the Sri Lankan government.

(c) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.

(d) A person whose name appears on a computerised “stop” list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a “stop” list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.

(8) The Sri Lankan authorities’ approach is based on sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora. The Sri Lankan authorities know that many Sri Lankan Tamils travelled abroad as economic migrants and also that everyone in the Northern Province had some level of involvement with the LTTE during the civil war. In post-conflict Sri Lanka, an individual’s past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan Government.

(9) The authorities maintain a computerised intelligence-led “watch” list. A person whose name appears on a “watch” list is not reasonably likely

to be detained at the airport but will be monitored by the security services after his or her return. If that monitoring does not indicate that such a person is a Tamil activist working to destabilise the unitary Sri Lankan state or revive the internal armed conflict, the individual in question is not, in general, reasonably likely to be detained by the security forces. That will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual.

26. I have noted above the evidence that has been accepted regarding the appellant and her husband. The events of May 2014 post-date the decision of Immigration Judge Maciel and so I am not bound by his finding that the appellant's husband does not have an objective fear of persecution upon return to Sri Lanka. Even so, and having carefully considered the appellant and her husband's account of events in my judgement, there is nothing in the events of May 2014 that brings the appellant's husband into one of the risk categories identified.
27. The appellant's husband is not, or is not perceived to be a threat to the integrity of Sri Lanka as a single state because he is, or is perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka. The appellant's husband is not a person whose name appears on a computerised "stop" list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Whilst he was stopped at the airport, he was not handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant. There is no suggestion that he is a present risk to the unitary Sri Lankan state or the Sri Lankan Government
28. In May 2014 both the appellant and her husband were released at the airport. If the appellant's husband was monitored, there is no evidence that he is a Tamil activist working to destabilise the unitary Sri Lankan state or revive the internal armed conflict. In my judgement, given his

profile and background the appellant's husband is not therefore, in general, reasonably likely to be detained by the security forces.

29. It follows that in my judgement, the appellant's husband does not have a well-founded objective fear of return to Sri Lanka. What remains is his claim that he will not return to Sri Lanka with his wife.
30. The immigration rules embrace a wide spectrum of status in the word 'settled': it includes both British citizens living in the UK and nationals of other countries who have indefinite leave to enter or remain here. There can be a world of difference, depending on the particular case, between expecting a foreign national, albeit now settled here, to return with his family to his country, and for example expecting a British citizen who has lived here all of his life and has an inalienable right of abode here, to live and work and find accommodation in a foreign country or forfeit his marriage. In the absence of a well-founded fear of return to Sri Lanka on the part of the appellant's husband, there is nothing to establish the very significant difficulties which would be faced by the appellant and her husband continuing their family life together outside the UK, and which could not be overcome or would entail very serious hardship for the appellant or her husband.
31. Having found that the appellant cannot succeed in her Article 8 claim under the immigration rules, I remind myself that the Tribunal must identify other non-standard and particular features of the case, that are of an exceptional nature to justify an assessment of the Article 8 claim outwith the rules: **SS (Congo) -v- SSHD [2015] EWCA Civ 387**. In my judgement, there are no compelling or exceptional circumstances that I have not already considered, to suggest that the "insurmountable obstacles" test does not properly reflect the appellant and her husband's rights under Article 8 ECHR.
32. Accordingly the appeal is dismissed under the Immigration Rules and on Article 8 grounds.

Notice of Decision

- 33. The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside.
- 34. The appeal is dismissed under the Immigration Rules and on Article 8 grounds.
- 35. No anonymity direction is made.

Signed **Deputy Upper Tribunal Judge Mandalia** Date 1st June 2016

TO THE RESPONDENT

FEE AWARD

As I have set aside the decision of the First-tier Tribunal and dismissed the appeal, there can be no fee award

Signed **Deputy Upper Tribunal Judge Mandalia**