Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29111/2013

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent	**Determination Promulgated**
On 5th June 2014	**On 19th June 2014**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MRS NIGHAT BI
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Noor (instructed by Heritage, Solicitors)
For the Respondent: Mr D Mills (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant is a citizen of Pakistan born on 2nd April 1985 who appeals to the Upper Tribunal, with permission, against the determination of the First-tier Tribunal (Judge R A Cox) promulgated on 31st January 2014 by which he dismissed her appeal against the Secretary of State's decision to

refuse to grant her indefinite leave to remain in the UK as the victim of domestic violence and to remove her to Pakistan.

2. My first task is to decide whether or not Judge Cox made an error of law in his determination and if so whether and to what extent his determination should be set aside.

3. Only one of the grounds upon which permission to appeal was sought was relied upon by Mr Noor, namely the single issue of whether the Judge applied the correct test when assessing the date upon which the marriage had permanently broken down. It was his submission that he had not.

4. The circumstances of this appeal are that the Appellant came to the United Kingdom with temporary leave as a spouse on 21st July 2007. That leave expired on 28th June 2009. An out of time application for settlement as a spouse was submitted on the 9th November 2009 and ultimately rejected by the Secretary of State on 15th May 2011. The Appellant denies any knowledge of that application.

5. The Appellant resided with her husband and his family in the UK between July 2007 and December 2008 when, following an incident of domestic violence, she left the property to go to stay with her brother. She then moved back with her husband, this time into their own rented property, in March 2009. She remained living in that property with her husband until October 2010.

6. The requirements of the Immigration Rules for leave to remain as the victim of domestic violence are that the marriage must have permanently broken down as a result of domestic violence during the currency of the leave, in this case prior to 28th June 2009.

7. The First-tier Tribunal found that the marriage had not permanently broken down during that period and so she could not succeed under the Rules. It was accepted that the cause of the breakdown was domestic violence. The Secretary of State did not challenge the finding as to the cause of the breakdown.

8. Mr Noor did not challenge the First-tier Tribunal’s Article 8 conclusion.

9. Mr Noor argued that within the Asylum and Immigration Jurisdiction there is no guidance as to what "permanent breakdown" means. He argued that guidance is necessary and submitted that “permanent breakdown” is analogous to “irretrievable breakdown” in divorce proceedings. He relied on various cases within the family jurisdiction and argued that the test is whether an Appellant can reasonably be expected to live with a spouse and if not then the marriage can be said to have permanently broken down. For reasons which I will go into in greater detail later I do not find that argument persuasive.

10. Mr Noor then referred to paragraph 10 of the determination where Judge Cox had found as follows:-

> "I found both the Appellant and her brother to be generally credible witnesses and I would certainly accept the marriage did permanently break down as a result of domestic violence in October 2010, since which time the parties have not cohabited. I would also accept from them, notwithstanding the absence of independent corroborative evidence from any source, that this was an arranged as opposed to a "love" marriage and that the Appellant generally found herself once here to be in an unhappy and abusive relationship. Of course, if the application for permanent settlement made in her name on 9th November 2009 was the Appellant's application, that really does put paid to her claim now. I am satisfied that the signature on the application form is the Appellant's but I am prepared to accept in her favour that she may have signed under duress and perhaps not even known what she was signing. I observe only that the application would indicate that the husband still regarded the marriage as subsisting. But if I leave that matter to one side and also accept that there was the incident in December 2008 leading to a two-month separation, the fact is that by March 2009 the parties had agreed upon a reconciliation (however unwillingly on the part of the Appellant) and, importantly as it seems to me, had in effect determined to start their life together afresh away from what appears to have been the baleful influence of the mother-in-law and brother and sisters-in-law. I found it telling that, when asked by her counsel what her opinion of the reconciliation was she replied "I wanted it to get better but it didn't ". It indicates to me that, although the reconciliation meeting may have been brokered by relatives, the Appellant was not at that time adverse to it and did not regard the marriage as having permanently broken down at that stage."

11. Where I am persuaded that the Judge fell into error is that, if he found that the Appellant was "forced", in 2009 against her will to return to her husband that does then indicate a permanent breakdown of the marriage when she left him in December 2008. A forced reconciliation is not a reconciliation. The issue then was her intention and motive in March 2009. The First-tier Tribunal Judge has made, in my view, contradictory findings that she was unwilling to reconcile but wanted it to succeed. Her willingness was a relevant factor. With the agreement of both representatives I indicated that I would set aside the determination in that respect only and hear evidence as to the circumstances of the reconciliation in March 2009.

12. I then heard what can only be described as tortuous evidence from the Appellant. I accepted that she was nervous and that she is uneducated but every effort was made to reassure her and the questions put in the simplest language. She prevaricated and gave contradictory answers and sometimes no answer at all. That cannot be explained by either nerves or illiteracy. Her brother was not much better and he had no such excuse. She was asked her intention when she returned to her husband in 2009 and she said it was because of the "obligation" regarding family. She claimed ignorance of what had taken place at the family meetings and said she did not attend. She was only able to say that the meetings were

to settle things. She said her brother told her what took place but then could not or would not tell us what he had told her.

13. The Appellant was asked what was discussed at the family meetings and whether the abuse she had suffered was discussed and whether she was assured that things would get better. She said that she was told that such assurances were given and that things would get better. She was asked the reason for moving into a new property with her husband rather than back with his family as before and was unable to give the reason for that. When pressed she agreed it was for a fresh start. She was asked why it was that if things had not got better as she had hoped, she stayed so long and she simply said that she had an obligation to stay from her family. She then gave varying answers as to whether or not she was in contact with her family during that period saying at one stage that she was in contact with her brother and at another stage that she was not. She eventually said that she had no contact with any member of her family between moving in with her husband in March 2009 and leaving in October 2010.

14. The Appellant was asked about the comment in her brother's statement where he said that in the past two years (2012 & 2013) efforts had been made to ensure a reconciliation and that the family are still trying to work for that. She was unable/unwilling to give a coherent answer.

15. The Appellant was asked when she decided in her own mind that her marriage was over. This was the part of her evidence that was most confused and inconsistent. She said both 2008 and 2010. She was unable to explain why, although she finally separated from him in 2010 she neither instigated divorce proceedings nor sought leave to remain for another three years – there are still no divorce proceedings. As for not applying for leave to remain she said that her husband had told her that if she told anyone she would be sent back to Pakistan. She confirmed that conversation took place when she lived with him – before October 2010. With regard to the divorce she said that she thought that he would divorce her. Neither are satisfactory answers. She had confided in her family in December 2008. The family has a history of migration to the UK for marriage and would have been able to seek legal advice. The same applies to divorce proceedings.

16. With regard to the date on which she concluded that her marriage was finally over her counsel asked her to clarify. He pointed out that she had said both 2008 and 2010 and asked her which it was. She said 2010.

17. I then heard evidence from the Appellant’s brother. This is the brother with whom the Appellant lived during the period of separation from December 2008 to March 2009 and with whom she has lived since October 2010. I found his evidence to be similarly less than impressive concerning the events of 2009. He said that he had always known that the Appellant’s husband was a bad man and was never in favour of the marriage; however, it was his parents’ decision and he was told not to interfere. Nevertheless, his parents apparently asked him to hold meetings to broker

a reconciliation at his home. Contrary to the evidence of his sister, he said that she was present at some of the meetings. He said that he knew his sister was very unhappy and unwilling to return to her husband; however he eventually acknowledged that she had never actually said so. By way of explanation for that he suggested that was because he was male and she was his sister and so she was shy of talking to him. That however is totally contradicted by her willingness to tell him all about the abuse she had endured.

18. The brother often, when having difficulty answering questions, resorted to saying that he was doing as he was told by his parents. In particular he blamed them when asked why, if he knew how dreadfully the husband had treated his sister, he went along with returning her to him. However, that parental pressure was apparently not present when she left in October 2010. He was unable to offer an explanation for that.

19. With regard to the delay in making the application to the Secretary of State he said that he did not know about such things. That is somewhat belied by the fact that both he and the Appellant's twin sister have settled in the UK through the marriage route. It is simply not credible that this family knew nothing of immigration law or how to seek legal advice.

20. It is also not credible that having brokered a reconciliation between his sister and a man he says he knew would not change, he would be instrumental in returning her to him. It is also not credible that having brokered this reconciliation he would not have made contact with her between March 2009 and October 2010. He said he tried only once when there was no answer and did not try again. He suggested that the reason for this was that his parents had told him not to interfere. However they asked him to interfere in brokering the meetings. Also he has been happy to go against their wishes in October 2010 – despite, as he said in his statement, attempts to affect another reconciliation. Further those are not the actions of a person who is now and has since October 2010 been fully supportive of his sister.

21. Although the First-tier Tribunal accepted that the marriage permanently broke down as a result of domestic violence and I do not go behind that finding, the evidence I heard as to when that happened and the circumstances of the separation were very far from credible.

22. The evidence that I heard had all the flavour of being given by people who knew that it was necessary to show that the marriage had ended in December 2008 in order for the appeal to succeed. The way in which the evidence was given by both witnesses, their prevarication and inconsistencies lead me to conclude that they were not being truthful. This was an arranged marriage not a love marriage therefore there was an element to which the Appellant was acting in accordance with her family's wishes when she married her husband. There has however been no suggestion that this was a forced marriage and I have no doubt that in the

culture from which the Appellant comes she was content to go along with the wishes of her family because that was always her expectation. For the same reasons she would have been reluctant to acknowledge that her marriage had failed and I have no doubt that the discussions that took place in 2009 were an attempt by the wider family to ensure that the marriage had every chance of success and I also find that she was a willing participant in that. She clearly would not wish to return to the abuse and ill-treatment that she had previously received and a considerable amount of that was at the hands of the wider family. That therefore makes it entirely understandable that the couple should be provided with rented accommodation of their own where they could live as a couple without interference from his family. The Appellant has herself said on more than one occasion that she thought or hoped things might get better. That was no doubt the hope of all those at the meeting and I have no doubt either that the Appellant was told that assurances had been given that his behaviour would alter. I find therefore that the Appellant was a willing party to the reconciliation albeit she may have been a little nervous because she had previously suffered ill-treatment.

23. I do not believe there was no contact between the Appellant and her family while she was living with her husband in their own home. It is also significant I find that the ultimate breakup of the marriage occurred when the husband left the Appellant not the other way round.

24. Mr Noor argued, following the line of the family cases that he cited, that a marriage is said to have permanently broken down if it has irretrievably broken down, which is the test for divorce. The cases that he relied on in particular are related to unreasonable behaviour. However, Mr Noor is I think confusing the ground of divorce and the facts to establish the ground. The cases that he referred to do not define “irretrievable breakdown” as he suggested, but rather they are cases which look at whether and in what circumstances it can be said that a party to a marriage “cannot be expected to live with the other party as a result of their behaviour” if they are in fact the living under the same roof. It has long been accepted that that fact can be established when parties are living under the same roof if it is the case that the relationship has in truth ended and the injured party has no alternative but to remain.

25. There is only one ground of divorce and that ground is that the marriage has irretrievably broken down. A petitioner establishes to the satisfaction of the court that the marriage has in fact irretrievably broken down by showing one of five things. Those are desertion, separation for five years, separation two years with the consent of the other spouse, adultery such that the petitioner finds it intolerable to live with the Respondent and unreasonable behaviour such that the petitioner cannot reasonably be expected to live with the Respondent. If this Appellant had issued a divorce petition on the basis of domestic violence and on the basis that she had nowhere else to go I have no doubt that she would have succeeded. Had she made application immediately arguing, credibly, that

she could not leave earlier, her case may well have succeeded. She did not do that even after the separation. To decide now after the Appellant waited a further three years, on an objective view that she could not be expected to live with her husband and thus the marriage had permanently broken down is wholly unsustainable. The test must be a subjective test:- when was it that this spouse could not reasonably be expected to live with her husband. Her evidence was that she decided the marriage was over in 2010. That was her decision. On my findings that the Appellant was a willing participant in an attempted reconciliation and that she was in contact with her family I can only conclude that while she was living with her husband after March 2009 the marriage was subsisting. Whether or not the Appellant was a willing party to the settlement application made in November 2009, its very existence indicates an ongoing marriage. A husband who wants nothing to do with a wife would have no reason to wish her to remain in the UK and again I note that ultimately it was the husband who left the wife.

26. I therefore find as a fact that this marriage did not break down permanently until October 2010 when the husband left the Appellant and instructed her to leave the house. That domestic violence was the cause of the breakdown I am prepared to accept as did the First-tier Tribunal Judge but not in 2009 as claimed.

27. Therefore having set aside the First-tier Tribunal's determination in part as indicated above I redecide it and find that the Appellant's marriage did not permanently break down prior to the expiry of her leave to enter and thus her appeal is dismissed.

28. The appeal to the Upper Tribunal is dismissed.

Signed Dated 17th June 2014

Upper Tribunal Judge Martin