



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/19871/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunals
On 31st August 2018

Decision and Reasons Promulgated
On 13th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS TOSLIMA KHATUN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Dixon (Counsel)
For the Respondent: Ms H Aboni (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Deni Matthews, promulgated on 18th April 2016, following a hearing at Bennett House, Stoke-on-Trent on 29th March 2016. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Bangladesh, and was born on 12th April 1949. She appealed against the decision of the Respondent dated 14th May 2015 refusing her application for leave to remain in the UK.

The Appellant's Claim

3. The Appellant's claim is as follows. She came to the UK on a visitor's visa on 11th September 2003. She came to assist her daughter through the late stages of a difficult pregnancy. Her husband was already in the UK. However, in the same month, he was diagnosed with cancer, and died a month later in October 2003. He had by that stage, received his indefinite leave to remain very shortly before his death. The Appellant now sought leave to remain as a dependent relative of her adult children in January 2004. That application was rejected. A further application was made in 2005 and also rejected. On the basis of these facts, the Appellant puts her claim in two different ways. First, that, as the judge put it, "the timing of her husband's tragic death effectively prevented her from making an application to join him as his spouse" (paragraph 42). Had he not passed away so soon after being granted ILR, and after the Appellant's arrival just a month prior to that, she would have been in a position to make an application to remain here as his wife. Second, that during the time that the Appellant has been in this country, she has made repeated applications to the Respondent to be allowed to remain in this country as the dependant of her children. She had developed private and family ties with them. There was a four year gap between her last application and the response from the Secretary of State. As the judge herself accepted, "I note she has been here for so long in part as a result of the time taken to resolve previous applications" (paragraph 42) that she feels she has a legitimate right to remain in this country now.

The Judge's Findings

4. In a sympathetic and comprehensively clear determination, the judge made the following findings. First, that the chronology of the Appellant's time in the UK, together with her successive applications to remain, "was not disputed by the parties" and that "prior to the present application and decision the Appellant had waited almost four years until a decision in 2009 from the Respondent" (paragraph 16). Second, that the Appellant wished to remain with her four adult children in the UK (although she had lost contact with one of her sons), and this evidence was consistent with "oral accounts from other witnesses" (paragraph 17). Third, that Mr Fokhrul Islam, the Appellant's son, wished to look after the Appellant, together with his wife, and that she was supported by them without recourse to public funds, and was "a dearly loved mother and grandmother, and that she is particularly good at settling her autistic grandson when his behaviour is challenging" (paragraph 19). Fourth, that the Appellant "is very close to all of her family in the United Kingdom" (paragraph 22). Fifth, that, having been kept waiting for four years from an earlier decision, the Appellant

“Has established strong and loving bonds with her children and grandchildren. I find that all concerned will be very sad to see any departure from the UK, and that in the short-term one of her grandchildren may have his behaviour adversely affected” (paragraph 30).

Sixth, that the Appellant “has no relatives in Bangladesh” (paragraph 31). Finally, that the Appellant’s removal “will represent a degree of upheaval” (paragraph 34), and that, with respect to her grandson who she has been looking after, “her departure will upset and distress her autistic grandchild particularly” (paragraph 44).

5. Nevertheless, the judge concluded, that in the circumstances, the decision of the Respondent Secretary of State could not be successfully challenged by the Appellant because, upon return to Bangladesh, she would have a home to return to,

“Will have significant family support, will remain in contact with her family, and will be able to see them during visits. She will be returning to her home area, after many years away but she has been in the UK without leave for many years, and elected to remain despite consistent refusals from the Respondent”.

Accordingly, the judge was not persuaded that “the proposed decision is a disproportionate interference in the Article 8 interests advanced in this appeal” (paragraph 45).

Grounds of Application

6. The grounds of application state that the judge failed adequately to take into account the fact that, but for the Appellant’s husband’s death, the Appellant would have been able to qualify for indefinite leave to enter and remain. The judge also failed to give proper regard to the autistic grandchild, with whom the Appellant had a special tie.
7. On 8th June 2018, permission to appeal was granted on the basis that it was arguable that the proportionality assessment in terms of the contention that, but for the Appellant’s husband’s death in 2003, the Appellant would have been entitled under the Rules, at that time for indefinite leave to remain, had not been properly conducted in a lawful manner.
8. On 12th July 2018, a Rule 24 response was entered to the effect that the Respondent Secretary did not show that the Appellant ever made any application to remain as a result of her marriage to her late husband. On 21st January 2004, just prior to the expiry of her visit visa, the Appellant applied to remain as the parent of Asma Amir. This application was refused. There was nothing to suggest that the Appellant ever claimed she had any right to remain as a result of her late husband obtaining indefinite leave in the UK. It was difficult to see what the “historic injustice” was in this case. Second, as far as the grandchild was concerned, there was no specific medical report about the effect of the removal of the Appellant on the grandchild.

Submissions

9. At the hearing before me on 31st August 2018, Mr Dixon, appearing on behalf of the Appellant, submitted that the issue of the Appellant's inability to apply for indefinite leave to remain, on the basis of her husband's status in this country, was a constant feature in the background of the facts of this case. For example, the judge only recognises this fact at paragraph 3 observing that, "her husband was already living in the United Kingdom, but sadly in that same month, he was diagnosed with cancer only to die a month later". Towards the end of the determination, the judge expressly recognises that "the timing of her husband's tragic death" had prevented the Appellant from making "an application to join him as his spouse" (paragraph 42). All of this, he submitted, was important because at the time, there was in existence immigration directorate provisions which allowed a person to switch from one category to another. This meant that the Appellant could switch from the "visitors" category to that of a "dependant". This could be done where there were exceptional compassionate circumstances, such as serious illness of one of the parties. Mr Dixon drew attention to page 28 of the Appellant's bundle, although he accepted that this particular policy had not been set out there. He also drew attention to Macdonald's Immigration Law & Practice which recognises (at paragraph 11.68) that the "no switching" provisions prevent currently persons from qualifying to vary their leave to remain as the spouse/civil partner of a British citizen or residence if they have not been in the UK beyond six months from the date of last admission, unless admitted as a fiancée/proposed civil partner. That, however, was not the position back in 2003, submitted Mr Dixon, when the Appellant arrived in the UK, and when up until October 2003, her husband was alive and living in this country with full legal status. This, stated Mr Dixon, begs the question as to whether the Appellant is simply to be treated as an overstayer, or whether a fuller consideration of the background facts in her case, would have led to the balance of considerations falling in her favour. If the judge had failed to give an entirely full consideration to these matters, addressing them only in an oblique manner, then arguably the way in which the balance of considerations should fall in a proportionality exercise, had not been properly evaluated at paragraph 42.
10. Second, as for the existence of the autistic child, the position was that the grandchild was self-harming as a result of autism and the judge had recognised that the Appellant had a particular calming influence on the boy. This aspect also has not been properly dealt with. The "best interests" requirement in the Rules suggested that a more detailed examination of the situation should take place.
11. For her part, Ms Aboni relied upon the Rule 24 response. She made two specific submissions. First, that the Appellant had never made any attempt to remain in the UK on the basis of exceptional compassionate circumstances. If an application was not made, it could not have been considered. Second, she had entered as a visitor, and had subsequently applied under paragraph 317 to remain as a dependent relative of Asma Amir. Ms Aboni explained that she had actually been able to locate the application. It was dated January 2004. It was refused under paragraph 319, with reference to paragraph 317. The Appellant's appeal thereafter, was dealt with "on the

papers” and it was dismissed. This suggests that she had knowingly remained in the UK without any basis of stay. She was here as a visitor and the expectation was that she would return. Plainly, when she entered, it was with the intention of going back. An application was never made under the policy.

12. In reply, Mr Dixon submitted that the factual circumstances were accepted by the judge. This meant that the judge had accepted that the Appellant’s husband had died just after she had arrived, thereby depriving her of the right to make an application as his wife. This was expressly recognised at paragraph 42 of the determination. Against these background facts, the question was what weight was to be attached in any proportionality exercise by the judge to the existence of a policy, under which the Appellant would have been able to apply to remain in this country, but for the fact that her husband, who had been seriously ill with cancer, passed away the following month, after her arrival. It ought not to be forgotten, submitted Mr Dixon, that the effect of the policy was precisely to allow people to “switch” from the visitor category to that of a “bereaved spouse”.

No Error of Law

13. I am satisfied that the decision of the First-tier Tribunal, did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. As stated by the judge below, the Appellant has my very considerable sympathy. This is not an easy case to determine. Nevertheless, the Appellant in this case did enter as a visitor, with the intention of returning back to Bangladesh. There was no application made to the Secretary of State as a dependant of her husband. I say this whilst recognising that the window of opportunity was extremely narrow for the Appellant to do so. She had only arrived in September and her husband was only granted ILR in October, when he deteriorated seriously with cancer, and then passed away that very same month. But importantly, the particular “policy” in question was not before Judge Deni Mathews. It is not set out at page 28 of the Appellant’s bundle. It has not been presented before this Tribunal. In fact, it is not even clear from the determination whether the arguments that are being put before this Tribunal were put in quite the same way, in terms of the Appellant’s right to remain here as a “bereaved spouse” on the basis of “exceptional compassionate circumstances”. Second, as far as the autistic child is concerned, whilst the judge recognised the role played by the Appellant, in terms of “settling her autistic grandson when his behaviour is challenging” (paragraph 19) there was no medical evidence, or other expert report, which suggests that the decision reached by the judge (at paragraph 44) was not open to her, when she concluded that “her departure will upset and distress her autistic grandchild particularly”. The ultimate conclusions (at paragraph 45) was one that was open to the judge.

Notice of Decision

14. There is no material error of law in the original judge’s decision. The determination shall stand.
15. No anonymity direction is made.

16. This appeal is dismissed.

Signed

Dated

Deputy Upper Tribunal Judge Juss

10th September 2018