



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/18374/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 7<sup>th</sup> August 2018

Decision & Reasons Promulgated  
On 11 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MR MURALEETHAS IYATHURAI  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms L Turnbull (Counsel)

For the Respondent: Mr D Clarke (Senior Home Office Presenting Officer)

**DECISION AND REASONS ON ERROR OF LAW**

1. The appellant's appeal against a decision to refuse his human rights claim was dismissed by First-tier Tribunal Judge O'Brien ("the Judge") in a decision promulgated on 17<sup>th</sup> January 2018. The appellant relied upon his human rights, in relation to family life with his wife, a British citizen and (though this was not a substantial part of his case) his private life ties. The judge found that the requirements of the Immigration

Rules (“the rules”) were not met and, in particular, that the appellant could not show that he fell within paragraph EX.1 of Appendix FM. In his overall assessment, the judge found that the public interest outweighed the interests of the appellant and his wife and that removal in consequence of refusal of the human rights claim would not breach Article 8 of the Human Rights Convention.

2. Permission to appeal was granted by a First-tier Tribunal Judge on 15<sup>th</sup> May 2018, on the basis that the judge may have erred in failing to make findings as to the extent that the appellant met the requirements for leave to remain as a spouse. The judge granting permission observed that the appellant ought not to take the grant as an indication that the appeal would be successful as, apart from anything else, it might prove difficult for him to establish that it would be disproportionate to require him to return to Sri Lanka to make an entry clearance application as a spouse.
3. There was no Rule 24 response from the respondent.

### **Submissions on Error of Law**

4. Ms Turnbull said that all the grounds were relied upon. First, the judge made no findings regarding whether the appellant and his wife met the requirements of Appendix FM. On the evidence, save for a period of overstaying of more than 28 days, the appellant could show that the requirements were met. Although the judge set out the evidence, there was an absence of specific findings. Secondly, the judge erred in finding that family life was established while the appellant’s status was precarious. He had leave to remain. His leave was not precarious in the true sense as he had an intention to live permanently in the United Kingdom and was required to demonstrate this in order to obtain the limited leave he had. Judgment was awaited from the Supreme Court in Rhuppiah. The appellant’s case was that it was not clear that he would have to leave the United Kingdom at any time. If he came as a student or a visitor, he would be expected to leave at the end of any fixed term but in the spousal category, he had to show an intention to live here permanently. The Court of Appeal in Rhuppiah felt that it was not necessary to decide this issue.
5. Thirdly, the judge failed to take into account the immigration history and the appellant’s settled intention to make his life in the United Kingdom. He gave up everything in Sri Lanka and had leave as a spouse. The failure to give due weight to the requirement that he show an intention to live here permanently amounted to a material error. Nothing would be served by his return to Sri Lanka simply to apply for entry clearance. Any such requirement would not be proportionate, in the light of Chikwamba. Fourthly, the judge erred in assessing the appellant’s particular circumstances. At paragraph 31 of the decision, it was not the case that the appellant claimed to have been advised to commence IUI treatment after his wife’s operations. As was clear from his witness statement, they were advised to try for a baby but not to recommence treatment. Fifthly, the judge erred in failing to properly weigh other factors, such as the period of time spent by the appellant away from Sri Lanka, the reason for his wife’s discretionary leave, the extent of the ties established in the United

Kingdom and the fact that he left Sri Lanka permanently to be with his wife. Sixthly, and finally, although the judge referred to section 117A to D of the 2002 Act at paragraph 15 of the decision, there was no express engagement with the section when he made his findings and conclusions, beginning at paragraph 27. The appellant spoke English, was financially independent, established private life ties while here lawfully and his immigration status was not precarious. Material parts of section 117B therefore fell to be taken into account in his favour. The judge's failure to take them into account amounted to a material error.

6. Mr Clarke responded, taking the grounds and submissions in the same order. First, the judge clearly did make findings regarding the requirements of the rules. Moreover, in relation to the settlement route, adverse factors did not simply consist of a period of overstaying in excess of 28 days. As the judge noted, the health surcharge had not been paid by the appellant as at the date of application or the date of decision and remained unpaid even at the date of hearing. This bore on the appellant's account and compounded the overstaying. So far as the ten years route to settlement was concerned, it appeared that the appellant did not argue with any force that there were insurmountable obstacles to family life continuing in Sri Lanka. That this was so appeared from paragraph 33 of the decision where the judge noted that it was not argued on the appellant's behalf that he could fall within paragraph EX.1. Secondly, the appellant and his wife knew that any period of further leave would be dependent on success in a further application. The appellant was not settled, and any further leave would depend on meeting the requirements of the rules. There was a distinction between unlawfulness in relation to a person's presence here and precariousness. The evidence showed that the appellant and his wife were aware that their status depended on success in a further application. As made clear in the authorities, the appellant had precarious status. Thirdly, the absence of payment of the health surcharge added weight to the public interest and distinguished the case from the circumstances considered in Chikwamba. The correct approach was shown in Hayat, for example at paragraphs 23 and 24 of that judgment. The net result was that the weight to be given to immigration control was not be reduced by the extent to which the appellant met some of the requirements of the rules. The judge adopted the correct approach, as shown in paragraph 29 onwards.
7. Fourthly, so far as paragraph 31 of the decision was concerned, the judge simply made a finding which reflected what the appellant had said, in relation to the passage of time between his wife's last operation and the commencement of IUI treatment. Moreover, other findings that were relevant in this context appeared not to have been challenged in the grounds. For example, there was no evidence that treatment could not be restarted in the future and no evidence that treatment would not be available in Sri Lanka. Paragraph 33 of the decision appeared to show a concession on the appellant's part that there were no insurmountable obstacles to family life continuing in Sri Lanka and the grounds contained no substantial challenge to the finding that the appellant did not fall within paragraph EX.1. Fifthly, it followed that if there were no insurmountable obstacles, there was no merit in the contention that the judge failed to take into account factors which included the period of absence from Sri Lanka. In any

event, the decision showed that the judge had all the relevant factors in mind. Finally, so far as Section 117B was concerned, at best the factors relied upon by the appellant were neutral, as made clear in Rhuppiah. Even though the judge did not refer expressly to the statute, the decision showed that he understood the relevant immigration history and the precariousness of the appellant's status and he directed himself correctly on the law in this context in paragraph 24.

8. Ms Turnbull relied upon her earlier submissions.

### **Conclusion on Error of Law**

9. The judge's decision is cogently reasoned and, I find, free from material error of law. Ms Turnbull carefully developed the written grounds but Mr Clarke was able to meet each of them effectively.
10. First, the judge did make clear findings regarding the requirements of the rules. At paragraph 29 he referred to a failure to pay the health surcharge, as a causative reason for rejection of the appellant's application for leave. Paragraph 33 contains a clear finding that the appellant could not bring himself within paragraph EX.1 of Appendix FM, the judge noting that no case that he could do so was argued on the appellant's behalf. An accurate summary of the rules in issue appeared at paragraphs 15 to 18. Secondly, the appellant's immigration status was precarious. Notwithstanding that he had to show an intention to live permanently in the United Kingdom to meet the requirements of the rules in the category he applied in, he had limited leave to remain and any further leave was dependent on a further, successful application. Applying guidance given by the Upper Tribunal in AM [2015] UKUT 260 and by the Supreme Court in Agyarko [2017] UKSC 11, where the Justices of the Supreme Court had regard to the Strasbourg judgment in Jeunesse, the appellant's status was properly assessed as precarious. The observations of the Court of Appeal at paragraph 44 of the judgment in Rhuppiah [2016] EWCA Civ 803 do not suggest a different conclusion. A further aspect of precariousness was the failure to make payment to cover the immigration health surcharge over the entire period of time from the application for leave until at least the date of hearing, amounting to some eighteen months. This bore directly on the fate of the leave application and was, or ought to have been, a factor within the knowledge of the appellant and his advisors.
11. So far as the third ground is concerned, the failure to pay the health surcharge and failure to meet the requirements of the rules showed that the public interest in maintaining immigration control had substantial weight. The decision shows that the judge understood the immigration history and the extent to which the appellant's ties to Sri Linka were diminished by his departure for the United Kingdom. This is apparent from the findings of fact contained, for example, in paragraph 27. Fourthly, the essential fact found in paragraph 31 was the passage of time between the appellant's wife's last operation and commencement of IUI treatment. Even if the judge did err in recording that the appellant and his wife were advised to commence treatment immediately rather than being advised instead to try for a baby, this falls

very far short of amounting to an error of law, let alone a material error. In context, even if the judge did err here, it was of little consequence in relation to the essential task of assessing the Article 8 case and weighing the competing interests.

12. So far as the fifth ground is concerned, a careful reading of the decision shows that the judge did have all relevant features of the case in mind, including the appellant's period of time outside Sri Lanka, his wife's immigration history and the leave granted to her at different periods of time, the circumstances in which the appellant left Sri Lanka to join his wife and the extent of their ties here. Moreover, there is force in Mr Clarke's submission that what the judge stated at paragraph 33 regarding paragraph EX.1 shows that the appellant's case was not advanced on the basis that there were insurmountable obstacles to family life continuing abroad. Finally, so far as section 117B is concerned, at best the factors identified in the grounds and by Ms Turnbull were neutral, as explained by the Court of Appeal in Rhuppiah. Although the last part of the decision contains no express mention of section 117B, there was a clear direction at paragraph 24. The findings of fact regarding the education and employment histories of the appellant and his wife also show that, in substance, the judge had the relevant factors in mind. This ground is not made out and no material error of law has been shown.
13. In conclusion, the decision of the First-tier Tribunal contains no material error of law and shall stand.

### **Notice of Decision**

The decision of the First-tier Tribunal shall stand.

Signed  
Judge R C Campbell  
Deputy Judge of the Upper Tribunal

Date: 07 September 2018

### **ANONYMITY**

There has been no application for anonymity and I make no order or direction on this occasion.