Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07081/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 September 2017	**On 10 October 2017**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MUKUNDKUMAR PATEL JIGISHBEN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Kannangara, instructed by Malik Law Chambers Solicitors
For the Respondent: Mr Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Turquet promulgated on 5 May 2017 dismissing her appeal against the decision of the respondent to refuse her human rights claim. It is at the outset of this case I think important to set out in some detail the history of how this appeal came before the First-tier Tribunal.

2. The appellant and her husband have been present in the United Kingdom since 2001 having entered as visitors. The husband subsequently made a

claim for asylum which was refused and eventually he was as it appears granted permission to stay under the Legacy Programme.

3. The Legacy Programme gave rise to a significant amount of litigation in the higher courts primarily arising in the judicial review of decisions under that process and it is unnecessary at least for these purposes for me to go into these in any great detail suffice to say that the programme is sufficiently set out in e well-known cases such as most recently in Hamzeh v SSHD [2013] EWHC 4113 (Admin) an in SH (Iran) v SSHD [2014] EWCA Civ 1469.

4. For whatever reason it appears that although the appellant and at all times it is said being treated as a dependant of the husband under his immigration claim initially the asylum claim and subsequently for whatever reasons it appears that she was not considered when a decision was made to grant her indefinite leave to remain on that basis.

5. It is not at all clear to me why, if it is now said that the central issue of this case is the differential treatment of a husband and wife, this was not addressed first when the decision was made in respect of the husband or in subsequent correspondence asking for clarification. Further, no proper reason is given why this important factor was not specifically drawn to the attention of the Secretary of State when an application was made for leave in line nor were there subsequent proper representations made after the decision in respect of which gave rise to this appeal. It appears it was only after the matter had to be adjourned that this issue was addressed. It is recorded and there does not appear to be a dispute in this in Judge Turquet's decision at paragraph 25 that the Home Office's older live cases unit requested information about the previous application of 3 January 2017 and solicitors had only responded on 18 April 2017 just two days before the hearing of that appeal. It therefore appears from the material before me that that issue is yet to be resolved.

6. Turning to the substance of the decision, the Secretary of State accepted that the couple were in an subsisting relationship certainly it does not appear to have been in dispute before the judge. The Secretary of State was not satisfied the requirements of paragraph EX1. of Appendix FM were met nor was the Secretary of State satisfied that there were reasons why although the requirements of the Rules were not met the appellant should nonetheless be granted leave to remain in the United Kingdom. The judge found first, the requirements of EX.1 were not met and second, that none of the other requirements of the Immigration Rules were met for example paragraph 276ADE and she considered having addressed herself in line with **Agyarko** both in the Court of Appeal and later inthe Supreme Court that she was not satisfied that there were reasons why having taken into account the public interest the removal of the appellant was disproportionate.

7. The challenges in the grounds are:

(i) that the judge failed to have adequate consideration to the Article 8 proportionality issue in which case the issue of the Legacy Programme is raised;

(ii) that the judge failed properly adequately to consider and deal with insurmountable obstacles issue under paragraph EX.1; and,

(iii) that there was inadequate consideration with regards to paragraph 276ADE of the Immigration Rules.

8. I deal with the third ground last because I have received no submissions on that and it does not appear that Mr Kannangara wishes to pursue that issue he certainly did not do so in submissions. I observe in respect of this ground that it is couched in terms of the ties which exist rather than any addressing of how the Rules are now formulated which is to whether there are very significant obstacles. The grounds fail properly to identify why or what those are and there is no submission put to me to show that the judge reached conclusions with regards to insurmountability or otherwise obstacles which were not open to her. The reasoning set out at paragraph 36 of the decision is sufficient and adequate to deal with all the issues and nothing has been said to me today to persuade me otherwise.

9. Turning to the second ground Mr Kannangara candidly accepted before me and I consider he was right to do so that he could not argue that the judge's approach to EX.1 was not one open to her. Having considered the fact that the matter for myself immaterial I am not satisfied bearing in mind what was said in **Agyarko** in the Supreme Court building on the jurisprudence of the Strasbourg Court that there is anything in this case other than the matter which I will turn to next capable of taking this out of the usual run of cases, bearing in mind that there had to be sufficiently compelling circumstances or at the very least something unusual to differentiate this case from the general position that where a family life has been established as it clearly has here certainly been built upon in this country since 2001 where neither party had leave to remain is something which would require compelling or other exceptional circumstances.

10. That brings to me the first ground of appeal which is the one which was the subject of the greater part of submissions before me. It is said that the judge erred in failing to take into account that the applicant had the appellant been treated differently from her husband in that although he had and for all intents and purposes there is no difference between his case and her case her being dependent on him such that she should have been granted indefinite leave to remain under the legacy programme in line with her husband.

11. I find no merit in the submission that that the judge ought to have taken into account the fact that no decision had been made under the Legacy Programme. On the basis of the material before me and certainly on the basis of the material before the judge as is shown in her decision, there

does not appear to have been any decision reached with respect to appellant.

12. There is no basis on which she could have been said nor does it appear to have properly been argued to the judge that the failure to reach the decision under the Legacy Programme was in itself unlawful or in that there was any reason why this was a significant factor given that a decision was yet to be made. Further it would appear that if a decision is made then it will be challengeable either by way of a further appeal or by way of judicial review.

13. I do note that there is a large body of case law regarding the Legacy Programme but I am not aware nor has either party drawn to my attention any cases in which there have been a situation like this where there is a husband and a wife who have been treated separately. Given that the matter is yet to be decided upon by the Secretary of State it could not have been proper for the judge to attach weight to that as that would have involved her speculating as to how the Secretary of State would approach the decision. Accordingly, for these reasons I consider that the judge did not err in not attaching weight or taking consideration into the decision and she reached a decision which was properly reasoned and was one to which she is entitled to come.

14. For these reasons I uphold the decision of the First-tier Tribunal.

SUMMARY OF CONCLUSIONS

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed Date: 9 October 2017

Upper Tribunal Judge Rintoul

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 9 October 2017

Upper Tribunal Judge Rintoul