Upper Tribunal
(Immigration and Asylum Chamber)
IA/00622/2016

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 December 2017	**On 20 December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

[A K]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Khan of Universal Solicitors, London
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh whose date of birth is recorded as [ ] 1985.

2. On 12 August 2014, he made application for extension of his leave to remain in the United Kingdom. In that regard Mr Khan for the Appellant invited me to note that the application when made had placed a tick under Section 3 of the application form against:

"Other purposes or reasons not covered by other application forms"

In other words, the application was being made outside of the Immigration Rules.

3. On 18 January 2016, a decision was made to refuse the application. On that same date, an application which had been made by the Appellant's wife was also refused.

4. The Appellant and his wife appealed to the First-tier Tribunal. Their appeal was heard by Judge of the First-tier Tribunal Abebrese, sitting at Taylor House on 20 March 2017. In a decision promulgated on 7 April 2017 Judge Abebrese dismissed the appeals both of the Appellant and his wife having regard to the Immigration Rules and by reference to what the judge described as, "exceptional circumstances outside of the Rules".

5. Judge Abebrese clearly gave weight to the fact that in respect of the Appellant's wife, discretionary leave had been granted to her on the basis of domestic violence inflicted on her by her ex-husband. However, more latterly she was relying not on domestic violence but now on medical grounds. In those circumstances, the decision of the Secretary of State to refuse the application of the Appellant's wife was found by Judge Abebrese to be consistent with the Respondent's policy.

6. Rather less consideration was given to the Appellant's appeal, whose appeal has come before me, because Judge Abebrese found principally by consideration of the Appellant's wife's appeal that both the Appellant and his wife could together, with their child, return to Bangladesh; there being, Judge Abebrese found, no insurmountable obstacles.

7. Certain adverse findings were made by Judge Abebrese. He rejected the evidence of the Appellant that it was not possible for his wife to return to Bangladesh because of her medical condition. Significantly Judge Abebrese had regard to the fact that neither the Appellant nor his wife had resided in the United Kingdom for a minimum continuous period of twenty years, though in fact the Appellant's wife had resided for ten years and lawfully so a matter to which I shall return in due course.

8. Insofar as the Appellant had suggested that there were threats which his wife would face from her ex-husband's family were she to return to Bangladesh, Judge Abebrese did not find that aspect of the claim proven; indeed, he went so far as to say that he did not find it plausible given that she, the Appellant's wife, had returned to Bangladesh on a number of occasions.

9. Not content with the Decision, by Notice dated 19 April 2017, the Appellant and his wife made application for permission to appeal to the Upper Tribunal. Judge of the First-tier Tribunal Grant-Hutchison granted permission in respect of both of them. In granting permission she said as follows:

> *"It is arguable that the Judge has erred in law (a) by failing to give adequate reasons as to why the transitional arrangements covering individuals who are granted a period of discretionary leave prior to 9 July 2012 do not apply. The second Appellant's previous marriage broke down [that is the Appellant's wife] and she developed a medical condition as a result and submitted an application to the Respondent based on domestic violence. Given her medical condition coupled with other factors she was granted discretionary leave and (b) by failing to into account in terms of Article 8(i) the second Appellant's medical condition and (ii) adequately taking into account the public interest in failing to apply the statutory provision of Section 117 in the Nationality, Immigration and Asylum Act 2002 at all".*

10. The grounds which gave rise to that grant of permission run to twenty-one paragraphs. The grounds submitted with respect to the second Appellant submit that the grant of discretionary leave was not solely as a result of domestic violence but was in consequence also of the medical condition. It was submitted that were the fear based only upon the threats of her husband international protection as a refugee would have been claimed.

11. As Judge Grant-Hutchison noted the grounds also submitted that the Judge had erred in not considering the correct policy. The question to be determined in consideration of the policy was whether the original grant of discretionary leave had been granted by reference to the medical condition affecting the Appellant's wife together with domestic violence rather than just on the basis of domestic violence. The relevant policy as set out in the Respondent's Rule 24 notice states as follows:

> *"Those granted leave under the DL Policy enforced before 9 July 2012 will normally continue to be dealt with under that policy through to settlement if they continue to qualify for further leave on the same basis as their original DL was granted (normally they will be eligible to apply for settlement after accruing six years continuous DL (or where appropriate a combination of DL and LOTR, see Section 8 above) unless at the date of decision they fall within the restricted leave policy.*
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> *Caseworkers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of the decision. If the circumstances remain the same, the individual does not fall within the restricted leave policy and the criminality thresholds do not apply, a further period of three years DL should normally be granted. Caseworkers must consider whether there are any circumstances that may warrant departure from the standard period of leave. See Section 5.4*
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> *If there had been significant changes that mean the applicant no longer qualifies for leave under the DL policy or the applicant falls for refusal on the basis of criminality (see criminality and exclusion section above), the further leave application should be refused".*

12. Since the decision to grant permission there has been a material change in circumstances. The Appellant's wife withdrew her appeal to the Upper Tribunal on 13 June 2017 and within a week, 19 June 2017, was granted indefinite leave to remain on the basis of long residency (ten years) and the child of the first Appellant and his wife obtained British citizenship.

13. Although the Appellant's wife has withdrawn her appeal, still it is necessary for me to look to any errors of law that might have been made by Judge Abebrese concerning her since any errors may impact upon the Appellant.

14. That the transitional arrangements applicable to those who come before 9 July 2012 for being granted leave under the discretionary leave policy in force at that time applied was not in issue. The Appellant's wife had been granted discretionary leave on 6 July 2012.

15. I note that the witness statement of the Appellant's wife which was before Judge Abebrese states at paragraph 4 that she applied for indefinite leave to remain based on domestic violence. However, it was during her relationship with her ex-husband that she became depressed and suffered from hallucinations until in 2012 she began to suffer from severe depression. Since 2012 she states that she was receiving psychological therapy.

16. In reading the Appellant's wife's statement I note also at paragraph 18 that she specifically made reference to the fact that she had completed ten years continuous lawful residence and therefore met the requirements of Rule 276B of the Immigration Rules.

17. Ms Isherwood for the Secretary of State valiantly sought to persuade me that there was no error of law. Put simply, her submission was that the first application made by the Appellant's wife was on the basis of domestic violence. The second was on the basis of mental health and there was an end to it. As to the refusal letter, it was clear that although the Secretary of State had considered the applications by reference to the Immigration Rules, that there was a sub-heading decision on "exceptional circumstances" demonstrated that contrary to the submission made on behalf of the Appellant, the Secretary of State had considered the application not only by reference to exceptions to the Rules, but that the wider application of Article 8 had been considered and the Judge was therefore entitled to come to the view that he did.

18. In coming to my view as to whether or not there is an error of law, I bear in mind that the Judge at paragraph 15 of the Decision noted that the Appellant's wife's evidence was that she had been granted discretionary leave on the basis of domestic violence and that although mental illness had been apparent since 2011 and diagnosed in 2012 she did not recall if evidence in relation to mental illness was included in her application for discretionary leave. She had been unable to retrieve that information which might have been held by her previous solicitors. I would observe

that since it was the Secretary of State that was contending that the application was being made on a different basis, one might have expected some evidence to have been forthcoming from her. Be that as it may, in my judgment the matter was not quite as black and white as Judge Abebrese or Ms Isherwood suggest.

19. If the mental illness was a direct consequence of the domestic violence then in my judgment it cannot be said that there was necessarily a change of circumstances such as to take the second Appellant outside of the policy. There was not only a nexus between the two but in a sense a continuation since the mental illness arguably was a direct consequence of the domestic violence. In fact, no-one has suggested otherwise. Certainly, Judge Abebrese has not made a finding that was not the case and the evidence of the Appellant's wife was clearly to that effect. The point was made by the Secretary of State that the Appellant's wife had returned to Bangladesh and so the issue of domestic violence insofar as she was affected by it, had abated. But the reason she returned was because of a bereavement in the family. She did not stay for long. The reasoning is inadequate. On that basis alone I find that there was the error of law. The fact that the Appellant's wife arguably ought to have succeeded in her appeal was clearly material to the considerations as to whether or not this Appellant was entitled to succeed in his appeal.

20. There is clearly merit in the ground that Section 117B was not considered when the same is mandatory.

21. However, there is a further basis upon which I find an error of law. Although not expressly set out in the grounds, because the change of circumstances came about after permission was granted, it would be wrong of me not to allow the point to be taken. The Appellant's wife has, as I have already said, been granted leave to remain in the United Kingdom on the basis of long residency. There is now a British child of the marriage. The facts which entitled the Appellant's wife and child to the relief which they eventually obtained existed at the date of the hearing Judge Abebrese. He just did not know it. Whilst Judge Abebrese cannot be said to be in error, (save for not giving adequate consideration to the fact that the Appellant's wife had been lawfully in the United Kingdom for ten years and giving some weight to that), that, with the benefit of hindsight, it becomes apparent that the Appellant's wife and child were entitled to relief, goes to the weight which is to be given to this family as a whole, when considering the appeal. I am assisted in this approach by the guidance in the case of **E and R –v- Secretary of State for the Home Department [2004] EWCA Civ 49**.

22. For the avoidance of doubt, I find errors of law for the following reasons:

    1. *That the Judge did not adequately reason why the further application for discretionary leave to remain was sufficiently dissimilar from the first application.*

2. *The Judge failed to have regard at all to Section 117B of the 2002 Act.*

3. *Through no fault of his own, the factual matrix giving rise to the relief which was eventually granted to the Appellant's wife and their child existed at the date of the hearing but was not considered by Judge Abebrese save that he ought to have had regard to the fact that the Appellant's wife had had ten years lawful residence in the United Kingdom and whilst even then it might not be said that indefinite leave to remain would follow, that was a factor to be weighed in the balance in the proportionality assessment, all the more so when the Judge had considered the twenty year Rule.*

23. Having found that there were errors of law it is necessary for me to remake the decision.

24. I start, since I need to start somewhere, with Section 117B of the Nationality Asylum and Immigration Act 2002. Given that the Appellant has family life in the United Kingdom, both with his wife who now has indefinite leave to remain, and their child a British citizen, this is one of those cases in which I can move quickly through the five *Razgar* questions to the issue of proportionality.

25. I begin by recognising in the Secretary of State's favour that the maintenance of effective immigration control is in the public interest. That the Appellant speaks English is neutral in the sense that if it were the case that he did not speak English that would count against him. However, it can be said that the fact he does speak English at least does not aggravate his position. At the time when the Appellant and his wife formed their relationship neither of them had status in the United Kingdom.

26. Significantly, however, section 117B(6) of the 2002 Act makes plain that the public interest does not require removal where a person has a genuine and subsisting parental relationship with a qualifying child, and it would not be reasonable to expect the child to leave the United Kingdom. In this case there is a British national child and so the issue is whether it would be reasonable to expect the child to leave the United Kingdom. On the fats of this case, it would only be reasonable to expect this child to leave the United Kingdom if it would be reasonable to expect mother to leave, which in my judgment it would not given the fact that she has now indefinite leave to remain with significant mental health issues which I accept would be aggravated significantly were she to be required to leave the jurisdiction. It is clear from the report of the East London NHS Foundation Trust that the Appellant's wife is very much affected by her past suffering, suffering as she does from Post-Traumatic Stress Disorder, which clearly, having regard to the report of Dr Kipler, Consultant Psychiatrist, was in consequence of the treatment of the hands of her ex-husband.

27. In all of this I remind myself that I have to have regard to the best interest of this child, a British citizen. I bear in mind that were this child to be obliged to leave the United Kingdom with the Appellant and her mother,

she would be deprived of the opportunity of growing up in the country of her nationality. She would lose the loss of educational opportunities.

28. I am assisted by the guidance in **MA (Pakistan) [2016] EWCA Civ 705** noting that my focus has to be on whether it is reasonable for this child to be expected to leave the United Kingdom. Of course, whether it is reasonable for this child must necessarily include some consideration of the parents. This is not a child, I appreciate, who has been in the United Kingdom for seven years but rather a child of tender years. I come to the view on the available evidence however, that it is not in the interests of this child to be removed to Bangladesh which would be the effective consequence of an adverse decision if her mother, as I find, would be more debilitated than she is now in consequence of the additional stress that she would find herself under by being deprived of the opportunity of remaining in the United Kingdom.

29. There is only one family. It is clearly in the interests of the child to be brought up by both parents. Having regard therefore to the totality of the evidence I resolve matters in the Appellant's favour.

Decision

The decision of the First-tier Tribunal contained material errors of law and is set aside. I remake the Decision and allow the appeal.

No anonymity direction is made.

Signed **Date: 19 December 2017**

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Deputy Upper Tribunal Judge Zucker

TO THE RESPONDENT
FEE AWARD

I make no fee award that is because the Appellant's wife ought to have made her application for ten years long residency at an earlier stage. The complications which have arisen in this appeal would not then have fallen to be considered.

Signed **Date: 19 December 2017**

Deputy Upper Tribunal Judge Zucker