Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00057/2015

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 28th April 2016	**On 18th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[H K]
~~**(ANONYMITY ORDER NOT MADE)**~~

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Miss L Norman, instructed by Messrs Bassi

DECISION AND REASONS

1. [HK] is a citizen of India born on [ ] 1985. I will refer to her as "the Applicant". She came to the United Kingdom on 6th April 2007 with a visa as a spouse valid until the 3rd April 2009. She submitted an application for further leave to remain as a spouse on 5th July 2011. That was refused but she was granted discretionary leave to remain on the basis of her marriage. On 28th August 2014 application was made on her behalf for indefinite leave to remain as a victim of domestic violence and she also applied for leave to remain on the basis of family and private life. These were refused and she made a further application for leave to remain on the basis of family and private life. The applications were refused and a decision made to remove her to India.

2. The Applicant's appeal against refusal to vary her leave and removal was heard before First-tier Tribunal Judge Phull on 22nd July 2015. In a decision promulgated on 13th August 2015 the appeal was dismissed under the Immigration Rules but allowed under Article 8 ECHR. The Secretary of State applied for permission to appeal to this Tribunal against the judge's decision.

3. In the grounds it was said that the judge had not provided adequate explanation as to why Article 8 was breached. The judge had accepted that there was domestic abuse but acknowledged that the Applicant could not succeed under the Immigration Rules. The judge then considered the impact upon the children of a relative should the Applicant be removed to India. The judge stated that the issue had not been dealt with by the Secretary of State although it would not have formed part of any general consideration but only featured in the balancing exercise regarding Article 8 which the judge could have considered. There was no explanation, it was said, as to why the lack of the Applicant's presence in the UK would breach her rights under the Human Rights Convention or those of the children. The judge found that it would be disproportionate to remove the Applicant because of domestic abuse to which she was no longer subject and a relationship with a relative's children but had not explained what the result of the removal might be. She had found that there was not anything in the public interest warranting removal of the Applicant but effective immigration controls were of public interest and there was nothing exceptional in the case that would warrant visiting the Human Rights Convention. Permission was granted.

4. The Applicant's representatives put in a detailed response under Upper Tribunal Procedure Rule 24 arguing that there was no material error of law in the judge's decision. The judge had found that there was family life and that the Applicant cared for the cousin's children. The existence of family life was a matter of fact. There was a degree of dependency between the Applicant and her cousin and the Applicant had been ostracised by her family in India. The cousin's British children enjoyed family life with the Applicant and would be adversely affected if she were removed. Finally it was said that the judge had found that the application for settlement under the Rules could not succeed because the Applicant had been granted discretionary leave and therefore could not satisfy the requirements of the Rules to obtain indefinite leave to remain on the grounds of domestic violence but

the judge did find that the marriage had broken down during the probationary period and the Immigration Rules do not preclude overstayers from applying for indefinite leave. The Applicant had applied in the correct manner and the only reason she could not succeed under the Rules was because she had been granted discretionary leave to remain. These factors, it was said, were all relevant to the proportionality assessment.

5. At the hearing before me Mr Mills addressed me first. He said that the application could not have been allowed under the Rules and had been allowed under Article 8. There was a reference to the marriage having broken down during the probationary period but it had broken down during a period of discretionary leave and therefore the Applicant could not meet the requirements of the Rules. The judge found at paragraph 32 of her decision that there was nothing in the public interest to deflect from the fact that the Applicant was a woman who had suffered domestic violence. Mr Mills submitted that this was a classic example of sympathy by a judge for an Applicant and a belief that Article 8 was a general dispensing power. But the Supreme Court had disapproved of such an approach in cases such as **Patel and others v SSHD [2013] UKSC 72.** He said that the purpose of the domestic violence concession and subsequent rule was so that an abusive British sponsor should not use an Applicant's immigration status as a lever in order to abuse. That was why the rule was specific. If the requirements of the Rules were met ILR was granted and that was a route out of the violence. He submitted that this was not the case with the current matter. Parliament had decided where the balance of the public interest fell. The judge appeared to think that any finding of domestic violence would lead to a right to remain but that was not the case. If there was a risk on return the Applicant could apply for asylum.

6. He continued that the finding that the Appellant was a victim of domestic violence was arguably perverse. It was based on the judge excluding a police report which the judge had assessed selectively. The inference (at paragraph 15) was that the Applicant's representatives had been unable to obtain the full report because the former husband's family worked with the police. The judge acknowledged she had the report but said that she was ignoring it because it had been redacted. She did not give a basis on which she said she could not rely upon it. Even if her view was not perverse but merely generous she had not demonstrated how the requirements of Article 8 were met. The Applicant did not meet the requirements of the Rules and the judge appeared to think the fact that she had "suffered enough" was an adequate explanation.

7. He continued that the judge found that there was family life with a cousin but the hearing had only taken place in the middle of 2015 and the Applicant had lived with her cousin for a little over a year. At paragraph 26 the judge found that the interests of the cousin and children were relevant. With regard to the welfare of the children she found that the decision under appeal was not in accordance with the law as the best interests of the children had not been adequately considered. It was not clear that it was ever argued that it was against the interests of the children if the Applicant, a second cousin, were removed. He said the interests of the children were

fully served by living with their own parents and the suggestion that the interests of the children should be considered without evidence of significance was not tenable. To add to the error the judge found that the decision was not in accordance with the law due to a failure to consider the best interests of the children, in which case she should not have gone on to consider proportionality. She had never considered the best interests of the children herself and had not explained how significant they were in the balance. The Applicant had been living with her cousin but had been working herself. There was no evidence of dependency and nowhere was there consideration of whether there were compelling factors outside the Rules requiring Article 8 to be considered.

8. Finally Mr Mills said that the judge had not considered in substance Section 117B of the Nationality, Immigration and Asylum Act 2002. She commented at paragraph 24 that she had had regard to the Section but she had not actually addressed it. Section 117B(5) indicated that little weight should be given to private life where leave was precarious. The judge had not considered that. It had come down to the judge having sympathy for the Applicant and thinking that she deserved to stay but that was not sufficient.

9. In reply Miss Norman referred to the Rule 24 response on which she relied. She said the starting point was that the judge found the witnesses to be credible. She said it was naïve to suggest that the judge should have relied on the police report when it had been redacted and there had been no explanation for that redaction. She said there was ample evidence of domestic violence and the marriage had broken down during the probationary period. It was the violence which had prevented the Applicant from making a further application in time. The test under the Rules was whether the relationship had broken down during the probationary period and the judge had accepted that it did. She found that the Applicant had not been able to make the application earlier. If she had done so, on the judge's findings, she would have been granted ILR. The state could not have acted as it would have done because of the nature of the domestic violence. The effect was that the Applicant was vulnerable, would be ostracised in India and could not return to her family.

10. She continued by saying that with regard to Article 8 the coercive control demonstrated was not in the public interest. It was suggested that it had not been shown that there was family life but as was apparent from the Rule 24 response family life covered a diverse range of relationships. The judge had explained this, she submitted. She was involved in the family of the cousin and her children. They looked after each other. There was an emotional dependency. The judge had been entitled to find that and to say that the interests of the children would be harmed if the Applicant had to leave With regard to the Rules there was no precluding of an overstayer applying for indefinite leave to remain yet the grant of discretionary leave prevented it.

11. As to Section 117B of the Rules Miss Norman said that the judge had considered that section but she did not have to consider each and every step. Finally Mr Mills said in response that there was a lack of reasoning as to why family life was engaged. If the

matter turned only on private life little weight could be given to it. The ultimate reasoning was simply that the Applicant was a victim of domestic violence.

12. Having considered those submissions I reserved my decision which I now give. The judge clearly felt great sympathy for this Applicant. She heard evidence from the Applicant and her cousins and found that there had been domestic violence. She did however accept that the Applicant could not meet the requirements of the Rules and in addressing matters under paragraph 276ADE (at paragraph 21 of her decision) she found that the Applicant had not explained what significant obstacles there might be for her integration into India should she be required to leave the UK. Whilst the judge believed that the Applicant would be ostracised by her own family the fact that she had not shown that she would face significant obstacles were she to return was not factored into the balancing exercise under Article 8.

13. The judge addressed the question of the existence of private and family life at paragraph 25 of her decision. She noted that the Applicant was in a relationship with her cousins with whom she had been living since February 2014 and that she helped to care for the cousin's children, to take care of the cousin when she was unwell and they were close. The judge went on to find that this established that there was family life within the terms of Article 8. As was pointed out in the Rule 24 response the existence of family life for Article 8 purposes is a question of fact but it needs to be explained why a relationship between adults and the children of relatives does amount to family life for these purposes. There appears to have been no financial dependency as the Applicant was working, at one point in the convenience store owned by her former in-laws and subsequently as a care assistant. I find that the judge in this instance has not explained according to criteria in cases such as **Kugathas v SSHD [2003] EWCA Civ 31** how the connection amounted to family life for the purposes of Article 8. It may be that there is family life between adults but the element of dependency establishing that family life needs to be expressed.

14. I found there was force in the submission that if the judge found that the decision was not in accordance with the law by virtue of failure to consider the best interests of the cousin's children then it was inappropriate to go on to consider proportionality. On the basis of the information which was before the Secretary of State the judge's finding in that regard does not however appear to have been well-founded as the Secretary of State did consider the best interests of the children at paragraph 30 of the refusal letter.

15. With regard to proportionality the question whether there was or was not family life was of core importance bearing in mind Section 117B of the 2002 Act. Whilst the judge referred to Section 117B she did not address the relevant sub-paragraphs in reaching her decision on proportionality. It is clear from cases such as **Dube (ss117A – ss117D) [2015] UKUT 00090 (IAC)** and **Bossade (ss117A – D – interrelationship with Rules) [2015] UKUT 415** that she should have done so, at least in substance. Miss Norman submitted that the judge had in fact performed this exercise but she did not for instance mention that under subsection (5) of Section 117B little weight should be given to private life established when a person's immigration status is

precarious. That was clearly relevant to the weight to be given to the Applicant's private life. I have therefore come to the conclusion that there were material errors of law in the judge's decision, which should be set aside. I did raise with the representatives what would be the appropriate course were I to reach this finding and they both agreed that the appeal should be remitted to the First-tier Tribunal for a new hearing in accordance with Practice Statement of the Immigration and Asylum Chamber of the Upper Tribunal 7.2 and under the provisions of Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

Decisions

The making of the decision by the First-tier Tribunal involved the making of a material error of law and that decision is set aside. The appeal is remitted for rehearing in accordance with the directions below.

There was no application for an anonymity order and none is made.

The fee award made by the First-tier Tribunal necessarily falls with the setting aside of the decision of that Tribunal.

Signed Dated 10 May 2016

Deputy Upper Tribunal Judge French

DIRECTIONS (SECTION 12(3)(a) AND 12(3)(b) OF THE TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

1. The appeal is remitted for rehearing with no findings preserved.
2. The members of the First-tier Tribunal chosen to reconsider the case should not include First-tier Tribunal Judge Phull.
3. There will be three witnesses and a Punjabi (Indian) interpreter will be required. The time estimate is three hours.
4. Each party shall serve upon the other and upon the Tribunal copies of any witness statements or other documents sought to be relied upon at the hearing at least seven days before that hearing.

Signed Dated 10 May 2016

Deputy Upper Tribunal Judge French