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

Aswatte (fiancé(e)s of refugees) Sri Lanka [2011] UKUT 0476 (IAC)

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
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| **On 2 November 2011** | ..... |

**Before**

**UPPER TRIBUNAL JUDGE JARVIS**

**Between**

**ENTRY CLEARANCE OFFICER, CHENNAI**

Appellant

**ERANDATHI LAKMINI CHANDRASENA ASWATTE**

Respondent

**Representation :**

For the Appellant: Mr S Kandola, Senior Home Office Presenting Officer

For the Respondent: Mr J Martin of Counsel, instructed by Kanaga Solicitors

1. The Immigration Rules make no provision for the admission of fiancé(e)s of refugees who are in the United Kingdom with limited leave. In FH (Post-flight spouses) Iran [2010] UKUT 275 (IAC), the Upper Tribunal found that the spouse of a refugee with limited leave was in an unjustifiably worse position than the spouses of students, businessmen etc, where the immigration rules make provision for a spouse to enter with limited leave. Unlike such persons, the refugee could not return home to enjoy married life there.

2. By the same token, a refugee cannot return home in order to marry the fiancé(e) and it may be unreasonable to expect the couple to marry in a third country. Where that is the case, and where all the requirements of paragraph 290 of the rules are met, save that relating to settlement, it is unlikely that it will be proportionate to refuse the admission of the fiancé(e).

**DETERMINATION AND REASONS**

**Introduction**

1.

The appellant appeals the determination of Immigration Judge Kanagaratnam issued on 29 December 2010, when Mr Martin appeared for the respondent before the First-tier Tribunal and the appellant was unrepresented, in which the Immigration Judge allowed the appeal, finding that the respondent before the First-tier Tribunal had shown to the balance of probabilities that the requirements of the rules had been met, albeit that was not a 'live' issue for him to decide as the ambit of the appeal was limited to human rights and race relations under section 84(1)(b) and (c) of the Nationality, Immigration and Asylum Act 2002 given that this was not a family visit. He also decided that because the appeal had succeeded under the immigration rules the decision to exclude breached the appellant's human rights under Article 8 ECHR (paragraph 6 of the determination).

2.
The respondent a citizen of Sri Lanka whose date of birth is given as 17 September 1973, appealed the decision of the appellant made on 1 July 2010 to refuse, without interview, leave to enter the United Kingdom ("UK") as a Marriage Visitor in order to marry her fiancé, Ranjith Gunathilake, also a Sri Lankan national, who is recognised as a refugee in the United Kingdom ("UK") where he has limited leave to remain until 2013.

3.
The respondent lodged a marriage visitor application form on 16 June 2010 and that was considered, without interview, under paragraphs 41 and 56D of the Immigration Rules HC395. However, it was stated on the front of the form that she intended to stay permanently in the UK. The appellant ECO therefore took the view that she could not meet the provisions of paragraph 41(i) which requires that she intend to visit the UK for a maximum stay of six months.

4.
The respondent's fiancé, as indicated, is a refugee in the UK and has only limited leave to remain in the UK until 2013. As the respondent was not already married to her fiancé before he fled Sri Lanka in 2000, she cannot qualify for entry under paragraph 352A which is relevant to so-called 'pre-flight spouses' of refugees.

5.
The appellant takes the view that the Immigration Rules are compliant with the Human Rights Act 1998 and that excluding the appellant from the UK is justified and a proportionate exercise of immigration control.

6.
It is noted that the respondent relies on Article 12 ECHR, the right to marry and found a family. The appellant takes the view that there is no apparent reason why the respondent and her fiancé cannot be expected to travel to a third country in order to marry, and is therefore satisfied that the decision to exclude does not breach Article 12 ECHR.

7.
The appellant makes no mention of Article 8 ECHR, the right to respect for private and family life, in the notice of decision dated 1 July 2010.

8.
As the visit application was not in respect of a proposed family visit to a person qualifying under the Immigration Appeals (Family Visitor) Regulations 2003, the appellant's right of appeal is limited to those grounds referred to in section 84(1) (b) and (c) of the Nationality, Immigration and Asylum Act 2002, that is on grounds of discrimination by a public authority and/or human rights grounds.

9.
The respondent appealed on human rights grounds pursuant to Articles 8 and 12 ECHR.

10.
The Entry Clearance Manager Review is dated 8 September 2010. The Entry Clearance Manager ("ECM") noted that the grounds of appeal do rely on Article 8 as well as article 12 ECHR. It was said that the respondent had made an honest mistake in ticking the box that said that she wished to remain in the UK permanently. However, the respondent's solicitors had stated in their letter of 26 March 2010 that 'both the sponsor and the respondent intended to live together in the UK.' Therefore, the ECM maintained that the decision made was fair.

11.
Moving to consider Article 8, the ECM noted that the right to respect for private and family life is a qualified right proportionate with the need to maintain an effective immigration and border control (my italics), and that decisions under the rules are deemed to be compliant with human rights legislation (my italics).

12.
The ECM adds that no satisfactory reason has been put forward as to why the respondent's fiancé in the UK is unable to travel elsewhere to be with the respondent and she is therefore satisfied that the decision is justified by the need to maintain an effective immigration and border control. Further, she states, 'there is no room for discretion and the ECO has followed and applied the rules accordingly.'

13.
The ECO sought permission to appeal to the Upper Tribunal. In summary, the grounds are that the Immigration Judge erred in law in allowing the appeal under the Immigration Rules because the respondent's fiancé has only limited leave to remain in the UK as opposed to being settled in the UK.

14.
It is accepted in the grounds that it was open to the Immigration Judge to decide the appeal pursuant to Article 8 ECHR, with the guidance in the case of FH (Post-flight spouses) Iran [2010] UKUT 275 (IAC) in mind.

15.
However, it is argued that no proper assessment of Article 8 has been made and the immigration judge has given wholly insufficient reasons for allowing the appeal on this ground. Further, that FH is applicable only to spouses as is made clear at para 25 of that determination which does not mention extending its guidance to other parts of the rules, nor, more specifically, to paragraph 290 with regard to 'post-flight fiancé(e)s.'

16.
Senior Immigration Judge Martin granted permission to appeal on 28 February 2011 when she was in particular persuaded that it was arguable that the Immigration Judge had erred in dealing with the appeal under para 290 of the Rules, although she does not refuse permission based on the Article 8 aspect nor otherwise limit her grant of permission .

17.
Further directions were given on 23 March 2011 and it is in this way that the matter comes before me now.

**The Relevant Law**

18.
It is accepted by the respondent that she could not show that she was genuinely seeking entry as a visitor for a limited period as stated by her, not exceeding 6 months (paragraph 41(i)), as she wished to remain in the UK indefinitely with her fiancé. Rather she relies upon Article 8 as read with Article 12 ECHR.

19.
Paragraph 290 is referred to as it is the paragraph that enables a person seeking leave to enter the UK as a fiancé(e) or proposed civil partner, to apply to an ECO for entry clearance. Paragraph 290, as at 1 July 2010, reads, insofar as is relevant here, as follows:

"290. The requirements to be met by a person seeking leave to enter the United Kingdom as a fiancé(e) or proposed civil partner are that:

(i) the applicant is seeking leave to enter the United Kingdom for marriage or civil partnership to a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement; and

(ii) the parties to the proposed marriage or civil partnership have met; and

(iii) each of the parties intends to live permanently with the other as his or her spouse or civil partner after the marriage or civil partnership ; and

(iv) adequate maintenance and accommodation without recourse to public funds will be available for the applicant until the date of the marriage or civil partnership ; and

(v) there will, after the marriage or civil partnership, be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and

(vi) the parties will be able after the marriage or civil partnership to maintain themselves and any dependants adequately without recourse to public funds; and

(vii) the applicant holds a valid United Kingdom entry clearance for entry in this capacity".

**Submissions**

20.
Mr Kandola for the appellant relied upon the grounds of appeal as set out above. He referred to paragraph 6 of the determination under appeal, which is where all the findings and conclusions are reached, noting that the Immigration Judge finds the sponsor to be a witness of truth to the balance of probabilities and accepts as reliable the documentary evidence produced regarding the sponsor's employment and the proposed matrimonial home, finding that the requirements of paragraph 290 are met in relation to maintenance and accommodation. However the judge has erred in finding that:

'by analogy to being a post-flight spouse the appellant can satisfy the requirements of para 290 and establish that she satisfies the requirements of the appropriate immigration rule.'

21.
Further, after finding that the couple have met and intend to live together in a permanent relationship, he erroneously continues to again conclude that the requirements of paragraph 290 have been met.

22.
The Immigration Judge then turns to Article 8, and for the same reasons, that is because the requirements of the rule are met, he allows the appeal on human rights grounds. The misdirection under the rules taints the Article 8 treatment. There is no proper analysis of FH , nor any consideration as to why it should apply to fiancé(e)s when it was concerned with spouses, and Mr Ockelton did not go so far as to say that the guidance given extends to fiancées. In FH , at para 11, the Upper Tribunal considers how refugees have been disadvantaged because others with limited leave could bring in spouses- for example students, ministers, artists and so on. However, Mr Kandola was not aware that such persons could bring their fiancé(e)s.

23.
As to whether there was any difference in policy relating to those who need and enjoy international protection and those who do not, such as a student or minister of religion, Mr Kandola relied upon the position of the SSHD before the Upper Tribunal in FH as far as the relevant policy was concerned and had nothing new to add. His submissions were relevant to both the error of law aspect and, if error of law were to be found, the substantive re-hearing aspect. If a finding in favour of the respondent were to be made, Mr Kandola submitted that it should include the proviso that each case should be considered on its own individual facts.

24.
Mr Martin submitted that if it is right that a post flight spouse be able to come to the UK to join a refugee, then a fiancé(e) should be treated in the same way. He relied upon the response pursuant to the Tribunal Procedure (Upper Tribunal) Rules 2008 and the skeleton argument he had lodged before the Immigration Judge.

25.
Whilst it was accepted that the Immigration Judge had erred in finding that the respondent met the requirements of para 290 because the sponsor is not settled in the UK and to that extent that ground is made out, that cannot dispose of the case because it is accepted by the appellant that the Immigration Judge was entitled to consider the matter under Article 8 and he had not materially erred in allowing the appeal under Article 8. Although FH deals with post-flight spouses, it was relevant to the circumstances of post-flight fiancé(e)s. In FH it was held:

“The Immigration Rules make no provision for the admission of post-flight spouses of refugees with limited leave. The Rules should be changed. In the mean time it is most unlikely that it will be proportionate to refuse the admission of the spouse of a refugee where all the requirements of paragraph 281 are met save that relating to settlement.”

26.
By analogy, if the respondent could show that she could meet the requirements of paragraph 290, then her appeal should be allowed on article 8 grounds and the Immigration Judge was right to have done so. Although the appropriate form for paragraph 290 applications had not been used by the respondent, it is clear that the information in her application covers the same circumstances as those concerning the fiancé(e)s of individuals who are settled in the UK. As such, this aspect may be considered on appeal applying the principles in MS (AS & NV) Pakistan [2010] UKUT 117. There is no application form that the respondent could have used and in the circumstances she did the best she could by choosing a form for another reason but making the purpose of her application abundantly clear and could not be accused of misleading anybody.

**Consideration and Findings**

27.
I remind myself that the burden of proof in relation to facts rests with the respondent to the usual civil standard of the balance of probabilities. As far as Article 8 ECHR is concerned, it is for the ECO to show that exclusion of the respondent is lawful, and is a necessary and proportionate measure in pursuit of a legitimate aim.

28.
Post decision evidence may be taken into account by an immigration judge where it casts light upon relevant matters as at the date of decision.

29.
I have considered all the evidence that was before the judge, in its totality, as well as the respondent's response and the skeleton argument.

30.
It is accepted by the respondent that the Immigration Judge erred in concluding that the respondent met the requirements of paragraph 290 of the Immigration Rues. Plainly she could not do so as her fiancé(e) is not settled in the UK.

31.
The respondent argues that the judge was right to conclude that the appeal should be allowed on Article 8 grounds and therefore any error he may have made in relation to his treatment of the appeal under the rules is not material. However, I prefer the grounds of the appellant and the submissions of Mr Kandola in that regard, which I concur with and adopt in finding that the Immigration Judge did err in law in his treatment of the article 8 aspect, as whilst he correctly finds that there is private life being enjoyed and that there is nascent family life if not actual family life between this couple, the only reason that the Immigration Judge gives for allowing the appeal under Article 8 is that the requirements of paragraph 290 are met, which, manifestly, they are not. He makes no mention at all of the case of FH so that the reader could be forgiven for thinking that it was not referred to before him when it is dealt with as the main limb of the appeal, albeit that it was not raised before the ECO until the appeal stage. No doubt the Immigration Judge was not helped by the fact that there was no presenting officer at the hearing. There are a number of relevant facts set out in the evidence of the sponsor that are summarised at para 4 of the determination, but they are not all brought to bear when the Immigration Judge is giving reasons for his decision. In all the circumstances I am satisfied that the Immigration Judge did fall into material error of law and I therefore move to re-make the decision.

**Remaking the Decision**

32.
It is not in issue before me that Article 8 family and private life rights are engaged here nor that the appellant's decision to exclude, whilst in accordance with the law and in pursuance of the legitimate aim of the maintenance of fair immigration control, has consequences of sufficient gravity so as to require the balancing exercise to be conducted in order to answer the question whether exclusion of the appellant is a proportionate response so that it is necessary in a democratic society.

33.
The ECM has wrongly stated in her review that Article 8 is a right ' proportionate with the need to maintain an effective immigration and border control , and that ' decisions made under the rules are deemed to be compliant with human rights legislation .'

34.
The need to maintain an effective immigration and border control is no doubt a the legitimate aim that the ECO pursues, but as has been indicated, it is for the ECO to show that the measure to exclude is necessary and proportionate to that aim and that no lesser measure will suffice.

35.
Whilst it is certainly understood to be the case that the Immigration Rules are drafted with the intent to be human rights compliant, it does not follow that decisions made pursuant to those rules are themselves therefore compliant with human rights legislation.

36.
The respondent finds herself in this difficult position because her fiancé(e), whom, it is accepted, she has known for many years, and with whom she was in a relationship prior to his fleeing Sri Lanka in 2000, has been granted only limited leave to remain in the UK as a refugee. Mr Kandola accepted that there was no other rule under which she could make application to enter the UK followed by an application for leave to remain. He founded upon it being reasonable to require the sponsor and respondent to go to a third country to marry and reside.

37.
Mr Martin, however, rightly submits that the refugee sponsor, unlike a student, cannot go home to marry his fiancé. As to requiring the couple to go to a third country, is it reasonable that difficulty be placed in their way? And in any event what country could that be? It might be argued that he could go to India were he a Tamil, but he is Sinhalese and the links with Tamil Nadu do not exist. There would be a need to obtain visas, the expense of so doing, as well as of somewhere to stay whilst complying with foreign marriage laws and the cost of so complying. Perhaps also of seeking permission to reside in a third country. There would still be the need for application for leave as a spouse once that became feasible, with further delay and cost. Once lawfully in the UK as a fiancée, she should have the possibility to apply for further leave from within the UK on human rights grounds if on no other basis ( see e.g. Chikwamba [2008] UKHL 40).

38.
It was accepted by Mr Kandola that even if there had been application for a visa under paragraph 56D of HC 395, the respondent could still not qualify to apply under paragraph 319L as this relates to applications for leave to enter only, so she would still need to leave the UK and re-apply to join her then husband.

39.
I am mindful that although this couple did not marry before the sponsor left Sri Lanka, it is accepted that it is a genuine and subsisting long term relationship, and that each intends to marry and live permanently with the other, despite their long separation. She has twice tried to obtain a student visa without success, and they have kept in regular touch since the sponsor’s departure. He has sent remittances to her. It is also appropriate to take into account and give weight to the ages of the sponsor and respondent and the fact that they wish to found a family, having taken notice of the fact that founding a family tends to become less easy with maturity and that there is a limit to the time in which a woman may be expected to bear children. The respondent was born in 1973 and the sponsor in 1962, so that their wish to found a family without delay is wholly understandable.

40.
The sponsor works as a trained carer in the UK and earns between £1300 and £1500 per month. His rent is £450 per month for the double room in London SW14, where it is proposed the respondent

would join him. The Immigration Judge finds, applying KA and Ors (adequacy of maintenance) Pakistan [2006] UKAIT 00065, that the couple can maintain and accommodate themselves without recourse to public funds. No issue has been taken by Mr Kandola in relation to any of the facts of the case as relied on by the Immigration Judge and it is not argued that he was in error to conclude that the requirements of the rules as they stood at the relevant time were met, save, of course, in relation to the fact that the sponsor is not settled in the UK.

41.
Mr Kandola could not offer any policy reason why the respondent should not be permitted to apply under the Rules to enter the UK as a fiancée to join her refugee partner. He simply relied upon the position of the SSHD in FH . In that regard, it is noted that the Vice President of the Upper Tribunal said at para 11 that:

“ **Comparable situations**

11.
The Secretary of State recognises that “post-flight spouses”, such as the appellant, cannot qualify under the Immigration Rules. In that respect, they are treated differently not only from pre-flight spouses (paragraph 352A) and the spouses of those settled in the UK (paragraph 281), but also from the spouses of others granted temporary leave in the United Kingdom. The spouses of students, those working in the United Kingdom, businessmen, artists, ministers of religion and so on may obtain leave in the United Kingdom under paragraphs 76 or (principally) 194, even though the sponsor has only limited leave, and even though the marriage took place after the sponsor came to the United Kingdom. From that point of view, therefore, refugees are in a particularly disadvantageous position. If, after leaving their country of nationality, they contract a marriage to a person who is not a British (or EEA) national, the Immigration Rules do not provide for the couple to live together in the United Kingdom. It is, as we remarked at the hearing, odd that the refugee should be disadvantaged in that way, because, unlike other persons with limited leave in the United Kingdom under the Rules, the refugee is a person who cannot return home to enjoy married life there”.

42.
At paragraph 19 it was noted that the presenting officer was

“unable to say whether the consequence for spouses of the change of policy was intentional or unintentional. The position as it is before us is that, as we have indicated, the appellant and other post-flight spouses seem to be the subject of particularly disadvantageous treatment; no public interest in that treatment has been identified; the Secretary of State is not even able to say whether the difference is intentional: but the effect of the Rules is that the difference undoubtedly exists .”

43.
The case of FH does indeed only concern post-flight spouses, but it does make relevant observations that apply to the circumstances of this appeal, so that I find that fiancées such as the appellant are similarly situated to the spouses of post-flight refugees, save, of course, that they were not in the committed relationship of marriage prior to the refugee spouse’s flight. In addition, a student will not be able to be joined by a fiancé(e), but of course the student, or other individual with limited leave is able to go home in order to marry where the refugee is not. It is in that light that Mr Kandola’s submission that each case must fall to be considered on its own individual facts and merits has force.

44.

A post flight fiancé(e) of a refugee may have become a fiancé(e) after a long and committed relationship in the country of origin of the refugee, such as that with which the Upper Tribunal is concerned in this appeal, or after a much shorter time and in wholly different circumstances. See the determination of the Upper Tribunal in FH at para 24, where there is a reminder of the need for great caution in using the European Convention on Human Rights to cover perceived defects in the Immigration Rules.

45.
Although it has been said that the couple could marry elsewhere or live elsewhere as husband and wife, there is no suggestion as to where that could be and no realistic argument or evidence as to any relevant third country has emerged. Nor has Mr Kandola sought to argue, assuming any such country were to be found, that it would be reasonable that the respondent and sponsor should have to deal with the upheaval, uncertainty and expense involved. The appellant ECO does not argue that the respondent fails to meet the requirements of paragraph 290 of the Immigration Rules as they then were, save for the requirement relating to settlement. No cogent argument justifying her exclusion on grounds that it would be proportionate has been advanced, and, for all the foregoing reasons, the article 8 rights of the respondent and sponsor require that the appeal be allowed and that the respondent be granted entry clearance.

46.
It is also relevant here to recall para 25 of the determination in FH :

“25.But, on the other hand, the appellant’s situation is by no means an unusual one, and it arises from provisions of the Rules for which there appears to be no justification. Unless there is some justification, of which we have not been made aware, of the Rules’ treatment of post-flight spouses, we think that the Secretary of State ought to give urgent attention to amending the Rules, by extending either paragraph 281 or, (perhaps preferably) paragraph 194, so as to extend to the spouses of those with limited leave to remain as refugees. In the mean time, it seems to us that although a decision based on Article 8 does have to be an individual one in each case, it is most unlikely that the Secretary of State or an Entry Clearance Officer will be able to establish that it is proportionate to exclude from the United Kingdom the post-flight spouse of a refugee where the applicant meets all the requirements of paragraph 281 save that relating to settlement”.

47.
For like reasons, the Secretary of State ought to give urgent consideration to amending the Rules as they concern fiancé(e)s.

48.
For the reasons given, the Immigration Judge has materially erred in law and a determination to allow the appeal is substituted, with a direction that entry clearance in the usual form be issued to her.

Signed

Upper Tribunal Judge Jarvis

Immigration and Asylum Chamber