



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/33000/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 10 May 2018

Decision & Reasons Promulgated  
On 22 May 2018

Before

DR H H STOREY  
JUDGE OF THE UPPER TRIBUNAL

Between

MR GIRESAN VADAKKE PONGOTTA  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr S Bellara (Counsel)  
For the Respondent: Mr T Melvin, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant a citizen of India has permission to challenge the decision of First-tier Tribunal Judge Meah sent on 19 December 2016 dismissing his appeal. Judge Meah's determination in fact dealt with two appellants: the appellant's wife Bhavani Kochikka (IA/31528/2015) and the appellant. The judge allowed the appeal of his wife but dismissed that of the appellant.
2. It will assist in explaining what I go on to decide if I set out key aspects of the chronology of these two appeals.

3. The appellant's wife came to the UK as a student in August 2006 and was granted extensions in the same capacity until 30 October 2014. On 17 October 2014 she submitted an in-time application for indefinite leave to remain on the basis of ten years' continuous residence in the UK. On 3 September 2015 the respondent refused her application on both general and substantive grounds. The general grounds stated that it was considered she had used deception in an ETS test taken in 2012.
4. The appellant first came to the UK as a student dependant in April 2008 and was granted extensions in the same capacity until 30 October 2014. On 20 October 2014 he applied for leave to remain as a spouse.
5. The appeals of both were joined and, as already noted, came before Judge Meah.
6. In relation to the appellant's wife, the judge stated that the refusal of her application was "only" on the ground of deception under paragraphs 322(1A) and 322(2): see paragraph 2 of the judge's decision. That was in fact incorrect. The respondent's refusal decision was also on the basis that she had not established she had ten years' lawful residence or that she could succeed under Appendix FM or outside the Rules on the basis of compelling circumstances. Be that as it may, the respondent's representative before Judge Meah is recorded at paragraph 3 as "confirming" that the general grounds were the only ones now relied on and that the respondent's application for permission to appeal against the judge's allowance of the wife's appeal was confined to the deception issue.

### **The Wife's Appeal**

7. The respondent's application for permission to appeal against the judge's allowance of the wife's appeal was dated 3 January 2017. On the Tribunal file there is a letter sent by the First-tier Tribunal dated 4 July 2017 informing the respondent in relation to the wife's appeal that the respondent's application has been refused. It states that the respondent might apply to the Upper Tribunal for permission to appeal. On the file there is also a decision on the respondent's application for permission to appeal dated 3 July 2017 made by Judge Ford concluding that the judge's decision to allow the wife's appeal contained no arguable error of law.
8. When the appeal of the appellant came before me in March 2018 I heard submissions from the parties and noted on the file that:

"The respondent (Home Office) has sought permission to appeal the judge's decision to allow the wife's appeal. Permission was refused on 4 July but it is still possible (according to HOPO Mr Duffy) that the respondent may renew the application for permission."
9. I note that in refusing the application of the appellant to adjourn today's hearing before me the Upper Tribunal refused this application stating that:

"[t]he respondent has not applied to renew a challenge against the decision of the First-tier Tribunal allowing the appeal of the appellant's wife. That decision

stands. The appellant's appeal can now be decided in the context of his wife having won her appeal."

10. Before me Mr Melvin challenges this decision. He says as far as the respondent is concerned the notice sent by the First-tier Tribunal to the parties dated 4 July 2017 was never received by the respondent. For that reason he asks that I consider that the respondent should still be entitled to bring an application for permission to appeal against the judge's allowance of the wife's appeal. He referred to an email sent on 8 May 2018 inquiring whether the respondent's 3 January 2017 application was "somehow lost". He reiterated that there is no record of the respondent receiving the FtT refusal of 3 January application.
11. I am not prepared to depart from what the Upper Tribunal has already stated in its letter of 4 May 2018 stating that the decision of the FtT judge allowing the wife's appeal "stands". It is clear from the file that:
  - (i) the respondent's application for permission to the FtT made on 3 January 2017 was not lost. It was refused by FtT Judge Ford on 4 July 2017; there is a copy of that decision on file;
  - (ii) a letter containing that decision was sent to the parties on 4 July 2017;
  - (iii) before me at the hearing on 2 March the respondent (represented by Mr Duffy) did not dispute that the respondent had received the notice of 4 July; his submission focused solely on whether the respondent might still apply to *renew* the application to the Upper Tribunal; no explanation has been afforded by Mr Melvin for why a different position is now taken about the outcome of the first application for permission;
  - (iv) despite the discussion that took place at the 2 March hearing before me, the respondent made no attempt to apply for permission to the Upper Tribunal;
  - (v) neither did the respondent write to say that her position was now that she had not received the FtT refusal of 4 July 2017.

### **The Appellant's Appeal**

12. Mr Bellara's first submission was that in light of the confirmation that the wife had won her appeal, I should simply allow the appellant's appeal on the basis that he is the dependant of someone who has been successful in her application for ILR. He said that I had already indicated at the hearing on 2 March 2018 that the FtT judge, having allowed the wife's appeal, should have allowed his appeal as he was a dependant in her ILR appeal, and that in the words stated in the letter dated 3 May 2018 applying for an adjournment "[t]he outcome of the appeal will be solely based on the outcome of the sponsor's appeal".
13. I am unable to accept this submission. I am prepared to accept that I may have stated at the hearing on 2 March that my provisional view was that the appellant should

succeed on the sole basis that his wife's appeal had been successful (that comports with my note on the file), but that was only a provisional view and it depended on the factual correctness of the premise that the appellant was a dependent in his wife's appeal. As Mr Bellara conceded, he plainly was not. His wife's application form does not list him as a dependent in her application. Furthermore, three days after she had applied for ILR on the basis of ten years' residence, he applied as the spouse of someone settled in the UK. His application was entirely distinct and was the subject of a separate decision. The respondent's refusal of his application was made on 21 September 2015 whereas the refusal of her application was made earlier on 3 September 2015. In addition, the respondent's refusal of his application was based on his failure to meet requirements of the Immigration Rules that were plainly requirements that applied to him. The Rules do not provide for automatic entitlement to ILR for dependants of partners.

14. In case I was not with him on the dependency issue. Mr Bellara proceeded to make submissions as to why I should still allow the appellant's appeal. He said that he would have to accept that the appellant would have a very difficult task establishing that there would be insurmountable obstacles in accordance with EX.2 preventing him from continuing his relationship with his wife in India. He also accepted that there was little evidence to show that he would face very significant obstacles to (re) integration into Indian society. Mr Bellara said that I should nevertheless find the decision of the FtT judge dismissing the appellant's appeal as wrong in law because the appellant had done enough to establish compelling circumstances outside the Immigration Rules under Article 8. In this regard he adverted to the appellant's written grounds of appeal, in particular that the appellant had previously been in the UK as the dependant of his wife who had been successful in her appeal against refusal of ILR; that the couple enjoyed family life before the introduction of the new Rules; that the decision was contrary to Hesham Ali [2017] UKSC 10; and that the judge did not make any serious attempt to consider the Article 8 rights of the appellant.
15. Mr Melvin contended that the judge's decision as regards the appellant was not vitiated by legal error and the appellant had not shown there were compelling circumstances outside the Rules.
16. I am not persuaded that the FtT judge erred in law.
17. Firstly whilst the appellant's written grounds of appeal to the FtT did raise Article 8 issues, Mr Bellara (who represented the appellant then as well) chose to make no submissions in respect of them. At paragraphs 23 and 24 the judge stated:
  - "23. Mr Belara conceded that the second appellant's appeal fell to be dismissed as he could not show that he was able to independently meet the requirements of the Immigration Rules in his own right. He would pursue a further leave application outside the scope of his appeal, subject to the outcome of the first appellant's appeal.
  24. This was argued in the grounds of appeal, although Mr Belara made no submissions under this heading. I do not see any merit in considering

Article 8 in any event, given my decision to allow the first appellant's appeal under the Immigration Rules, and on the basis of Mr Bellara's concession that the second appellant's appeal could not succeed on any count and that he was essentially reliant upon the outcome of the first appellant's appeal."

18. Before me Mr Bellara did not resile from that account of his submissions before the FtT judge.
19. Secondly, the effect of these submissions was that the appellant through his representative accepted that the proper course of action for him would be to pursue a further leave application. In that context the judge cannot be criticised for failing to engage any further with the written submissions regarding Article 8.
20. Thirdly, as Mr Bellara conceded before me, the appellant could not succeed under the Immigration Rules either under the private life requirements of paragraph 276ADE or the partner route. As the Supreme Court clarified in **Hesham Ali** failure to meet the requirements of the Rules is a relevant factor when conducting the Article 8 proportionality assessment outside the Rules.
21. Fifthly it is not possible to discern any sound evidential basis for concluding that there were compelling circumstances in the appellant's case. Any express assessment of his Article 8 circumstances by the FtT judge would have had to apply s117B NIAA 2002 considerations, and to take account of the evident fact that the appellant's immigration status has always been precarious. He has never had settled status. He came to the UK as the dependant of a student and can never have had any legitimate basis for considering he could stay once his wife ceased to be a student. He had remaining ties in India. He had no significant private life ties in the UK. Mr Bellara has conceded that he cannot really show that there were or are any insurmountable obstacles to him and his wife resuming their family life in India. Moreover, by virtue of his wife succeeding in her appeal he had the prospect of being able to apply as the spouse of a settled person, which he did not have before. In the appellant's application he did not himself seek to raise any exceptional circumstances.
22. In light of the above I do not consider that there was any legal error in the decision of the FtT judge to dismiss the appellant's appeal albeit allowing the appeal of the appellant's wife. The judge's dismissal of the appellant's appeal shall stand.

No anonymity direction is made.

Signed

Date: 17 May 2018



Dr H H Storey  
Judge of the Upper Tribunal