Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35515/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 15 April 2014	**On 30 May 2014**
Oral determination given following the hearing	……

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

POOJA THAPA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Balroop, Counsel, instructed by A2 Solicitors
For the Respondent: Mr G Saunders, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Nepal who was born on 13 February 1983. She is married to a Mr Mohan Poudel who has been in this country now for a long period of time, as will be apparent from what is said below.

2. The appellant arrived in this country on 16 September 2007 on a student visa which was valid until 31 October 2010 and prior to the expiration of her student visa she applied for an extension of leave which was granted until 16 April 2012. The appellant met her husband in March 2008 and they were marred in this country on 2 April 2009. It is common ground that this is a valid and subsisting marriage and that the parties intend to live together permanently in the UK as husband and wife. She is now very heavily pregnant and her child is due to be born sometime this month.

3. It is not in dispute that following their marriage the appellant could not immediately apply for leave to remain as a dependant of her husband as at that time he had only limited leave to remain in the United Kingdom as a student, but on 24 January 2012 he applied for indefinite leave to remain based on ten years' lawful residence. It was the intention of the appellant and her husband, and certainly their hope, that leave to remain would be granted before the expiry of the appellant's existing student leave on 16 April 2012 which would enable her then to apply as her husband's dependant under the Immigration Rules.

4. What then seems to have occurred is as follows. On 26 March 2012 the respondent made a decision to allow the appellant's husband's application. Included within the appellant's bundle at page 98 is the residence permit in respect of the appellant's husband on which it is stated that he was granted indefinite leave to remain on 26 March 2012. As a fact, therefore, it would appear that as that date the appellant had indefinite leave to remain. There is an issue as to the precise date on which the appellant's husband was "settled" which will be discussed below, but this is a relevant date.

5. No doubt because of a lack of sufficient administrative resources the decision which the respondent had already made was not communicated to the appellant's husband until 21 April 2012, by which time the appellant's existing leave had expired. Because she had to make her application for further leave to remain before her leave expired, she made this application on 13 April 2013, which was just before that leave expired (and was 8 days before the respondent's decision to grant her husband indefinite leave to remain was communicated to him). Otherwise she would technically have been present in this country without leave, which would have prevented her making an in-country application as her husband's dependant because she would have had no immigration status. She made her application for leave to remain on Article 8 grounds.

6. Thereafter it seems that the respondent did nothing with this application until 23 July 2013, a period of some fifteen months, when the application was refused. By that time there can be no question but that the appellant's husband was "settled" within the meaning of any definition contained within the Rules.

7. The appellant appealed against this decision and her appeal was heard before First-tier Tribunal Judge Sommerville sitting at Birmingham on 31 January 2014, but in a determination promulgated on 19 February 2014 Judge Sommerville dismissed the appeal both under the Immigration Rules and also on human rights grounds; this

was no doubt intended to be a reference to Article 8 outside the requirements of the Immigration Rules or at any rate under the residual powers within the Rules to grant an application under Article 8 if a refusal would otherwise result in "unjustifiably harsh consequences" for an applicant.

8. The appellant now appeals to this Tribunal, permission to appeal having been granted by Designated First-tier Tribunal Judge McClure on 14 March 2014.

The Hearing

9. I heard submissions on behalf of both parties which I have recorded contemporaneously. As these submissions are contained within the Record of Proceedings I shall not refer below to everything which was said to me during the course of the hearing. I have, however, had regard to everything which was said as well as to all the documents which are contained within the file before reaching my decision.

10. On behalf of the respondent Mr Saunders very fairly accepted that no point had been taken in the refusal letter and none was taken now with regard to the financial requirements under the Rules, the relevant Rules in this case being contained within paragraph E-LTRP1.3 of Appendix FM onwards. It was accordingly accepted that the financial requirements were satisfied. I deal below with what the relevant issue is.

11. On behalf of the appellant Mr Balroop submitted (and this was common ground) that the relevant section of the Rules was contained within Appendix FM at E-LTRP1.1 onwards. I now set out the relevant provisions which are as follows:

> "Section E-LTRP: Eligibility for limited leave to remain as a partner
>
> E-LTRP1.1. To qualify for limited leave to remain as a partner all of the requirements of paragraph E-LTRP.1.2.2 must be met.
>
> Relationship requirements
>
> E-LTRP1.2. The applicant's partner must be –
>
> (a) a British citizen in the UK;
>
> (b) present and settled in the UK; or
>
> (c) in the UK with refugee leave or as a person with humanitarian protection"

12. I pause at this stage to state that it is common ground that the requirement is that the applicant's partner (in this case the appellant's husband) must be **either** a British citizen in the UK **or** present and settled in the UK**.** It is not suggested (as in the grounds it seems to have been assumed the judge had found) that there was a requirement that the partner must be both a British citizen in the UK and a person present and settled in the UK. Judge Sommerville had reached his findings on the basis that the appellant's husband was neither a British citizen nor a person present

and settled in the UK. For the purposes of this determination the issue which must be determined is whether or not at the relevant time (which will be discussed below) the appellant's husband was a person present and settled in the UK.

13. The requirements under Section E-LTRP continue as follows:

> "E-LTRP.1.3. The applicant must be aged 18 or over at the date of application.
>
> E-LTRP.1.4 The partner must be aged 18 or over at the date of application. ...
>
> E-LTRP.1.6. The applicant and her partner must have met in person.
>
> E-LTRP.1.7. The relationship between the applicant and her partner must be genuine and subsisting.
>
> E-LTRP.1.8. If the applicant and partner are married or in a civil partnership it must be a valid marriage or civil partnership, as specified. ...
>
> E-LTRP.1.10. The applicant and her partner must intend to live together permanently in the UK and, in any application for limited leave to remain as a partner (except where the applicant is in the UK as a fiancé(e) or proposed civil partner) and in any application for indefinite leave to remain as a partner, the applicant must provide evidence that, since entry clearance as a partner was granted under paragraph D-ECP.1.1. or since the last [grant of] limited leave to remain as a partner the applicant and the partner lived together in the UK or there is good reason, consistent with the continuing intention to live together permanently in the UK, for any period that they have not done so ...
>
> E-LTRP.1.12. The applicant's partner cannot be the applicant's fiancé(e) or proposed civil partner, unless the applicant is granted entry clearance as that person's fiancé(e) or proposed civil partner.
>
> <u>Immigration Status Requirements</u>
>
> E-LTRP.2.1. The applicant must not be in the UK –
>
> (a) as a visitor;
>
> (b) with valid leave granted for a period of six months or less, unless that leave is as a fiancé(e) or proposed civil partner, or was granted pending the outcome of Family Court or divorce proceedings ..
>
> E-LTRP.2.2. The applicant must not be in the UK in breach of the immigration laws (disregarded any period of overstaying for a period of 28 days or less), unless paragraph EX.1 applies.

Financial requirements ..."

14. As already noted above, the respondent does not challenge that the financial requirements are satisfied and indeed it is apparent from the covering letter sent by the appellant's solicitors on her behalf that documents evidencing this have been sent to the respondent.

15. There is an English language requirement, but it is not suggested that this requirement was not satisfied, and indeed given that the appellant had been present in this country as a student for many years, there is no basis upon which the application could have been refused on this ground.

16. The error of law which is asserted with regard to Judge Sommerville's determination is first that he was wrong to find as he did at paragraph 10 of his determination that the appellant's husband was not "present and settled in the UK". It is worth recording in full what Judge Sommerville in fact found at paragraph 10 of his determination under the heading "Analysis of the evidence and findings of fact":

> "10. I have considered the application in the context of Appendix FM to the Immigration Rules, ELTRP 1.1 to 1.12. For the reasons explained above, as at the date of decision, the appellant could not satisfy paragraph E-LTRP 1.2(a) or (b) as her partner was neither a '*British citizen in the UK*' or '*present and settled in the UK'*. It is accepted that they meet all the requirements of E-LTRP 1.3 to 1.12 and in particular that the appellant and her partner are in a genuine and subsisting [marriage]."

17. The first thing that must be said about this finding is that it is in itself clearly wrong, because as at the date of decision, which was July 2013, the appellant's husband clearly was present and settled in the UK. This is not challenged, and it could not be because over a year earlier he had been granted indefinite leave to remain on this basis. However, what does need to be discussed today is what the relevant dates are for the purposes of this appeal.

18. The decision under Article 8 is also challenged, because the judge found at paragraphs 14 that the refusal did not result in "unjustifiably harsh consequences" for the appellant and her husband, in line with the decision of this Tribunal in *Gulshan* [2013] UKUT 00640. The judge apparently made this finding on the basis that because "the appellant and her husband both knew when they entered into their relationship that their respective immigration status was precarious" and they are both from Nepal, he did "not accept that just because they said that they now have no close relatives in Nepal it will be unduly harsh for them to return there and this is notwithstanding that the employment opportunities are not as good as they are in this country".

19. As will be discussed below, when reaching a finding that the consequences of this decision would not be "unjustifiably harsh" the judge does not appear to have given any (or any proper) consideration to the competing factors which might be said to exist in the circumstances of this case, and in particular that the appellant was by this

time heavily pregnant and due to give birth shortly. All that is said in this regard is what is contained at paragraph 11 of the determination, as follows:

> "I consider whether paragraph EX(a) applies. At the date of decision and at the date of hearing the appellant had no child. However, I accept on the evidence that she is pregnant and the child is due to be born in April. That does not assist the appellant as she had no child at the date of entry clearance and therefore EX(a) is not satisfied."

Discussion

20. The first question I have to determine is whether or not there was an error of law within the determination sufficiently material that the decision must be set aside and remade. In my judgement there was, for a number of reasons which I shall now set out. In the first place, as already noted, Judge Sommerville was clearly wrong when he found that the appellant's partner was not "at the date of decision" "present and settled in the UK". He was. He had been granted indefinite leave on 26 March 2012 and that decision had been communicated to him on 21 April 2012.

21. Although it might have been argued that as at the date of application (being 13 April 2012) the appellant's husband was not present and settled in the UK (because the decision to grant him indefinite leave had not been communicated to him by that date) this was not even considered within the determination.

22. I also consider that, given the circumstances of this case, which were that if a variation of leave was refused this appellant would be obliged to return to Nepal, give birth in that country to a child whose father was present and settled in this country, and then apply for permission to return on the basis that she was entitled so to do under the Rules, the judge should have given further consideration to these circumstances before just stating baldly that the refusal does not result in "*an unjustifiably harsh* consequence" for the appellant and her husband.

23. Accordingly, this Tribunal must remake the decision, which I shall now do. The first issue which is before me is as to whether or not, when considering whether the appellant's husband could be described as present and settled in this country, (for the purpose of considering whether the appeal should succeed under the rules), I need to consider the position as at the date of the application or whether the relevant date is the date of decision. Even if I were to consider that the relevant date was the date of the application, I would then need to consider whether or not as at that date the appellant's husband should be treated as settled (he was clearly present at all relevant times) or whether, because he had not been told by then that his application had succeeded, he could not then be treated as settled.

24. The next question I would have to consider (which would only be material were the application not to succeed under the provisions set out at E-LTRP within Appendix FM) would be whether in any case further leave should be granted under the Rules but outside these provisions on the basis that the refusal of the application would result in "unjustifiably harsh consequences" for the appellant and her husband.

25. I turn first to consider whether or not the appropriate date on which the application needed to be considered was the date of application or date of decision. In my judgement, it was the date of decision. Neither party could point me to any relevant authority, other than by analogy, but I bear in mind that this was an in-country application and that at all times until the date of the decision both the appellant and her husband were in this country lawfully.

26. In the case of in-country applications, there seems to be no reason why the application should not be considered as at the time the decision is made. At that time, as already noted, the appellant's husband was indeed settled in this country and there is no challenge to that fact.

27. As Mr Balroop submitted, if the respondent wished applications such as these to be considered as at the date of application (as for example is the case with points-based applications) it would have been open to her so to provide within the Rules, as indeed is provided in the case of points-based applications. The fact is that she has not done so. The appellant's appeal accordingly must succeed on that ground alone.

28. Even if I am wrong about that, in my judgement as at the date of application the appellant's husband anyway was for the purposes of these Rules "settled". It is common ground that he was in fact granted indefinite leave to remain on the grounds of long residence on 26 March 2012. There is no requirement within the Rules that this decision has to be communicated before it takes effect. Even if when the decision was sent for some reason it went missing in the post, this would not have invalidated the decision. Accordingly, by the time the appellant made the application, even though she was not aware of the fact, her husband was in fact settled. Accordingly, on any basis, this appeal should succeed under the Rules.

29. I would add that in any event, there would seem to be a residual unfairness in a situation where even though a decision had been made to grant indefinite leave to the appellant's husband, there being no basis upon which his application could properly have been refused, because this was not a matter of discretion within the Rules, that decision was not communicated in sufficient time to allow his wife, the appellant, to make her application.

30. Obviously, in light of my decision to allow the appeal on the basis I have stated above, it is not strictly necessary for me to consider the Article 8 position, but I do so anyway for the sake of completeness, in the alternative. In my judgement when considering all the factors in this case, the decision not to grant this application was contrary to the appellant's Article 8 rights when the decision was made by the First-tier Tribunal and would be even more so today, when the appellant is about to give birth (she was about seven months' pregnant when Judge Sommerville made his decision).

31. It is an important factor that were this appellant now to be required to return to Nepal, on the evidence before this Tribunal, there is no reason to doubt but that if she applied from there as the dependant of her husband, who is now present and settled

in the UK, that application should succeed. So she would be required to return shortly after (she clearly could not be expected to fly to Nepal before) the birth of her child, who would be the child of a person present and settled in the UK, (and thus entitled to British citizenship), merely in order to make an application from abroad which there is no reason to doubt would succeed. The effect of this would be that there would be an enforced separation between the appellant and her husband and also between the child when born and that child's father (or between the mother and her child if the child did not leave with her). As was made clear by the House of Lords in *Chikwamba* [2008] UKHL 40 and also subsequently by the Court of Appeal in *Hayat* [2012] EWCA Civ 1054, there would have to be a good reason why such a separation would be considered not to be in breach of an applicant's Article 8 rights in such circumstances.

32. In my judgement, the phrase "unjustifiably harsh consequences" has to be considered in light of all the factors in this case, and I consider given the background to this case, that there is no proper reason for requiring this appellant in present circumstances to return to Nepal merely in order to make a fresh application from abroad.

33. It follows that this appeal must be allowed and I shall so order.

Decision

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

The appellant's appeal is allowed, on all grounds.

Signed: Date: 27 May 2014

Upper Tribunal Judge Craig