



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

Appeal Number: IA/13714/2014

THE IMMIGRATION ACTS

Heard at FIELD HOUSE

On 1st October 2014

**Determination
Promulgated**

On 10th October 2014

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL G A BLACK

Between

**MR RAHAT KHAN
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms H Gore (Counsel instructed by Staines & Campbell)
For the Respondent: Mr P Deller (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law in the determination by the First-Tier Tribunal (Judge Mayall) promulgated on 16th June 2014. The Tribunal dismissed the appeal on immigration and human rights grounds.

Background

2. The appellant is a citizen of Bangladesh and his date of birth is 16.2.1974.

3. The respondent refused his application for further leave to remain on a discretionary basis. He claimed to be the victim of domestic violence which had led to the break up of his marriage. The respondent considered the application under Appendix FM on the basis of family life and private life under Paragraph 276ADE. Further the respondent considered if there were exceptional circumstances to engage Article 8 ECHR and found none.

4. In a determination the Tribunal found that the marriage was a “stormy affair” [31] but that it did not break down because of domestic violence [36]. The Tribunal heard evidence from the appellant and took into account a witness statement, a crime report and reference number, a witness statement of the appellant taken by the police, two victim of crime letters and a personal statement to employers [6].

5. The Tribunal referred [27] to the Immigration Rules HC 395 (as amended) at paragraph 289A, notwithstanding that the application was neither formally made nor considered under those provisions. The Tribunal found that the appellant did not meet the requirements under (i) & (iv)[28-29].

6. The Tribunal considered family and private life and found that the appellant failed to meet those rules. It then considered the application in light of **Haleemudeen** [2014] EWCA CIV 588 [39-48] and **Nasim**[2014] UKUT 00025 and found nothing in the way of compelling circumstances which would justify going outside of the rules to consider Article 8 ECHR.

Grounds of appeal

7. Ground 1 - The appellant maintained that the Tribunal failed to apply paragraph 289A correctly. The breakdown took place during the applicable timeframe.

8. Ground 2 - The Tribunal failed to consider the evidence of domestic violence in the round and /or the evidence in support of the incident on 8th October 2011 including the appellant’s own witness statement.

9. Ground 3 - The Tribunal, in assessing private life under Article 8, was wrong not to regard domestic violence as a compelling circumstances.

10. Ground 4 - The Tribunal failed to carry out a full “Razgar” assessment and failed take into account relevant factors.

Permission to appeal granted 21.8.2014

11. First-tier Judge Hollingsworth found an arguable error of law in the determination. He reasoned that the Judge had been unclear as to how he

had applied the law referred to at [27-29]. Although the Tribunal was not satisfied that the marriage broke down as a result of violence, it was not clear on the extent of the available evidence whether the appellant had been a victim of domestic violence. At [34] the Judge found that he was not satisfied that violence was used in the September incident. Other incidents had been related during the course of the case.

Hearing

12. For the error of law hearing the appellant's solicitors David Tang & co produced a bundle amounting to 25 pages. Ms Gore who was instructed by the appellant's new solicitors Staines & Campbell produced the Immigration guidance notes on domestic violence.

13. At the outset it was conceded that the first ground of appeal was not sustainable. There was an error of law in the Tribunal's application of paragraph 289A, in so far as the Tribunal failed to apply the correct time frame in which the breakdown occurred. The evidence established that the chronological requirements were not met in any event.

14. At the end of the hearing I reserved my decision which I now give with my reasons.

Submissions

15. Ms Gore relies on the remaining grounds of appeal. She submits that the Tribunal failed to apply the correct definition of domestic violence as set out in the IDI's. There was clearly domestic violence based on the Tribunal's own findings at [31]. The police report referred to acts such as self harming which were examples of domestic violence as coercive and controlling behaviour.

16. The Tribunal failed to give sufficient weight to relevant factors under Article 8 such as lawful 6 years residence in the UK, the appellant's leave was in part as a spouse and he was a victim of domestic violence. There were exceptional circumstances relevant to proportionality and a second stage Article 8 assessment should have been conducted.

17. Mr Deller draws attention to the history of the immigration proceedings; the appellant made no formal application under paragraph 289A, he was admitted for 27 months with a marriage visa and when he applied for further leave to remain he did not have the English language certificate and so he was then granted discretionary leave for 3 years outside of the Rules. It was during the period of discretionary leave that the breakdown of the marriage occurred.

18. The Tribunal was correct to find that the cause of the marriage breakdown was not domestic violence. There were incidents of domestic violence but the cause of the marriage breakdown was found to be an adulterous affair by the appellant's wife and her decision to commence divorce proceedings.

19. Article 8 was correctly considered under the Rules and were not met.

20. Mr Deller submits that whilst there remained controversy as to the application of the "**Gulshan**" gateway test, there was nevertheless a need to establish a strong case to engage Article 8 before going on to consider the steps in **Razgar**. None of the factors relied on by the appellant were of sufficient weight to engage Article 8.

21. Ms Gore argues that the section 120 Notice included the appellant's application under 289A. The Tribunal should have focused on the respondent's failure to consider the application under the rules and whether or not the decision made was not in accordance with the law. The Tribunal's findings as to domestic violence were unclear, non specific and failed to encompass the whole period of time from 2008 - 2014. Domestic violence caused the marriage breakdown.

Discussion and conclusion

22. I am satisfied that there is no material error of law disclosed in the determination. Although no formal application made under paragraph 289A and no consideration under paragraph 289A was made by the respondent, the Tribunal did consider [26-30] whether the requirements were met and concluded that they were not. This is a wholly sustainable finding on the evidence before the Tribunal. The Tribunal's error as to the period in which domestic violence was to have caused the breakdown was not material. The Tribunal has considered all of the available evidence adduced in support of domestic violence and concluded that whilst there were incidents of a domestic nature between the parties, there was no domestic violence that caused the marriage to breakdown [31-36]. The Tribunal found at [36] that the reason for the breakdown was the appellant's discovery that his wife was having an affair, leading to her demand for a divorce. I am satisfied that the appellant's argument is essentially a disagreement with the decision made. The Tribunal carefully analysed the evidence of incidents in 2009 and 2011 and fully engaged with the relevant issues and evidence including the appellant's own evidence [7-17] and the independent documentary evidence. In the context of the requirements under the Rules the Tribunal correctly focused on the cause of the breakdown of the marriage rather than the occurrence of domestic violence.

23. It is accepted that the appellant cannot meet the requirements of the Rules in Appendix FM and paragraph 276 ADE for family and private life. The Tribunal approached the Article 8 issue having regard to "compelling circumstances" citing **Haleemudeen**. I am satisfied that the Tribunal properly considered whether there were exceptional or compelling or strong circumstances to justify a second stage assessment under Article 8 ECHR and it found, correctly in my view, that there were not. The Tribunal followed the law as it currently stands in **MM**. Although Mr Deller alluded to the fact that the respondent maintained that the **Gulshan** approach was good law, he accepted that the Tribunal's approach was properly

approved and appropriate. I am satisfied that the Tribunal found no evidence of domestic violence towards the appellant that would amount to an exceptional or compelling circumstance and indeed there was no evidence to show that he had suffered either physically or mentally. The other factors relied on including six years residence in the UK and leave as a spouse, simply do not carry sufficient weight for engagement of Article 8.

Decision

24. There is no material error of law disclosed in the determination which shall stand.

Signed

GA Black
Deputy Judge of the Upper Tribunal

No fee award.
No anonymity order made nor requested

Signed

GA Black
Deputy Judge of the Upper Tribunal