Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/19819/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
On 20 January 2015	**On 21 January 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

ENTRY CLEARANCE OFFICER

Appellant

and

PONNUTHURAI SIVANTHAN

Respondent

Representation:
For the Appellant: Mrs M O'Brien, Senior Home Office Presenting Officer
For the Respondent: Mr T D Ruddy, of Jain, Neil & Ruddy, Solicitors

DETERMINATION AND REASONS

1. The parties are as described above, but the rest of this determination refers to them as they were in the First-tier Tribunal.

2. The appellant is a citizen of Sri Lanka and a refugee in Germany. He applied to enter the UK as the spouse of a refugee under Part 11 of the Immigration Rules. The ECO refused that application for the following reasons:

    (i) his wife is a UK citizen and does not have refugee status;

(ii) there was insufficient evidence of maintaining a family unit with his wife and two children (both also lawfully in the UK), and the children are adults;

(iii) there were doubts whether marriage is subsisting;

(iv) there is no provision under the European Agreement on the Transfer of Responsibility for Refugees (EATRR) for transfer of status;

(v) the appellant sought exercise of discretion in his favour, but had not applied under the Immigration Rules as a spouse; and

(vi) the outcome was proportionate under Article 8 of the ECHR.

3. The findings made on appeal by First-tier Tribunal Judge Quigley in her determination promulgated on 17 July 2014 may be summarised thus:

(i) despite some problems with the evidence, the appellant did have an ongoing relationship with his wife and children;

(ii) he was left in limbo;

(iii) he had made a spouse application;

(iv) the respondent always had a discretion outside the Rules;

(v) there was a good arguable case outside the Rules;

(vi) the family was broken up for reasons outside its control; and

(vii) the interference for purposes of effective immigration control was disproportionate.

She dismissed the appeal under the Rules but allowed it under Article 8 of the ECHR.

4. The ECO's grounds of appeal to the Upper Tribunal are along these lines:

(i) the Judge erred by allowing the appeal on an Article 8 standalone basis and failing to have regard to the Rules when making the Article 8 assessment;

(ii) there were no arguably good grounds for leave outside the Rules, and no compelling circumstances not sufficiently recognised under the Rules;

(iii) there was no family life for Article 8 purposes among the appellant and his adult sons, there being no evidence of anything more than the normal emotional ties;

(iv) the appellant could apply for entry clearance as a spouse under Appendix FM of the Rules;

(v) the appellant's wife could travel between the UK and Germany as she wishes;

(vi) if the Judge had properly directed herself, she would have dismissed the appeal.

5. First-tier Tribunal Judge Chohan granted permission to appeal, observing that the Judge did not appear to have considered why the appellant could not apply as a spouse under the Rules.

6. *Submissions for ECO*. The application under paragraph 352A of the Rules was bound to fail on the simple point that the appellant's wife does not have refugee status. It is now trite law that examination of Article 8 must begin with the Rules, which in this case means the Rules for admission of spouses [Appendix FM, not Part 11]. Those provisions are compliant with Article 8 for almost all cases. The determination ignores those provisions entirely. The Judge was bound to examine that before she could even consider going outside the Rules. In the light of ground (i), the Judge had no reason to embark upon a freestanding proportionality assessment, and ground (ii) was not just disagreement. There was also a lack of reasoning for taking relations with the two adult sons into account. The ECO's decision did not interfere with the *status quo* of family life between husband and wife. As an EU citizen she could spend as much time with him in Germany as she chose. It would not have been possible for the Judge to apply the correct Rule to the facts because the appellant did not bring evidence of the relevant facts. It seemed likely there would be difficulties over the financial tests. There was no information about the English language requirement. The case had sympathetic aspects but even at highest it did not justify going outside the Rules, as compared with *MM* [2014] EWCA Civ 985. The determination should be reversed.

7. *Submissions for appellant*. It was (correctly) acknowledged that Part 11 of the Rules and the EATRR had been incorrectly pursued by previous agents, and offered no assistance to the appellant. However, the Judge did refer to the Rules, for example at paragraphs 14 -15. The Judge had not been concerned only with the sympathetic aspects of the case but had dealt with the facts before her. Although the ECO had doubted the subsistence of the marriage the Judge found overwhelmingly in favour of the appellant, for good reasons which were not now criticised. Paragraphs 24 and 25 of *Kugathas* [2003] EWCA Civ 31 (which underlies the ECO's ground (ii)) should be read together:

> 24. There is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life.
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> 25. Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless

> something more exists than normal emotional ties: see S v United Kingdom [1984] 40 DR 196 and Abdulaziz, Cabales and Balkandali v United Kingdom [1985] 7 EHRR 471. Such ties might exist if the appellant were dependent on his family or *vice versa*. It is not, however, essential that the members of the family should be in the same country. The Secretary of State accepts that that possibility may exist, although in my judgment it will probably be exceptional. Accordingly there is no absolute rule that there must be family life in the United Kingdom, as the Immigration Appeal Tribunal held.

This case showed a stronger set of circumstances than *Kugathas*. The Presenting Officer in the First-tier Tribunal had not argued that the Judge should not assess the case according to the criteria of Article 8. While the requirements of Appendix FM had not been addressed, the appellant's wife works only part-time and it does not seem that the financial requirements could be met. The lack of reference to those requirements in the determination was not significant to the outcome. All the findings were in the appellant's favour so there was nothing to weigh against him. The determination should stand.

8. I reserved my determination.

9. Appendix FM of the Rules begins with this:

> Purpose
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> GEN.1.1. This route is for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British Citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection (and the applicant cannot seek leave to enter or remain in the UK as their family member under Part 11 of these rules). It sets out the requirements to be met and, in considering applications under this route, it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others (and in doing so also reflects the relevant public interest considerations as set out in Part 5A of the Nationality, Immigration and Asylum Act 2002). …

10. That general provision has to be read in light of the subsequent jurisprudence. Perhaps most pertinent in this case is that in *MM* the Court of Appeal held that the financial requirements in the Rules did interfere significantly with Article 8 rights, but that the Rules struck a fair balance in that respect, with which the Court was not entitled to interfere.

11. In this case the Judge appears to have thought that the appellant had applied as a spouse, rather than for refugee family reunion, and to have failed to appreciate clearly that there are distinct provisions in the Rules (see paragraphs 28 – 29). The appellant does not now contend that he should have succeeded based on the Rule under which he applied. The Judge appears also to have become confused between matters of discretion outside the Rules (over which the First-tier Tribunal and Upper Tribunal have no jurisdiction; s. 86(6) 2002 Act) and the interaction of Article 8 of the

ECHR with the Rules (see again paragraph 29). The grounds of appeal are correct to point out that any Article 8 assessment must begin with the Rules. The appellant had not made the relevant application, although that option was pointed out by the ECO, and he did not try to bring his case on appeal within the Rules for entry of spouses. That omission is key. Unless and until he has measured his case according to the Rules, the appellant cannot say why he ought to succeed notwithstanding the Rules. Once he reaches that stage, he has to show why notwithstanding the Rules including GEN.1.1 and in light of subsequent jurisprudence his case is one where the Rules do not lawfully strike the balance.

12. The Judge erred in her legal approach. Although Mr Ruddy did his best to argue that the Article 8 consideration could stand on its own, the errors were material. For example, the determination does not look at the question of why the financial and English language requirements of the Rules might be ignored.

13. In remaking the decision, this is not a case where relations between the appellant and his adult children go beyond those usually to be expected. The relationship which is involved for Article 8 purposes is between husband and wife. The decision means that they cannot live together permanently in the UK but it does not alter the present situation, does not prevent visits and does not prevent the wife from spending as much time with her husband in Germany as she chooses. The case has a sympathetic aspect but so do all situations where family members live apart wholly or partly because of the Rules. However the test is expressed, and whether it presents one or two stages, the facts of this case are not such that Article 8 requires the grant of entry clearance to settle as a spouse notwithstanding the provisions of the Rules established to govern such situations.

14. The determination of the First-tier Tribunal is **set aside**. The following determination is substituted: the appellant's appeal, as originally brought to the First-tier Tribunal, is **dismissed**.

15. No anonymity direction has been requested or made.

21 January 2015
Upper Tribunal Judge Macleman