Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09045/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 May 2014	**On 2 June 2014**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KAMAL GAMINI ARUNAPRIYA PUWAKWATTA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Vidhyadharan
For the Respondent: Mr I Palmer

DETERMINATION AND REASONS

1. This is a resumed hearing of the Secretary of State's appeal against the decision of a First-tier Tribunal Judge dismissing the respondent's appeal under the Immigration Rules but allowing it under Article 8 ECHR.

2. For ease of reference the parties are hereafter referred to as they were in the First-tier Tribunal so that Mr Puwakwatta is the appellant and the Secretary of State for the Home Department is the respondent.

Background

3. The appellant is a citizen of Sri Lanka who applied on 24 October 2012 for variation of his leave to remain in the United Kingdom. The application was refused and he appealed the decision. A removal decision was also made by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006 but that was not a decision made in accordance with the law and fell away.

4. The respondent sought permission to appeal the decision allowing the appeal under Article 8. At an error of law hearing before me on 11 February 2014 I found that the First-tier Tribunal Judge failed to reason properly her determination on the Article 8 issue and this amounted to a material error of law. A written decision to that effect was served on the parties. The resumed hearing took place before me on 7 May 2014.

The Resumed Hearing

5. Before me I had all the documentation that was before the First-tier Tribunal Judge. In addition a further bundle was produced numbered 1–56 and also a skeleton argument filed on behalf of the appellant.

6. The appellant gave evidence in English and confirmed the truth of his two statements on the court file. Ms Vidhyadharan then cross-examined him. Either because he did not understand or he was being obfuscatory it took a number of questions put in different ways before the appellant accepted that he made the application for further leave to remain as his wife's dependant in December 2010 even though he was already in a relationship with his current partner Ms Shah before that date in April 2010. He was asked whether he thought that was a dishonest application but he did not agree that it was. He had entered into an arranged marriage which did not work and the relationship fell apart. He was confused and did not know what to do and he became mentally ill through all the stress. Ms Shah was the only person who helped him. He did not think it was a problem if he did not tell the Home Office about his change of circumstances. He did not know he had to inform them but appeared to accept that he had applied merely so that he could stay in the United Kingdom with Ms Shah. The up-to-date position is that the decree nisi of divorce has been pronounced and the application for the decree absolute will be able to be lodged in approximately 6 weeks. (It appears from a discussion with counsel that there were difficulties with service of the divorce petition on the appellant's wife as the appellant did not know where she was living. However, an acknowledgment of service was received dated 5 February 2014 and after that the petition was able to proceed.)

7. In further cross-examination the appellant said that his partner's mother is 80 or even older than that. She has other family members living in north London. Although the First-tier Tribunal Judge's determination recorded that the sponsor is not her mother's primary carer she has always been

her carer although there were a couple of ladies who helped. Ms Shah makes daily visits and takes her mother out in the car and to go shopping. It is still the case that Ms Shah does not see her son. Ms Shah is some ten years older than the appellant. Just the two of them live together. Ms Shah has a brother who is a very busy man. Occasionally he visits his mother late in the evenings after his shop closes. The appellant himself has an uncle here but has not seen him for approximately three years.

8. There was no re-examination. I elicited from the appellant that his mother lives in Sri Lanka as does his younger sister who is married and lives there also. His other sister lives in Australia.

9. I heard evidence from Leena Shah who filed two witness statements and confirmed their contents to be true. Cross-examined by Ms Vidhyadharan Ms Shah said that the appellant has applied for his divorce and that she was in a relationship with him when he applied with his wife to stay as her spouse. Ms Shah accepted that the appellant made the application to enable his relationship with her to continue. She applied for him because she did not want to lose him. She confirmed her mother's age to be 80 and that her brother lives in another town and visits once or twice per month. Her mother had carers but the situation has now changed. Her carers were not looking after her mother properly as she is now getting older. A new carer would be employed if a suitable one could be found. She confirmed that the appellant has an uncle in the UK but she has not met him because the appellant and he do not get along. The appellant has family in Sri Lanka being a mother and sister "and other family".

10. Re-examined by Mr Palmer Ms Shah said that her brother lives in Southgate and her mother in Harrow. By the time the application was made to remain the appellant's wife had already left home. Ms Shah's brother owns a shop which is open seven days a week. He works from nine to five and on Sundays for half a day. She has not approached the council for help with looking after her mother as she does not want anyone else to help her. Ms Shah prepares food for her. Her mother's health is deteriorating. Ms Shah's father died in September 2012. Ms Shah also said that it is difficult having a carer from another community. They do not eat the same food and her mother does not speak English.

11. I heard submissions from both representatives. I noted them and have taken them into account in arriving at my decision.

My Findings

12. I heard oral evidence from the appellant and Ms Shah. I have considered their statements, their cross-examination, the submissions and the skeleton argument. In general the facts in this appeal are not in dispute in any major way. There were small differences between the evidence given by the appellant and Ms Shah but nothing of major importance. For instance, the appellant said that Ms Shah's brother works until late during the week – this being the reason given that he is unable to help look after

his mother - whereas Ms Shah said that he works 9-5 which does not suggest to me that he does work late.

13. I was unimpressed by Ms Shah's comments regarding the lack of help for her mother and the reasons given as to why she no longer has the two carers that she did have. Her mother's reported reluctance to have anyone else care for her who does not speak her language and prepare her food in the way she wishes supports the argument that Ms Shah could not go to Sri Lanka with the appellant because her mother needs her here as her primary carer. Of course I am able to understand that she would like Ms Shah to be with her constantly to meet her needs and I can understand also that Ms Shah wishes to be with her mother but that is far away from the situation where Ms Shah is the only person who can look after her to the exclusion of others. I would need a lot of persuasion on much better evidence than I have heard before concluding that Ms Shah is her mother's primary carer out of necessity rather than choice. Her mother is not in good health and needs help with certain tasks but appears to have a degree of independence. Ms Shah works approximately 36 hours per week according to her payslips and during that time I assume that her mother looks after herself. If Ms Shah were not available others would help care for her mother.

14. On other matters the appellant and Ms Shah are now aged 39 years and 50 respectively. They are both in good health. Ms Shah arrived in the UK in 1976, is divorced, has a grown-up son with whom she has no contact, and she has lived with the appellant since March 2012. The appellant is a Sri Lankan national who first arrived in the UK as a student in January 2001. It appears from the documentation, although I am not sure about it, that he remained here with some form of leave until he returned to Sri Lanka to marry Ms Perera in February 2008 in Colombo. He then returned to the UK leaving his wife in Sri Lanka but went back there in May 2009 returning to the UK in October 2009 as a dependent of his wife who herself obtained entry clearance as a student. It is not clear to me for what reason the appellant was refused a visa in February 2009, as is recorded in his application form, but in any event he subsequently obtained entry clearance.

15. According to the appellant his arranged marriage to Ms Perera was in trouble from the start. Shortly after returning to the UK in October 2009 he met Ms Shah in April 2010 and their relationship began. The appellant's wife moved out of the matrimonial home towards the end of 2011 and she and the appellant finally separated by the end of February/March 2012. Thereafter he moved into Ms Shah's property in March 2012.

16. It is not denied that by the time the application was made for the appellant to be included as a dependent spouse on Ms Perera's application of 10 December 2010 his marriage to her had already failed. It is reasonable to assume that the request for further leave was granted on the basis of false representations having been made in the application. On the basis that

the appellant represented that his marriage was still subsisting leave was granted until 21 January 2013.

17. Before the appellant's further leave expired he applied on 24 October 2012 for leave to remain as the unmarried partner of Ms Shah and it is that application which was refused and is the subject of this appeal.

18. It is common ground that the appellant cannot meet the requirements of the Immigration Rules. In essence the appellant cannot show that he is a partner within the meaning of Appendix FM and he does not fall within paragraph 276ADE of the Immigration Rules (Private Life). I am satisfied from the oral and written evidence that the appellant and Ms Shah are in a subsisting relationship and that they are living together.

19. There are no children involved. Ms Shah cares for her mother but as at the date of the hearing although her mother is suffering from a number of problems she is able to live on her own. She had carers helping her but, for whatever reason, they no longer do so. Ms Shah states that she is her mother's primary carer and that her brother is too busy to help look after his mother. From the evidence given I conclude that it must be the case that Ms Shah indeed helps her mother as no doubt any loving daughter would help an elderly relative but that she does not look after her full-time because she herself works as a Mayoral Assistant. If her mother's health were to fail to a greater degree then it may only be possible for her to be hospitalised or become resident in a care home, and that would be with or without Ms Shah's help.

20. In considering the requirements to be met by the appellant for leave to remain on the ground of private life as per paragraph 276ADE and Appendix FM of the Immigration Rules the case law, including **R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin),** shows that the Immigration Rules were amended in 2012 to address more explicitly the factors according to domestic and Strasbourg case law weighing in favour of or against a claim by a foreign national based on Article 8 ECHR to remain in the United Kingdom. The amendments were introduced with the intention to align the Immigration Rules more closely with the approach to be taken under Article 8 and to unify consideration under the Rules of Article 8 and Section 55 of the Borders, Citizenship and Immigration Act 2009 which deals with the welfare of children, where there are any. Instructions were issued by the Secretary of State regarding the approach to be applied by officials in deciding to grant leave to remain outside the Rules. Those instructions were that if the Rules are not met it will be appropriate normally to refuse the application but leave can be granted where exceptional circumstances in the sense of "unjustifiably harsh consequences" for the individual would result. As Sales J stated the residual discretion "fully accommodate[ed] the requirements of Article 8".

21. In **Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558** paragraph 40 states:-

> "40. I, however, consider that the FTT Judge did err in his approach to Article 8. This is because he did not consider Mr Haleemudeen's case for remaining in the United Kingdom on the basis of his private and family life against the Secretary of State's policy as contained in Appendix FM and Rule 276ADE of the Immigration Rules. These new provisions in the Immigration Rules are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Overall the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it had previously been. The new Rules require stronger bonds with the United Kingdom before leave will be given under them. The features of the policy contained in the Rules include the requirements of twenty year residence, that the applicant's partner be a British citizen in the United Kingdom, settled here, or here with leave as a refugee or humanitarian protection, and that where the basis of the application rests on the applicant's children that they have been residents for seven years."

And at 43:-

> "43. In **Nagre's** case Sales J stated (at [26] and [29]) that it is necessary to find 'particular factors in individual cases … of especially compelling force in favour of a grant of leave to remain' even though those factors are not fully reflected in and dealt with in the new Rules and 'to consider whether there are compelling circumstances not sufficiently recognised under the new Rules to require the grant of such leave'. In **MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192**, albeit in the context of deportation and Article 8, this court stated (at [44]) that the Rules are 'a complete code', and that the provision in paragraph 398(c) that where the exceptions to mandatory deportation in paragraphs 399 and 399A do not apply, 'it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors' involves the application of a proportionality test as required by the Strasbourg jurisprudence."

22. I turn to look at Article 8 ECHR and have considered the decision of the House of Lords in **Huang v SSHD [2007] UKHL 11**. There the House of Lords reaffirmed the analysis given in **Razgar, R (on the application of) v SSHD [2004] UKHL 27** and also reaffirmed the importance of continuing reliance on established Strasbourg jurisprudence relating to Article 8. I have taken the step by step approach in Razgar. The proposed removal will be an interference with the exercise of the appellant's right to respect for his private life and his family life with Ms Shah and this engages the operation of Article 8. It is not in issue that the interference is in accordance with the law and is necessary in the interests of

immigration control. Although not a legitimate end in itself it is a well established means of protecting the economic wellbeing of the country. I therefore proceed to consider whether the interference is proportionate to the legitimate public end sought to be achieved and it is for the respondent to show this.

23. According to the appellant's statement he has been a student in the United Kingdom since 2001. He had or should have had no expectation as a student that he would be entitled to remain here after the conclusion of his studies. He had or should have had no expectation that if his marriage foundered in its early stages, as in fact it did, that he would be allowed to remain to pursue another relationship.

24. When the appellant arrived with leave in 2009 following his marriage it was already in trouble. He, with Ms Shah's help, made an application for further leave based on the appellant's continuing marriage with Ms Perera. Ms Shah in evidence said that this was done because she did not want to lose him. I find that the appellant would have been perfectly aware that if the true circumstances about the state of his marriage had been known at the time he sought further leave he would not have been able to remain here. That is because the whole basis of his application for leave was his continuing dependency upon the leave granted to his wife. I find further that if his relationship with Ms Shah was by then sufficiently established he should have returned to Sri Lanka and made an application from there. The passage of time has enabled their relationship to develop and they are living together. I have little doubt that it is a genuine relationship and that they wish to continue to cohabit and may wish to marry in due course. The appellant is employed as a Clinical Support worker in the NHS. I take all of this into account.

25. There are no particular difficulties for the appellant to return to Sri Lanka. His mother and sister live there. There is no good reason why he should not return to live there and find a job. Ms Shah could apply to return there with him. Any such application would be subject to the Sri Lankan immigration laws as far as Ms Shah is concerned, presumably.

26. I understand that Ms Shah wishes to be close to her mother in her mother's later years and with her declining health. Doubtless her mother would wish her to remain here also and receive the benefit of her daughter's attentions and that it would affect her adversely if her daughter were to leave the country. For those reasons it is therefore much more likely in my finding that if the appellant left the country Ms Shah would not go with him. However, sometimes hard choices have to be made. It would not seem impossible for Ms Shah to travel to Sri Lanka to visit the appellant. He would be free to make an application to rejoin Ms Shah in this country and if he then met the requirements of the Rules he would be able to do so.

27. The case of **Chikwamba** (**Chikwamba v Secretary for the Home Department [2008} UKHL 40**) is not one that can properly be argued

supports the appellant's claim to be able to succeed under Article 8. In that appeal the female applicant failed in her asylum claim but on account of the conditions in Zimbabwe at the time removals of failed asylum seekers to that country were temporarily suspended. While in this country in that state of limbo the applicant married a Zimbabwean national who had been granted asylum and, accordingly, he had the right to remain. This was a genuine marriage and a daughter was born to the appellant and her husband. After the lifting of the suspension of forced removals the question arose as to whether the appellant, presumably with her very young daughter, should be required to return to Zimbabwe in order to apply from there for permission to come to the United Kingdom in order to resume her life with her husband. As was said in that case it ought to have been accepted that the applicant's husband could not be expected to return to Zimbabwe, that the applicant could not be expected to leave her child behind or perhaps return to Zimbabwe with her to endure "harsh and unpalatable" conditions, and if she were to be returned to that country she would have every prospect of succeeding in an application made for permission to re-enter and remain in the United Kingdom with her husband.

28. The circumstances in the current appeal are very different as must be apparent from the facts that have been found and are set out above.

29. As was said in **Chikwamba** generally speaking would-be immigrants who desire to remain permanently should apply for permission to do so before coming here. Although the appellant was entitled to come here as the dependent of his wife he was less than frank about the failure of that marriage when applying for further leave on the basis of his continuing marriage and leave was granted on the basis that it was continuing. He should have returned to Sri Lanka to make his application to join Ms Shah from there. It is not in my finding in the particular circumstances of this case disproportionate to require the appellant to leave the United Kingdom now to make such an application which may or may not succeed. If he now meets the requirements of the Rules then any such application will succeed. If he is not successful I take into account that there are no children involved. Although there would be undoubted difficulties for the relationship to continue they are not such that they cannot be overcome either by Ms Shah joining the appellant in Sri Lanka, or by visits, however unsatisfactory that may be in the shorter term. Such visits would presumably last until the appellant's application to return here is successful or Ms Shah's family circumstances in the UK change at some time in the future to enable her to join the appellant in Sri Lanka on a permanent basis.

30. All these matters are in the balance. On the particular facts and weighing the appellant's human rights against the public interest as codified in the Immigration Rules I find that this is not one of the exceptional cases where the appellant's rights and the rights of others who are affected by the decision lead me to conclude that there would be a disproportionate interference in the appellant's family and private life by refusing this

appeal. This is for the reasons set out earlier in this determination. Therefore the appeal fails.

Decision

31. For the above reasons this appeal is dismissed under the Immigration Rules and under Article 8 ECHR.

32. There has been no anonymity direction thus far and given the circumstances of this appeal I see no good reason to make such a direction now.

Signed Date

Upper Tribunal Judge Pinkerton