Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15885/2019

THE IMMIGRATION ACTS

Decision Under Rule 34 Without a hearing	**Decision & Reasons Promulgated**
On 12 November 2020	**On 16 November 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

VICTORIA DOMINGO BALENTE
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge James ('the Judge') promulgated the 3 December 2019 in which the Judge dismissed the appellant's appeal on human rights grounds.
2. Permission to appeal was refused by another judge of the First-tier Tribunal but granted on a renewed application by a judge of the Upper Tribunal, the operative part of the grant being in the following terms:

> "The only ground of appeal available to the appellant was that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. Although the appellants ability to satisfy the Immigration Rules was not the question to determine by the FtT Judge, it was capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim

> of enforcing immigration control. The focus of the respondent's decision and the hearing before FtT Judge was the appellant's relationship with her partner. Although the appeal was not advanced in this way, it is at least arguable that the appellant met the requirements for indefinite leave to remain on the grounds of long residence set out in paragraph 276B of the immigration rules. A finding that the rule was met at least arguably, may have resulted in a different outcome. The remaining grounds appear to have little merit if considered as freestanding grounds, but I do not limit the grant of permission.

3. In accordance with the Covid-19 protocol published by the Upper Tribunal directions were sent to the parties indicating that the question of whether the Judge had made an error of law material to the decision to dismiss the appeal could be considered on the papers without a hearing, inviting views upon such a proposal, and providing an opportunity for further submissions to be made. Both parties have responded, and their submissions have been carefully considered.

4. The Overriding Objective is contained in the Upper Tribunal Procedure Rules. Rule 2(2) explains that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues.

5. Rule 2(4) puts a duty on the parties to help the Upper Tribunal to further the overriding objective; and to cooperate with the Upper Tribunal generally.

6. Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides:

> '34.—
>
> (1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
>
> (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.
>
> (3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings.
>
> (4) Paragraph (3) does not affect the power of the Upper Tribunal to—
>
> (a) strike out a party's case, pursuant to rule 8(1)(b) or 8(2);
>
> (b) consent to withdrawal, pursuant to rule 17;
>
> (c) determine an application for permission to bring judicial review proceedings, pursuant to rule 30; or

(d) make a consent order disposing of proceedings, pursuant to rule 39, without a hearing.'

7. It has not been shown to be inappropriate or unfair to exercise the discretion provided in Rule 34 by enabling the error of law question to be determined on the papers. Nothing on the facts or in law makes consideration of the issues on the papers not in accordance with overriding objectives at this stage.

Background

8. The appellant is a citizen of the Philippines born on the 16 April 1979 who entered the United Kingdom lawfully as a Tier 4 student and who was subsequently granted leave to remain as a spouse valid to 18 November 2018. On 15 October 2018, the appellant applied for Indefinite Leave to Remain (ILR) as a spouse. The application was refused by the respondent for the reasons set out at [4] of the Judge's decision.

9. The Judge sets out his findings of fact from [10]. At [12] the Judge records *"The main issue to address during this hearing was whether the Appellant has a genuine subsisting relationship with her husband".* The Judge records in the same paragraph that the appellant appeared either unable or unwilling to provide basic information to simple questions, despite being given repeated opportunities to do so on the same topic.

10. At [26] Judge writes:

> "In summary not a single question posed to the wife and the husband married up. These contradictions and discrepancies, together with the lack of easily available evidence not adduced in support, and also the lack of any witnesses to attend the hearing in support of their relationship, wedding ceremony and marriage, and lack of witness statements, materially undermines the assertions made by the Appellant and her husband that this was a genuine marriage, that was ongoing and subsisting. I do not accept that it is. Therefore this appeal fails."

11. At [28] the Judge finds that neither witness was a witness of truth.

12. The Judge finds the appellant had not established she has family life in the United Kingdom recognised by article 8 ECHR and went on to consider the appellant's private life in a properly structured manner. Having done so the Judge concludes the decision to remove is proportionate leading to the appeal being dismissed.

The written submissions

13. The appellant's submissions are written by Lara Simak of 12 Old Square Chambers, who was not the advocate who represented the appellant before the Judge.

14. It is contended on the appellants behalf that an examination of her immigration history show she completed 10 years continuous lawful leave in the United Kingdom on 9 September 2019 and that at the date of the refusal of the application for ILR as a spouse of a British citizen, on 10 September 2019, the appellant was entitled to a grant of leave

pursuant to paragraph 276B of the Immigration Rules. It is asserted on the appellant's behalf that she met all the long residence requirements for such a grant.

15. Whilst expressing disagreement with the finding she was not in a subsisting marriage the appellant asserts her entitlement to ILR on the basis of long residence is not dependent upon the continuity or quality of her marriage as her leave continued pursuant to section 3C Immigration Act 1971 for the duration of the appeal process.

16. The appellant seeks to rely on the decision of the Upper Tribunal in OA [2019] UKUT 65, by reference the first headnote, although the full headnote reads:

> "(1) In a human rights appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002, a finding that a person (P) satisfies the requirements of a particular immigration rule, so as to be entitled to leave to remain, means that (provided Article 8 of the ECHR is engaged), the Secretary of State will not be able to point to the importance of maintaining immigration controls as a factor weighing in favour of the Secretary of State in the proportionality balance, so far as that factor relates to the particular immigration rule that the judge has found to be satisfied.
>
> (2) The fact that P completes ten years' continuous lawful residence during the course of P's human rights appeal will generally constitute a "new matter" within the meaning of section 85 of the 2002 Act. The completion of ten years' residence will normally have a material bearing on the sole ground of appeal that can be advanced in a human rights appeal; namely, whether the decision of the Secretary of State to refuse P's human rights claim is unlawful under section 6 of the Human Rights Act 1998. This is because paragraph 276B of the Immigration Rules provides that a person with such a period of residence is entitled to indefinite leave to remain in the United Kingdom, so long as the other requirements of that paragraph are met.
>
> (3) Where the judge concludes that the ten years' requirement is satisfied and there is nothing to indicate an application for indefinite leave to remain by P would be likely to be rejected by the Secretary of State, the judge should allow P's human rights appeal, unless the judge is satisfied there is a discrete public interest factor which would still make P's removal proportionate. Absent such factors, it would be disproportionate to remove P or require P to leave the United Kingdom before P is reasonably able to make an application for indefinite leave to remain.
>
> (4) Leaving aside whether P has any other Article 8 argument to deploy (besides paragraph 276B) and in the absence of any policy to give successful human rights appellants a particular period of limited leave, all the Secretary of State is required to do in such a case is grant P a period of leave sufficient to enable P to make the application for indefinite leave to remain. If P subsequently fails to make such an application, P will

> continue to be subject to such limited leave as the Secretary of State has granted in consequence of the allowing of the human rights appeal."

17. The appellant asserts it was readily ascertainable to a reasonably informed decision maker, and clearly known to the respondent, that the appellant had entered the United Kingdom lawfully on 10 September 2009, indicating potential entitlement to long residence on 9 September 2019. The appellant asserts that the application made was for ILR and that on no reasonable assessment can it be said that her assertion of an entitlement to leave on the basis of long residence is a new matter.
18. The appellant asserts the only reasonable outcome of the human rights appeal was that it should have been allowed.
19. For the Secretary of State Mr Tan submits in relation to the 10-year ILR point, that it is accepted the decision under appeal before the Judge dated 10 September 2019 did not consider paragraph 276B. It is submitted the application for ILR was on the basis of marriage on application form SET(M) and not an application for a grant of ILR on the basis of long residence for which form SET(LR) is relevant.
20. It is submitted that at no point did the appellant vary her application or request that the application include consideration of paragraph 276B, which would have required a consideration of different issues to those relating to an application under Appendix FM or paragraph 287 including, for example, consideration of whether such residence was continuous.
21. The respondent asserts any application to vary an existing application would also have to satisfy the requirements of paragraph 34E and F with reference to paragraph 34.
22. The Secretary of State asserts that despite being represented at all stages the appellant failed to vary her application or submit further grounds or at the appeal stage to ask the Secretary of State to consider whether she was entitled to ILR on the basis of 10 years continuous lawful residence, which was at that stage a "new matter".
23. The respondent also notes that at the date of the application, 15 October 2018, not only was the application not made pursuant to paragraph 276B but the appellant had not acquired 10 years continuous lawful residence which would have required the appellant to make a specific request to vary the application to take into account the different aspect that had subsequently arisen.
24. The respondent asserts the Judge cannot be criticised for failing to consider a matter that was not considered and decided upon by the Secretary of State, nor asked to do so by the appellant, nor raised as a new matter before the Judge.

Error of law

25. The question that this stage is not whether the appellant is entitled to a grant of ILR on the basis of long residence but whether the Judge erred in law in a manner material to the decision to dismiss the appeal on human rights grounds.

26. If no arguable legal error is made out the appeal must be dismissed although it may remain open to the appellant to make a fresh application if she believes she is entitled to ILR on the basis of long residence.

27. I find the claim to be entitled to ILR on that basis to be a 'new matter' as it was not an issue raised by the appellant and her SET(M) application form, there is no evidence that the appellant sought to amend the application or to ask the respondent to consider any additional entitlement on the basis the 10 year period had allegedly been acquired on 9 December 2019, there was no application to amend the grounds of appeal or to ask the Judge, with the permission of the respondent, to consider and make findings upon this issue at the hearing. Whilst a representative who had no involvement in the proceedings prior to the determination dismissing the appeal may take a view the appeal should have been allowed, that does not alter the factual matrix set out above.

28. In Mahmud (S85 NIAA 2002 – "new matters") [2017] UKUT 488 (IAC) it was held that (i) Whether something is or is not a 'new matter' goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue; (ii) A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal; (iii) In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive. Examples were given. Where a relationship had previously been relied on and considered by the SSHD then the fact the couple had married would be new evidence but not a new matter. Conversely the fact the couple had a child was likely to be a new matter. Actual consideration in a decision letter of the new factual matrix relied upon is required for a matter not to be a "new matter".

29. The Upper Tribunal in OA found that the fact an appellant completes ten years' continuous lawful residence during the course of their human rights appeal will generally constitute a "new matter" within the meaning of section 85 of the 2002 Act.

30. There is nothing submitted on behalf of the appellant to establish that any entitlement to ILR on the basis of 10 years continuous lawful residents does not constitute a "new matter" on the fact that this appeal. The appellant's submissions appear to be an attempt to circumvent the requirements of section 85 by arguing that just because this fact arose it should have been considered by the Judge despite the fact it was a new matter and there was no request for the Judge to do so or variation of the application for leave.

31. Headnote 3 of OA records the finding that "*Where the judge concludes that the ten years' requirement is satisfied and there is nothing to indicate an application for indefinite leave to remain by P would be likely to be rejected by the Secretary of State, the judge should allow P's human rights appeal, unless the judge is satisfied there is a discrete public interest factor which would still make P's removal proportionate..*" A Judge might conclude the 10-year requirement is satisfied if this arises in a situation in which the Judge is asked to make such a finding. That will, of course, include not only consideration of the period of stay but also whether it was continuous. That does not assist the appellant in this case as the Judge was not asked to make any such a finding and did not therefore conclude that the 10 years requirement was satisfied.

32. I agree with the submission of Mr Tan that the Judge cannot be criticised for failing to consider a matter that was not raised as an issue in the decision under challenge before the Judge, and which neither the Judge nor Secretary of State was asked to consider by the appellant; nor raised as a new matter before the First-tier Tribunal. No arguable legal error material to the decision to dismiss the appeal arises on this point.

33. The appellant also seeks to challenge the factual findings of the Judge, but that challenge is without arguable merit and fails to establish material legal error.

34. The Judge had the benefit of seeing and hearing oral evidence being given in addition to the documentary evidence and attached the weight to that evidence that was considered appropriate in all the circumstances. The Judge considered the article 8 assessment in a properly structured manner. The first question to be considered was whether the appellant had established the existence of a protected right. The Judges conclusion that the appellant had not established the existence of family life recognised by article 8 is a decision within the range of those open to the Judge on the evidence. The Judge sets out findings leading to that conclusion which are supported by adequate reasons. The weight to be given to the evidence was a matter for the Judge. Thereafter the Judge considered the appellant's private life.

35. It is not made out the Judge failed to consider all relevant aspect of the proportionality exercise, in relation to ties to the Philippines noting at [30]:

> "30. The Appellant confirmed that she retains close links to her home country, due to the concerns about the father's health and that she is close to her brother there. The Appellant has sufficient funds and skills learned and acquired in the UK, to return to her home country, and is able to be supported in family accommodation, until she obtain a job in her own country. There are no letters from NGO's, religious institutions, family or friends in the UK, other than the mother in law, which I do not accept is credible in light of the above adverse finding and failure to attend to be subject to cross-examination. It thus appears that the Appellant works long hours at her care assistant job, and has little other life, other than her studies which she fails to provide evidence of, other than the mandatory language tests."

36. There was nothing before the Judge or in the grounds of appeal that establishes there are any very significant obstacles to integration for the appellant in her home state. The appellant left the Philippines aged 30, is familiar with the language and culture, retains links, and did not establish the appropriate threshold has been crossed, let alone reached, on the facts.

37. The Judge also considered the appellant's ties to the United Kingdom and clearly undertook a proper balancing exercise. Having done so, the Judge concluded the respondent's decision was proportionate. Whilst the appellant disagrees with that and wishes to remain in the United Kingdom, the ground's fails to establish the decision is outside the range of those reasonably available to the Judge on the evidence. No arguable legal error material to the decision to dismiss the appeal on human rights grounds is made out sufficient to warrant the Upper Tribunal interfering any further in this appeal.

Decision

38. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

39. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson
Dated the 12 November 2020