



UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: IA/51839/2013

THE IMMIGRATION ACTS

Heard at: Field House
On: 3 November 2014
Prepared: 12 November 2014

Determination Promulgated
On: 20 November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MRS SHERENE THAYALINI HUBERT
NO ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr J Martin, of counsel (instructed by Nag Law Solicitors)

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with leave against the determination of First-tier Tribunal Judge Higgins promulgated on 6 August 2014 dismissing her appeal against the

respondent's refusal of her application dated 22 November 2013 for further leave to remain.

2. The background to the appeal was that the appellant is married to Mr Anton Devanakyam who has been granted exceptional leave to remain until 21 November 2016. He and the appellant made their respective applications on the same day. The appellant's application was refused by the same person who granted Mr Devanakyam's application for exceptional leave to remain.
3. He had at an earlier date been granted discretionary leave to remain. Accordingly, it was contended that he would be entitled to indefinite leave to remain once he has 'held' his leave for a period of six years. That will coincide with January 2016.
4. Both Mr Devanakyam and the appellant are Sri Lankan nationals. He has been resident here since 2000 having originally been granted a visa as a student with the intention of securing an accountancy qualification. He has been in employment since 2001.
5. He completed parts 1 and 2 of the ACCA programme by 2008. He was required to satisfy the requirements of part 3. Although he had to acquire some practical experience, he was unable to find an appropriate position. He has worked for Sainsbury's throughout.
6. The appellant came to the UK as a student on 27 August 2009. For most of her life, she has lived and worked in Sri Lanka apart from a period of four years when she worked in Bangladesh.
7. She came to the UK to obtain an MBA. She has secured that degree and was subsequently granted leave to remain as a post-study work migrant until 4 April 2013.
8. Mr Devanakyam and the appellant married on 1 February 2011. Their daughter was born in the UK on 11 October 2013. The respondent was aware of the change in their circumstances at the date of decision.
9. The Judge found that the appellant had been aware from the outset that her husband was a student with no permanent right of residence here. He had been unable to secure a further grant of leave to remain as a student and had been advised to apply for discretionary leave to remain. He had no leave to remain for about five months, until he was granted discretionary leave to remain in the UK in January 2010 [9].
10. The Judge noted that her husband's discretionary leave to remain expired on 26th January 2013. He made an application for further leave and the appellant applied at the same time for leave to remain as his dependant.
11. Although Mr. Devanakyam was granted discretionary leave to remain until 21st November 2016, the Judge found that it was unclear as to what factors might have led the respondent to extend his leave.

12. He found that the appellant's application was refused because she did not meet the requirements for a grant of leave to remain in Appendix FM of the rules. Nor were there exceptional circumstances warranting a grant of leave outside the rules. Her daughter was still a baby and would be able to adapt to life in Sri Lanka. There did not appear to be any insurmountable obstacles preventing her husband from returning to Sri Lanka with her and their daughter and continuing family life there [15].
13. The appellant was reasonably confident that if returned to Sri Lanka, she would be able to find work. She was currently on maternity leave and would resume the job with Sainsbury's later in 2014.
14. Her husband had returned to Sri Lanka on four occasions since coming here in 2000. His last visit with the appellant was in 2011 [18].
15. The Judge noted that the parties accepted that the appellant could not succeed under the rules [21].
16. Mr Martin accepts that the Judge had in the circumstances been correct to go on to consider the case under Article 8 outside of the rules and to decide that the case turned on the question of proportionality. He accepted that the Judge properly identified the issue to be whether or not the appellant's removal constituted a proportionate response to the public interest in effective immigration control [29].
17. At paragraph 30, the Judge noted that it is "generally open to the spouse of a non-EEA national to apply for leave to remain as his or her dependant" [30]. If leave to remain were granted, her leave would ordinarily not extend beyond that of her partner's.
18. Mr Martin referred him to the decision in **FH (Post-flight spouses) Iran [2010] UKUT 275** which he relied on [19]. He pointed out the lacuna in the Rules [19].
19. The Judge stated [30] that he had received no evidence on the issue, but suspected that no provision was made in the rules for an application to be made by the spouse of a person with discretionary leave '.....because of the variety of circumstances which might give rise to a grant of limited leave to remain outside of the rules. The policy considerations which might justify a grant of limited leave to remain in such circumstances could vary so widely that each case would be better addressed on its particular merits.'
20. He then proceeded to consider the extent of private life enjoyed by the appellant's partner over the course of 14 years. He noted that this was a factor which weighed heavily against the removal of his wife, which the Judge had no doubt would lead to his leaving with her [31].
21. However, the "principal respects" in which his private life found expression in the UK were on the basis of his relationships with his two brothers as well as relationships developed through his long employment with Sainsbury's. The nature of these latter relationships is such that they could be replicated in Sri Lanka. His

relationships with his brothers would be devalued to the extent that direct personal contact would be considerably rarer were he living in Sri Lanka [31].

22. He found at paragraph 32 that a factor which weighed in favour of the appellant's removal was that both she and her husband were aware when they embarked on the relationship that in neither of their cases was their continued residence in the UK guaranteed. She anticipated returning to Sri Lanka once she had secured her MBA. She was aware that her husband had come here as a student, whether or not she was aware when he met her at the airport that he had at that point no leave at all. When they subsequently married they did so in the knowledge that he only had discretionary leave [32].
23. He noted that Mr. Devanakyam's discretionary leave had been renewed [33]. He stated that the appellant might still have had to resort to Article 8 of the Human Rights Convention even if her husband had been a British citizen.
24. His findings are summarised at paragraph 34. The appellant and her husband could enjoy family life satisfactorily in Sri Lanka. Their daughter's best interests would not be harmed. He attached "considerable weight" to the fact that each of them knew from the outset that the other's continued presence here was precarious. The appellant's husband would be unable to complete part 3 of the ACCA programme, but six years after completing Parts 1 and 2, the Judge was "entitled to conclude that there is little real possibility of him now doing so." [34]
25. He therefore concluded that the balance came down on the side of the public interest in removal.
26. On 25th September 2014, First-tier Tribunal Judge De Haney granted the appellant permission to appeal. It was arguable that the Judge erred in law ".....in that his analysis of the policy principles, in assessing why there is a lacuna in the rules relating to leave for the spouse of a person given discretionary leave, [was] flawed and speculative".
27. Mr Martin submitted that although the Judge accepted that there is no provision in the rules for an application made by the spouse of a person with discretionary leave, his consideration of whether there are sound policy reasons was entirely speculative. There was no evidence on that point. Nor was it explicable as to why somebody in the position of Mr. Devanakyam should be in a worse position than a person who is here on limited leave as a student.
28. Although acknowledging that FH (Post-flight spouses) Iran [2010] UKUT 275 concerns spouses of refugees might have had stronger arguments in their favour, there was nevertheless no principled reason that the respondent had advanced as to why people with discretionary leave should not be in a similar position to other individuals with limited leave. He submitted that it was 'beholden' on the respondent to show why there was no provision in the rules to deal with a person in the position of the appellant.

29. He noted – without contradiction - that there are no IDIs and there is no policy document that informs the situation. It was the respondent who is required to show some justification for the failure to deal with a person in the position of the appellant.
30. He submitted that insofar as there is a gap, this would be highly relevant when assessing proportionality under Article 8. The Judge should have considered whether this appellant and her husband should be in a worse position than those with limited leave who were studying, for example, for a degree.
31. Mr Martin also criticised the Judge's analysis at paragraph 33, where the Judge stated that much had been made of the fact that Mr. Devanakyam's discretionary leave had been renewed. The Judge then went on to state that the appellant "might still have had resort to Article 8 of the ECHR had her husband been a British citizen."
32. He submitted at paragraph 5 of his grounds that the Judge had accepted that the appellant and her husband had been entirely truthful [3]. Part of their evidence was that their combined earnings were at least £28,300. Accordingly, he submitted that it is difficult to see why the appellant would need to rely on Article 8 if her husband was British.
33. Furthermore, he submitted that the decision of the respondent had been irrational. On the very day that her husband had been granted leave to stay in the UK for three more years, she at the same time refused his wife's application, '...effectively deciding that her husband should leave the UK with his wife'.
34. However, it appears that Mr Devanakyam had been allowed to stay on account of his ties in the UK and the life he had established. That should all the more include the life he had established with his wife and daughter.
35. The reality is that he would face a real dilemma - either to continue staying here alone or being split up from his family. Yet he wants to stay here. He is entitled to stay here. He is working. He has the expectation of settling here after three years. It was not "right" that when assessing the best interests of the child, they should be "forced to separate".
36. Accordingly, he submitted that the Judge had not dealt properly with the "lacuna point" and had not dealt appropriately with the "irrationality point."
37. On behalf of the respondent, Mr Whitwell submitted in conformity with the Rule 24 response that the Judge had directed himself appropriately and made sustainable findings. In effect, the grounds advanced disclosed no material error of law and are "mere disagreements with the negative appeal outcome." There were no exceptional factors advanced that could weigh against the public interest of removal.
38. Mr Whitwell pointed to the chronology in this case. The sponsor had obtained discretionary leave before the marriage. It was also of relevance that they are both Sri Lankan nationals. Neither is a refugee. He submitted that were Mr Devanakyam

and their daughter to move to Sri Lanka with the appellant, there would, as found by the Judge at paragraph 26, be no interference with the family life they enjoy together.

39. He referred to the decisions in Nasim and Others (Article 8) [2014] UKUT 00025 as well as Patel and Others v SSHD [2013] UKSC 72. This focuses attention on the nature and purpose of Article 8 and in particular recognises the limited utility of the Article in private life cases which is far removed from the protection of an individual's moral and physical integrity.
40. He submitted that both are in employment. The sponsor had previously embarked on his accountancy course and had failed to complete it. He had regard to the extent of his relationship with his two brothers as well as those developed through long employment. That was the extent of his private life evidence in the UK. It could be replicated in Sri Lanka.
41. Furthermore, both were aware of the precarious nature of the situation when they embarked on their relationship. Neither had continued residence in the UK guaranteed. When they married, they did so in the knowledge that Mr Devanakyam had only discretionary leave.
42. FT (Iran) is a different case. That involved refugees. There the sponsor would not be able to return with the appellant.
43. He submitted that had they been married before discretionary leave was granted to the sponsor, "this may have been different." That was not the case however.
44. In reply, Mr Martin submitted that there had been no answer to his submission that if her husband was settled and had British citizenship, the appellant would not need to rely on Article 8. The maintenance requirements under the rule would clearly be satisfied.
45. Moreover, if her husband had had leave as a student or was in any of the other categories in respect of which provision is made in the rules for a wife to join the sponsor, she would comply with the relevant requirements as a spouse. Accordingly, paragraph 33 of the determination does not provide an answer but is entirely speculative.
46. Her husband 'had a daughter' while he was lawfully in the UK, albeit that he was not settled. Under the relevant IDIs applicable to discretionary leave, he had every expectation that his status would be renewed. Accordingly, it is not correct to assert that he was in a precarious situation when he married the appellant.
47. He repeated his submission that the Judge had not dealt properly with the lacuna. Unless there is a good reason for the appellant not being entitled to apply in these circumstances, there is no principled basis upon which she should be in a worse position compared to other applicants who are able to join their spouses in the UK as dependants.

Assessment

48. The facts in this case are not in dispute. The Judge had no hesitation in accepting their evidence without qualification. [3]
49. Mr Whitwell contended that this is a case where Nasim, and Patel, supra, ought to be applied.
50. He submitted that 'if you take out the issue relating to lacuna, this is a relatively straightforward case'. However, Mr Martin has in effect submitted that the lacuna issue was at the centre of the case.
51. I find that there is no route provided under the rules with regard to the appellant's or her husband's circumstances. Nor were any policy reasons identified on behalf of the Secretary of State for the Home Department as to why a person who has discretionary leave to remain should not in principle also be allowed to have their spouses with them.
52. I recognise that the situation is not entirely analogous to that in FH, supra, where the rules made no provision for the admission of post flight-spouses of refugees with limited leave. The Tribunal held that the rules should be changed. In the meantime, the Tribunal found that it is most unlikely that it will be proportionate to refuse the admission of a spouse of a refugee where all the requirements of paragraph 281 are met save that relating to settlement.
53. The position here is that the appellant and his spouse appear to be the subject of particularly disadvantageous treatment. No public interest justifying such treatment has been identified or relied on.
54. It appears that the treatment of the appellant infringes Article 14 of the Human Rights Convention and is discriminatory when taken with Article 8, and Article 12, concerning the freedom to marry.
55. The First-tier Tribunal Judge stated without evidence or submission made on behalf of the respondent, who was represented by counsel at the hearing, that he "suspects" that no provision is made by the spouse of a person with discretionary leave "because of the variety of circumstances" that might give rise to a grant of limited leave to remain outside the rules. The Judge speculates that the policy considerations which might justify a grant of limited leave in such cases could vary so widely that each case would be better addressed on its particular merits.
56. The obligation to provide justification for the lacuna in this case rested with the respondent. The appellant is unable to qualify under the Immigration Rules, as her situation is not provided for, with the result that she is accordingly treated differently from the spouses of others who have only been granted temporary leave in the UK. This includes the spouses of students, workers, businessmen, artists, ministers of religion and others who may obtain leave in the UK pursuant to the rules -(paragraph 11 of FH).
57. In particular, there was no explanation provide as to why the person who might have got married during the currency of his limited leave must be prevented by the rules from being joined by his dependant spouse.

58. I find that the consequences of the asserted lacuna should have weighed substantially in the proportionality assessment in the appellant's case.
59. Furthermore, I accept that there is an unexplained conflict between the decisions made at the same time by the same officer in deciding that Mr Devanakyam would be allowed to stay in the UK for three more years, but at the same time refusing the appellant's application. The effect of that second decision has the effect of undermining the benefit entailed by that leave, resulting in a decision that he should leave the UK together with his wife if he wishes to enjoy family life with her. It is not explained why, given that Mr Devanakyam was allowed to stay on account of his ties in the UK, including the private life ties he had established here, that should not have included the life he had established with his wife and child.
60. I accordingly find that the decision of the First-tier Tribunal Judge involved the making of material errors on a point of law.
61. Both parties agreed that if such finding was made, that I should proceed to remake the decision.
62. In re-making the decision, there is, as noted, no substantial dispute relating to the facts. Both parties are Sri Lankan nationals. The appellant's husband has been resident in the UK for over 14 years. He has remained here lawfully throughout. He has been in employment since 2001. He has completed Parts 1 and 2 of the ACCA programme by 2008. He was however unable to acquire an appropriate position in order to obtain practical experience.
63. The appellant arrived as a student in August 2009. There had been a connection between the two families. They had met when her family visited the area on holiday. Her husband was asked to meet her on arrival in the UK in order to help her settle in. They fell in love and married.
64. Mr. Devanakyam had been unable to obtain a further grant of leave to remain as a student and was advised to apply for discretionary leave. For a period of some five months, he had no leave until discretionary leave was granted in 2010.
65. They married on 1 February 2011. The appellant obtained an MBA and was granted leave to remain as a post-study work migrant until 4 April 2013. Mr. Devanakyam's discretionary leave to remain expired on 26th January 2013. He made an application for further leave before it expired, as did the appellant, who applied for leave to remain as his dependant. Their daughter was born in October 2013. The respondent was aware of the change in circumstances when considering their applications in November 2013.
66. On the very same day that her husband was granted discretionary leave to remain until 21 November 2016, the appellant's application was refused.
67. The appellant is currently on maternity leave; she will resume her job later in 2014. She would be able to find work if returned to Sri Lanka.
68. Her husband has plans to obtain the ACCA qualification. He is determined to find a position in which he can secure the practical experience he requires to realise his

ambitions. The parties are able to maintain and accommodate themselves in the UK without additional recourse to public funds.

69. I bear in mind that a Tribunal should not ordinarily use the Human Rights Convention to address perceived defects in the immigration rules (FH, supra).
70. I find however that there is no proper justification identified by the Secretary of State for the Home Department for treating this appellant differently from other categories of persons where the rules cater for the husband being joined by his dependant spouse.
71. I also take into account the fact that on the same day that the appellant's application was refused, her husband was told that he could stay in the UK for three years. I find that to be a significant factor in weighing up the respective interests of the appellant and respondent.
72. I have also had regard to Lord Bingham's opinion in EB (Kosovo) [2008] UKHL 41 where he stated that it would rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse, and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal.
73. The respondent has implicitly recognised that it would not be reasonable for Mr. Devanakyam to return to Sri Lanka, having granted him discretionary leave to remain. I find that it would not in the circumstances be reasonable for him to have to return to Sri Lanka, which would then result in his separation from the appellant and child.
74. Finally, Mr Martin sought to rely on authorities such as Chikwamba [2008] UKHL 40 and the Court of Appeal's decision in Hayat. Article 8 cases can be determined without the appellant and others having to leave the country to apply for entry clearance. See further Zhang [2013] EWHC 891 (Admin).
75. I have had regard to the public interest considerations under s.117B of the 2014 Act. I find that the appellant will not be a burden on the taxpayer. Further, I find that the parties commenced a relationship in the UK when they had leave to remain here. Moreover, the appellant has been employed. There is no suggestion that she is not able to speak English.
76. Having regard to the circumstances as a whole, I find that the decision of the respondent does not constitute a proportionate interference with their right to respect for private and family life. The demand for respect for the Article 8 rights of the appellant and her husband require that she be granted leave to remain in the UK as the dependant of her spouse at least until 27th November 2016.

Decisions

The decision of the First-tier Tribunal involved the making of an error on a point of law. Having set aside the decision, I remake it allowing the appellant's appeal on Article 8 grounds.

No anonymity order made.

Signed

Dated 12/11/2014

Deputy Upper Tribunal Judge Mailer