



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/07490/2013

THE IMMIGRATION ACTS

Heard at Field House
On 3 September 2013

Determination Promulgated
On 30 September 2013

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellant

NADEZDA FAKHRUTDINOVA

Respondent

Representation:

For the Appellant: Mr G Saunders, Senior Home Office Presenting Officer

For the Respondent: Mr D O'Callaghan, Counsel, instructed by Birnberg Pierce & Partners

DETERMINATION AND REASONS

This is an oral determination. Although the Secretary of State is the appellant before me I will for ease of reference refer to her as the respondent as she was the respondent in the First-tier. Similarly although Ms Fakhrutdinova is the respondent I will refer to her as the appellant as she was the appellant before the First- Tier. The First-tier Judge allowed her appeal and the Secretary of State appeals against that decision.

1. The appellant was born on 30 November 1983 and is Russian. She came to Britain in May 2003 for a work placement and her leave was extended in that capacity until June 2007. She then received an extension of stay until August 2008 as a student. In August 2008 she married a British citizen, Mr Alex Evans, and applied for leave to remain as a wife. That application was refused but when her appeal was successful she was granted 36 months discretionary leave to remain.
2. Her marriage broke down because of domestic violence. Her husband suffered from bipolar disorder. They were divorced in January 2012. In April 2012 she applied for leave to remain. It is clear from the application that what she was applying for was leave to remain under the domestic violence provisions. That application was refused on 21 February 2013 on human rights grounds. I understand from Mr Saunders and Mr Callaghan that the reason that the application was refused on human rights grounds rather than under the domestic violence provisions was because the Rules then granted leave to remain under the domestic violence provisions on the basis that an applicant had been granted leave to remain as a spouse for 27 months whereas this appellant had been granted leave to remain for three years.
3. The appellant appealed against the refusal and her appeal was heard by Judge of the First-tier Tribunal Coutts on 16 July 2013. He heard evidence both from the appellant and from her mother-in-law and from her employer. He took into account details of the domestic violence and the appellant's history here. In paragraph 16 onwards of the determination he set out his findings and reasons. He applied the structured approach set out in the judgment of the House of Lords in **Razgar [2004] UKHL 27** and accepted that it was stated when he dealt with the issue of proportionality that weight should be placed on the legitimate of the maintenance of effective immigration control. He noted the arguments put forward by the Secretary of State.
4. In paragraph 22 he stated that:
 - "22. However I am not persuaded that this is a legitimate aim to be achieved here rather I am of the view that the legitimate aim here is the protection of women who are the victims of domestic violence. Following the hearing in 2009 the respondent granted the appellant 36 months' discretionary leave to remain in the United Kingdom as a spouse. It is incongruous and plainly wrong that having done so that the appellant should be placed in a worse position than someone who was granted 27 months' leave or less and who would be entitled to indefinite leave to remain once they had established domestic violence after that time free to live their life as they wished without the additional upheaval burden of having to leave the United Kingdom.
 23. The underlying purpose of the Immigration Rules is to ensure that victims of domestic violence are not faced with having to stay in a violent and abusive relationship in order to maintain their immigration status. That is now the settled position and in my view this protection should have been afforded to the appellant who suffered terribly at the hands of her husband and who was actually granted more than 27 months' leave by the respondent as a spouse. It cannot be said that the respondent was unaware of the appellant's domestic situation because it was apparent at the time of the 2009 appeal hearing:

husband's mental health being a relevant factor why it was held that family life should continue here owing to his inability at that stage to relocate if she were removed.

24. In my view it is both unnecessary and disproportionate for the respondent to now say, once that relationship has broken down owing to domestic violence, that the appellant should be granted no further leave and, if required, to leave the United Kingdom. Whilst the breakdown of her marriage might have been anticipated, the effect upon her of a breakdown could have been and that, with due respect to the respondent, was why the Immigration Rules were drafted in order to afford victims of domestic violence a suitable protection; it is only right that the spirit of that protection should apply to the appellant."
5. At the hearing before me Mr Saunders referred to the weight which the judge had put on the issue of legitimate expectation. He stated that it appeared that the judge was really wanting the Rules to be other than they are (the reality, of course, is that the Rules themselves have now changed and would now, had the appellant applied later, have benefited her).
6. Mr Saunders accepted the appellant's relationship with her parents-in-law but stated that that did not meet the **Kugathas** test but was only an element of private life. He indicated that he considered, or indeed it was argued in the grounds, that inadequate consideration had been placed on maintaining immigration control.
7. It is my conclusion having read the determination that in fact the judge did reach conclusions which were open to him. He did take into account the legitimate aim, being the maintenance of effective immigration control, but weighed against that the terms of the domestic violence Rules. He did not say that he was allowing the human rights appeal on the basis of the family life provisions but what he was doing was weighing up a large number of factors which he felt weighed in the balance and showed that the removal of this appellant would be disproportionate.
8. That was a conclusion I consider which was open to him. The Tribunal has been repeatedly reminded by the Court of Appeal in a number of judgments, the central one of which I consider is that of **Mukarkar [2006] EWCA Civ 1045**, that merely because a judge below reaches a conclusion which is different possibly from that of a judge in a higher court that is no reason to upset the decision of the judge below. Carnwath LJ stated in his judgment that "... the mere fact that one tribunal has reached what may seem to be an unusually generous view of the facts of a particular case does not mean that it has made an error of law.."
9. I place weight on the ratio in that judgment of the Court of Appeal. I find no material error of law in the decision of Judge Coutts and do not consider it appropriate to set aside the decision and therefore his decision allowing this appeal on human rights grounds shall stand.

Signed

Date

Upper Tribunal Judge McGeachy