



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/13673/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 16 April 2014

Determination Promulgated  
On 12 May 2014  
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Before

UPPER TRIBUNAL JUDGE STOREY

Between

ENTRY CLEARANCE OFFICER, COLOMBO

Appellant

and

REGA RATHNAVEL

Respondent

**Representation:**

For the Appellant: Mr T Melvin, Home Office Presenting Officer  
For the Respondent: Miss A Benfield, Tamil Relief Centre

**DETERMINATION AND REASONS**

1. The appellant (hereafter the Entry Clearance Officer or ECO) appeals with permission against the determination of First-tier Tribunal (FtJ) Judge Harris sent on 18 February 2014 allowing the appeal of the respondent (hereafter the claimant)

protesting the decision of the ECO dated 17 May 2013 refusing to grant entry clearance as a spouse.

### **Immigration Rules**

2. The FtT judge first considered that the claimant could not meet in full the financial requirement of the Immigration Rules under paragraph EC-P.1.(d) of Appendix FM (E-ECP.3.1). There was no reply from the claimant disputing this aspect of the judge's decision nor did Miss Benfield seek to pursue it before me. As the appeal to the FtT was against an ECO decision, it was governed by S.85A of the Nationality, Immigration and Asylum Act 2002 and as such the judge was obliged to consider how matters stood at the date of decision in May 2013 and at that time it was manifest that the claimant had not met the financial requirements. Hence the only issue concerns the judge's decision to allow the appeal on Article 8 grounds.

### **Article 8**

3. The reasons given by the FtT Judge for allowing the claimant's appeal on Article 8 grounds were essentially that the claimant and her husband had a genuine and subsisting marriage, that they intended to live together permanently in the UK and that as the sponsor had refugee status there were insurmountable obstacles to him relocating to Sri Lanka.
4. It is argued by the ECO in the grounds that the judge failed to apply properly the guidance set out by the Upper Tribunal in **Gulshun (Article 8 - new rules - correct approach) [2013] UKUT 00640** and had not applied the correct criterion when considering whether outside the Rules there were compelling circumstances not sufficiently recognised under them. Mr Melvin also submitted that it was observable that the judge had effectively reduced the proportionality assessment to the issue of insurmountable obstacles.
5. Whilst criticisms can be made of the FtT Judge's proportionality assessment, I consider this to be a case in which great weight needs to be accorded to the guidance given by the Court of Appeal in **MF (Nigeria) [2013] EWCA Civ 1192**, in particular the emphasis placed by the court in this judgment on substance as opposed to form. The court made clear that what matters is not so much whether there is consideration of Article 8 inside or outside the Rules or under a mixture of both but rather whether the decision-maker has conducted a substantive assessment taking into account all relevant elements of the claim. Whilst the judge did not in terms apply the language in **Gulshun** and the criterion of exceptional or compelling circumstances, I am satisfied that his approach fulfilled that requirement. The claimant was the spouse of a refugee and if she and he had been better advised could have made an application under paragraph 352D, a rule which imposed no financial requirements on the applicant. Although Mr Melvin is right the FtT Judge did not expressly consider the longevity of the couple's relationship, it is clear that the judge knew and accepted that they had met in October 2011, had married (in Italy) in February 2012 and that

they were in a genuine and subsisting relationship which they intended to maintain permanently. Put another way, the judge accepted that they enjoyed a strong family life. It is true that Strasbourg jurisprudence recognises that it is legitimate for a contracting state to apply Immigration Rules that impose financial requirements on couples, but equally that jurisprudence recognises that the balancing exercise is a fact-specific one and it is clear that the judge was quite satisfied that the sponsor could accommodate and provide for his spouse, the sponsor having earned in six months of self-employment the equivalent of £23,734 per annum (paragraph 22).

6. Mr Melvin has argued that the judge effectively reduced the proportionality assessment to a consideration of insurmountable obstacles, but the judge's language at paragraph 44 indicates that he had considered relevant factors in the round – see paragraph 44 – and that factors other than insurmountable obstacles were addressed.
7. Mr Melvin highlighted the point raised in the written grounds that the judge himself had noted it was open to the claimant to make a fresh application as soon as the sponsor met the financial requirements, but then seemed to ignore it. Once again, the text indicates otherwise. The judge certainly weighed this factor against the claimant (paragraphs 37-38) but clearly concluded it was not decisive.
8. I remind myself that it is only open to me to interfere with a FtT decision if it contains a material error of law; my task is not to consider whether the decision was necessarily one that another judge would have come to. The judge's decision, although open to some degree of criticism, evinces a substantive consideration of relevant factors weighing for and against the claimant and for the above reasons is not vitiated by legal error.
9. The FtT judge did not err in law and his decision to allow the appeal on Article 8 grounds shall stand.

Signed

Date

Upper Tribunal Judge Storey