Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/06958/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**

On 22 December 2014 **On 8 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MRS JESMIN AKTER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Rahman of Counsel
For the Respondent: Mr S Whitwell, a Home Office Presenting Officer

DECISION AND REASONS FOR FINDING A MATERIAL ERROR/NO MATERIAL ERROR OF LAW

Introduction

1. This is an appellant's appeal against the decision of First-tier Tribunal Judge Morrison (the Immigration Judge) to dismiss the appellant's appeal against the refusal to vary leave and to remove him to Bangladesh.

© CROWN COPYRIGHT 2015

2. The appellant arrived in the UK in July 2006 it seems as a dependent spouse of her husband who has been living in the UK since 13 October 2003. There is some confusion about the application which gave rise to the appeal to the First-tier Tribunal but it appears the appellant made an application on 9 September 2013 "outside the Rules" but subsequently submitted a second application on 28 October 2013 on form FLR (M) Version 10/2013 in which she sought leave to extend her stay in the UK and applied for a biometric immigration document on the grounds that she was a spouse of a person present and settled here, i.e. Mr Mohammad Ali Babar. She states that her immigration history was that of a student dependant, i.e. dependent on a points-based migrant.

3. The application was considered by the respondent as an application under Appendix FM on the grounds that the appellant was the partner of a person in the UK in a genuine and subsisting relationship who was able to satisfy the requirements of the Rules. Alternatively, consideration was given to her rights under Article 8 of the European Convention on Human Rights including her right to respect for her private life incorporated into the Rules by paragraph 276ADE. The respondent decided that the appellant did not meet the requirements of the Rules and refused further leave to remain. She also considered that her decision was consistent with the right to respect for private and family life contained within Article 8, although she accepted in some cases it is necessary to consider granting leave to remain outside the requirements of the Immigration Rules.

<u>Appeal Proceedings</u>

4. The appeal against that refusal is supported by grounds of appeal which state that the sponsor had made an application for indefinite leave to remain (ILR) on the basis of ten years' long residence in the UK which had not yet been decided. The respondent should have awaited the outcome of that application before deciding the appellant's application. The appellant claims to be aggrieved by the decision which is not consistent with the duty to act fairly. No human rights arguments were raised in the grounds, and at the subsequent hearing of the appeal Mr Haque did not maintain an appeal under Article 8 (see paragraph 23).

5. The present grounds suggest that the Immigration Judge erred in his application of Appendix FM to the facts of this case. The decision was "premature". The decision was actually dated 12 January 2014 to refuse the application for an extension of leave on the basis that the appellant's husband did not have ILR. The grounds of appeal state the Immigration Judge erred in failing to consider the requirements of the old Rules that were in force prior to 9 July 2012. This is by reference to the "transitional provisions" whereby Part 8 continued to be in force.

6. The grounds of appeal were considered by First-tier Tribunal Judge Nicholson on 21 October 2014. He granted permission to appeal because

he considered the transitional provisions (A277 as read with A280) state that with regard to applications made after 9 July 2012 by persons who have been granted entry for limited leave under Part 8 of the Rules in existence at 9 July 2012 would continue to be considered by reference to Part 8 of Appendix FM. Judge Nicholson considered that the appellant had previously been granted leave under paragraph 319C in Part 8 as a student dependant and it appeared that her leave in that capacity was still extant as at 9 September 2013. It was unclear whether the point was raised before the Immigration Judge, nevertheless, Judge Nicholson considered it right to grant permission so that this ground could be properly argued. He did not refuse permission on the remaining grounds but in fact they have not been effectively pursued save that the appellant did submit that the judge ought to have considered Article 8 despite its being abandoned by his representative.

7. The respondent submitted a Rule 24 response indicating that the Immigration Judge was entitled to conclude that the requirements of Appendix FM were not met and the Immigration Judge directed himself appropriately.

The Hearing

8. Mr Rahman submitted on behalf of the appellant that paragraph 319C set out the requirements for successful applications by a points-based migrant. The appellant's husband was here under the points-based scheme. There had been various renewals of her leave, the most recent being the application considered in this appeal made in June 2012, i.e. before the changes in the Immigration Rules introduced in July 2012. I was reminded that the transitional provisions state that where an appellant has leave and made a further application it was to be determined under Part 8 of the old Rules. Mr Rahman made reference to the Immigration Directorate Instructions Family Migration: Chapter 8 Transitional Provisions. Paragraph 3.1.1 states:

> "A person who is in the UK and had been granted entry clearance or limited leave to remain under Part 8 following the application for initial entry clearance or leave to remain under Part 8 submitted before 9 July 2012, and this leave is extant where this is a requirement of Part 8, and they apply for further leave on the same basis".

Mr Rahman submitted that his client had extant leave and therefore would have been able to stay in the UK if she satisfied the requirements of Part 8 of the old Rules. I was also referred to pages 10 and 11 of the appellant's bundle to the First-tier Tribunal which indicated that children can be included as dependants.

9. The respondent's reply was that the issue as to applicability of the 2012 Rules was only raised late. Indeed this issue has not been raised before

the First-tier Tribunal. Mr Whitwell set out the immigration history for the Tribunal. He said that:

"• On 6 June 2012 limited leave to remain was given until 13 April 2014.

• On 11 July 2013 the respondent curtailed the leave on the grounds that the appellant's sponsor's educational institution had its licence revoked. Following that revocation the appellant had 60 days (until September 2013) to make an application for an extension of her leave. Unfortunately, the application she made was made outside the Immigration Rules on 9 September 2013.

• On 28 October 2013 the appellant's representatives (Hossain Associates) submitted the application form for a spouse of a person present and settled in the UK was used. The decision was made in response to that application on 21 January 2014.

10. I was referred to the relevant Rules in Phelan's Immigration Law, page 262-264. It was pointed out that paragraph 319C is concerned with applications for leave to remain as dependants of pointed-based migrants. Had the appellant made an application on that basis it may have been successful. Mr Whitwell also accepted that there was an issue under Article 8 but that had only received limited consideration by the Immigration Judge because the appellant's representative had "thrown in the towel" on that point. Based on the application the appellant made none of the transitional provisions applied (Mr Whitwell referred me in detail to paragraphs A277-A281 for the details). In particular, paragraph 319C, dealing with applications for leave to remain as dependants of points-based migrants, was not preserved by the transitional provisions. If the appellant wished to make an application as a dependent spouse of a person present and settled in the UK, she would need to meet the requirements of Appendix FM. It seems that a number of the requirements of that Appendix were not met according to the refusal letter. Even if the maintenance requirements of that Rule were met, the appellant would not have been, at the date of her application, the dependent spouse of a person present and settled here with indefinite leave to remain as was required by that Appendix. The sponsor was granted ILR at a later date. In addition, English language skills need to be demonstrated. All the evidence must be submitted with the application to comply with Section 85(3) (b) of the Nationality, Immigration and Asylum Act 2002. Accordingly, this appeal had to fail.

11. Mr Rahman responded by pointing out that the appellant had ticked the box on her application stating that she had passed an English language test provided by a test provider (see page 32 of 51). At this point Mr Whitwell conceded that this point had not been raised in the respondent's refusal and therefore he was not pursuing the point about the English language qualifications. Mr Rahman then said that the application in 2013

was not in fact made “outside the Rules”. The appellant had applied under FLR (M) for an extension of her leave under the Immigration Rules. If her application was not in accordance with the Immigration Rules “exceptionally” this appeal could be allowed outside those Rules. At this point the appellant pointed out that the appellant and the sponsor had a disabled son but I pointed out this had not featured in the evidence presented before the First-tier Tribunal nor had any evidence been filed to the Upper Tribunal dealing with this issue. Mr Rahman pursued the point under Article 8 and did not abandon the argument that the transitional provisions applied. The appellant was a dependent spouse of a points-based migrant.

12. Mr Whitwell said in response that even if the application had been made under paragraphs 281-284 it would not satisfy the requirements of paragraph 280(c).

13. At the end of the hearing I decided to reserve my decision as to whether an error of law had been shown and if so, what steps should be taken to deal with it.

Discussion and conclusions

14. The basis of the appeal before the Immigration Judge (see paragraph 6(iv) of his determination) was that the appellant’s husband had completed ten years’ lawful residence in the UK and the appellant ought therefore to be allowed to “remain outside the Immigration Rules under FLR (O)”. The Immigration Judge records that the appellant’s solicitors submitted two applications, one for the appellant and one for her husband. The appellant’s application on form FLR (M) was on the basis that the appellant was the spouse of a person who was about to be granted settlement in the UK. The application form states that the appellant’s parents and siblings were in Bangladesh but that her husband, son and other close relatives were in the UK. The refusal, as the Immigration Judge also recorded, was on the basis that the appellant’s husband did not meet the requirements of the Immigration Rules at the date of the application in that he was not a person “present and settled in the UK”. He was not granted ILR until a later date. The appellant could not benefit from EX1 as her child was not a British Citizen and although private life had been considered under 276ADE the appellant could not meet the requirements of subparagraphs (iii)-(iv) thereof). The respondent considered whether there were exceptional circumstances justifying exercising her discretion to allow the appellant to stay outside the Immigration Rules under Article 8 of the ECHR but concluded that due to the appellant’s family ties to Bangladesh these requirements could not be met.

15. Mr Rahman argued strenuously that the transitional provisions applied to this case. I had been taken through those in detail by Mr Whitwell but it is clear that they do not. This was not an application for further leave to remain, on the same basis as previous applications. In particular, the

appellant had not previously applied for indefinite leave to remain as the dependent spouse of a person present and settled in the UK. She had previously applied as the dependant of a points-based migrant. Had she made that application, it was strongly arguable, it would have been considered under Part 8 of the Immigration Rules in force at 8 July 2012. However, this was not so. The transitional Rules (in page 262-264 of Phelan) make clear that paragraph 319C (which applies to dependent relatives of a person present and settled in the UK) was not one of the provisions preserved. Therefore, the appellant cannot succeed under the Immigration Rules as they existed at 8th July 2012.

16. The appellant could not succeed under the ECHR because Mr Haque, who represented her before the First-tier Tribunal, did not maintain his appeal on that basis. However, I note that the Immigration Judge looked at the facts which were relevant for Article 8 in paragraph 23 of his determination. It was not, in my view, seriously arguable that the appellant had a right to form a private or family life in the UK when she could continue her family life with her husband in Bangladesh, where he was a citizen and where they have a large number of relatives.

17. For these reasons I can find no error in the decision of the First-tier Tribunal.

Notice of Decision

The appellant's appeal is dismissed. There is no error in the decision of the First-tier Tribunal and the decision to refuse to vary leave and to make removal directions remains.

The appeal has been unsuccessful and I make no fee award.

I make no anonymity direction.

Signed Date

Deputy Upper Tribunal Judge Hanbury