Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02439/2016

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 23 October 2017	**On 6 November 2017**
Decision prepared immediately following the hearing	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MRS J
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms T Murshed, Counsel instructed by Deccan Prime Solicitors LLP
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a rehearing of an appeal following a decision which I made on 26 September 2017 that a decision made by the First-tier Tribunal had contained a material error of law such that the decision had to be remade. Much of what is contained within the decision I made as to error of law is repeated within this decision.

2. The appellant is a national of India who arrived in this country in September 2010 with leave to remain as the dependant of her husband who had a Tier 4 visa. She was included as a dependent on a Tier 1 application made by her husband on 27 March 2012 and was granted leave to remain until 31 January 2014. She left the UK in October 2013 briefly for a holiday and then again left in June 2014, returning the following month on her own Tier 2 visa. She is qualified as a dentist in India but came back initially to work for a software company in which job she was earning about £30,000 a year, although at the same time she was taking steps to obtain the qualification to practise as a dentist in this country. The appellant had had a child in July 2013, which child is an Indian citizen. Regrettably and very sadly (and as I noted in my earlier decision this is accepted by the respondent) the appellant's husband has behaved disgracefully to her and on a number of occasions abused her physically. He has no less than four convictions for domestic violence and had been cautioned twice. The appellant had also obtained a non-molestation injunction against him. He has now returned to India and it is unlikely he will ever be allowed back into this country. Currently the appellant's child is in India living with the appellant's parents, but the aim of the appellant if she is allowed to remain in this country is to apply for permission for her son to join her here.

3. In addition to being violent towards the appellant her husband also made threats to her employer, the consequences of which is that she lost her job and the employer ceased being her sponsor. This is also accepted by the respondent. It is not clear whether the appellant would have been able to bring proceedings in an employment tribunal in respect of the cessation of this job, but that is not an issue which has been put before me. In all events (and this also is accepted on behalf of the respondent) entirely because of the husband's appalling behaviour, instead of being in a position where in the normal course of events she would have been able to remain lawfully in this country until such time as she became entitled to settlement, this is no longer the case. This is because her leave was curtailed following the cessation of the sponsorship of her employer, although the appellant has always been in this country with leave, which is a matter to which I will refer below.

4. Initially it was suggested on the appellant's behalf that she had had a "legitimate expectation" that in the fullness of time she would be granted indefinite leave to remain, but her argument is not now advanced in these terms. However, it is still asserted on her behalf that the circumstances in which her employment ceased, such that she would no longer have a lawful right to remain unless this appeal succeeded, was an important factor which adds weight to her Article 8 claim to be allowed to remain.

5. As already noted, because her employer had withdrawn its sponsorship of the appellant, the respondent curtailed her leave so that the leave to remain which she had had, which had not been due to expire until 31 July 2019 (before which she had been hopeful she would have been able to extend the leave, and there is no reason to suspect that she would not) was curtailed to expire on 8 September 2015. Before that leave expired, that is while the appellant was here lawfully, the appellant applied for leave to remain on form FLR(O) based on her Article 8 rights. The application was

made on 1 August 2015, and so until her appeal rights are exhausted she has 3C leave to remain. As noted, this appellant has never been present in this country without leave, and it is not now suggested on behalf of the respondent that she has.

6. The appellant's application was refused by the respondent on 15 January 2016 and the appellant's appeal was lodged some eleven days later, within time.

7. After the appeal had been lodged, but before it was heard, the appellant had commenced a relationship with Mr W, a British citizen. It is accordingly clear that at the time she commenced this relationship, her immigration position could properly be described as "precarious" (because she knew that unless her appeal was successful she would not be allowed to remain) but equally it is also clear that the relationship was commenced and continued at a time when she was in the country lawfully, as she still is.

8. The appellant's appeal was eventually heard by First-tier Tribunal Judge Housego, sitting at Harmondsworth, on 26 April 2017, but in a Decision and Reasons promulgated a week later, on 3 May 2017, Judge Housego dismissed the appeal. Although he accepted that the appellant had been truthful with regard to the circumstances in which her husband had abused her, he nonetheless decided that the relationship with Mr W "is to be attributed little weight" (see paragraph 68 of his decision) and seemingly also within the same paragraph that her visa "had expired".

9. The appellant appealed against this decision and at a hearing before me on 26 September 2017 I found that Judge Housego's decision was not sustainable. When making this decision, I set out what was said on behalf of the respondent by Mr Jarvis, who was then representing the respondent, following discussion during the hearing. Mr Jarvis had stated as follows:

> "I would accept, having heard the appellant's Counsel make the point, that there was not an engagement [within the decision] with why it is that the appellant's circumstances are precarious, which is the adverse actions of a husband, which in general were accepted.
>
> So in retrospect now, having shifted away the argument, looking at why the relationship was precarious, the judge had not dealt with the material matter which could have affected the outcome. Therefore, in terms of how this was played out, the judge has erred in the findings on proportionality.
>
> I accept that this is an unusual case, and the judge possibly, unfortunately has not engaged with all the factors. This leads to findings which were made with regard to Article 8 outside the Rules, as unsustainable".

10. As I stated within my decision as to error of law, I agreed with Mr Jarvis that for the reasons he had given the finding with regard to Article 8 outside the Rules was indeed unsustainable but added that the judge had also appeared to misunderstand what was set out within Section 117B of the Nationality, Immigration and Asylum

Act 2002, which was inserted by Section 19 of the Immigration Act 2014. At paragraph 68, the judge had stated as follows:

> "Taking these [that is the claim to private and family life] one at a time, the family life with Mr W does not amount to an Article 8 reason to grant her leave. The relationship was formed when her status in the UK was precarious, as he knew. Her visa had expired and she had applied for leave to remain outside the Immigration Rules. Accordingly it is to be attributed little weight. There is no right for a British citizen to have immigration status accorded to the person he wishes to marry. The factors in S117A, B and D of the Nationality, Immigration and Asylum Act 2002 that the appellant meets are the absence of negative factors not reasons to grant leave to remain on Article 8 grounds".

11. In fact, as I noted in my decision as to error of law, so far as Section 117B is concerned, it is provided at sub-paragraph (4) that:

> "Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom **unlawfully** [my emphasis]".

12. As I have already noted, the relationship was formed at a time when the appellant was in the UK lawfully, as she has always been.

13. Little weight should be given (as provided within Section 117B(5)) where an appellant is relying on "private life" because this sub-section states that "Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious".

14. There is no specific provision that "little weight" should be given to family life in these circumstances, and of course that is what her life with Mr W is. So although obviously it is a factor that the appellant's immigration status could be said to have been precarious, and therefore the weight to be attached to the relationship with Mr W would be less than it otherwise might have been, it is not right that the Tribunal is obliged to attach "little weight" to this family life that she has with him. This is particularly so in the circumstances of this case, where the reason why the appellant's immigration position was precarious was because of the appalling treatment which she had received at the hands of her husband.

15. It was for these reasons that I agreed with Mr Jarvis that Judge Housego's decision could not be allowed to stand, as it had been made following an incorrect assessment of the factors and the weight to be given to them.

16. I accordingly set aside the decision of the First-tier Tribunal and directed that the rehearing would be before myself but that before this took place the appellant should

serve further evidence in particular with regard to the financial position of Mr W, which Judge Housego had considered was unsatisfactory at the hearing before him.

17. This evidence was in fact served, although unfortunately I did not see it until the morning of the hearing. In addition to this evidence I was also assisted by a full skeleton argument prepared on behalf of the appellant by Ms Murshed, and also by the very fair approach taken to this appeal at this hearing by Mr Duffy on behalf of the respondent.

18. Mr Duffy set out the respondent's position very clearly and very fairly. The respondent did not have any issues with regard to the credibility either of the appellant or of Mr W. It was accepted that as now shown by the P60 evidence submitted on behalf of the appellant, that Mr W earned £30,000 a year and also that the appellant had savings of £40,000. She spoke good English obviously and so far as all the neutral factors set out within the new Part V of the 2002 Act were concerned, all of these were satisfied. Mr Duffy on behalf of the respondent also accepted that although the appellant could not succeed specifically under the Rules, nonetheless she could rely on a number of factors which were suggestive of this case being a very unusual, even exceptional one. In the first place, economically, this couple would not be a drain on the British economy, so that point could not be taken against the appellant. Also, she had never been in this country unlawfully. Furthermore, the fact is that she was here with an expectation (albeit it was not conceded or indeed put that she had what could technically be described as "a legitimate expectation") of being allowed to remain. Nonetheless, she would in the usual course of events probably have been allowed to settle in this country in due course. The most important factor in this case was that it was because of the actions of her husband that her leave was curtailed, which clearly is not a typical factor in cases such as this. To summarise Mr Duffy's position, on the basic facts of this case there were numerous factors in support of the appellant being allowed, exceptionally to remain.

19. In my judgement, the reasons for allowing this appellant to remain are so compelling that this can truly be said to be one of those rare cases where exceptionally leave to remain ought to be allowed under Article 8 outside the Rules. In addition to the factors very fairly accepted on behalf of the respondent by Mr Duffy, there are some additional features in this case which are clear from the evidence which has been put before the Tribunal and which has been accepted on behalf of the respondent. As a matter of fact, this appellant currently remains married to her ex-husband and so unless and until she obtains a divorce she would not be able to apply to return to this country either as a wife (clearly, because she cannot marry Mr W until she has been divorced from her current husband) or even as a fiancée, because until she is divorced she is not free to marry. So in this case, if she were to return to India, in order to make an application from India to return to the UK, that application might not be possible for some considerable time. Also, in order to obtain a divorce she will be obliged to have personal dealings within India involving her current husband, with the attendant risks and trauma this would involve.

20. It is not reasonable, in my judgement, in the circumstances of this case, to expect Mr W, who is settled here with a good job and is economically independent, to accompany the appellant to India and so the reality is that the two options are first that the appellant could remain here with Mr W, being no drain on the economy at all but indeed a benefit to the British economy or she could return to India at the cost of a disruption in the relationship for possibly several years, where she would have the heartache of being forced into a position where she would have to deal with her divorce in India where her husband was present and where her husband would have increased opportunities to continue the appalling behaviour towards her which he has shown he was capable of in this country.

21. In my judgement the factors in favour of allowing this appellant to remain in this country now are so strong and so compelling as to outweigh by a considerable margin the reasons why she should not be allowed to remain, which are essentially no stronger than that immigration control needs to be enforced. As in this case, there is absolutely nothing untoward about this appellant's immigration history or indeed about any of the requirements one would normally wish an applicant for settlement eventually to satisfy but very very positive reasons indeed why the interference with her Article 8 rights would in the circumstances of this case be severe, I have no difficulty in finding this case so exceptional that leave should be granted outside the Rules.

22. It follows that the appellant's appeal must be allowed and I will so find.

Decision

I set aside the decision of First-tier Tribunal Judge Housego as containing a material error of law and I remake it as follows:

The appellant's appeal is allowed, on human rights grounds, Article 8.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

Upper Tribunal Judge Craig Dated: 31 October 2017