IAC-HW-MP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/44231/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th September 2015	**On 28th October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS KULSUMA AKTER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance on behalf of the Appellant
For the Respondent: Mr L. Tarlow, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Bangladesh, born on 6th December 1990. She appeals against the decision of First-tier Tribunal Judge Quinn, sitting at Richmond on 9th April 2015, who dismissed her appeal against a decision of the Respondent. That decision dated 16th October 2014 was to refuse to grant the Appellant leave to remain as a Tier (General) Student dependant and to refuse to issue her with a biometric residence permit.

2. The Appellant's husband, Mr Mohammed Nurul Afsar ("Mr Afsar"), was granted leave to remain as a Tier 1 (Post-Study Work) Migrant valid until 14th August 2014 having applied for that leave on 3rd April 2012. The Appellant entered the United Kingdom on 15th February 2014 as her husband's dependant, six months before his leave was due to expire. On 13th August 2014, the day before expiry, she applied for a variation of leave to remain, this time as a Tier 4 (General) Student dependant. The refusal of that application by the Respondent on 16th October 2014 has given rise to the present proceedings. Mr Afsar who made his own application at the same time as the Appellant was sponsored by Birmingham College of Law and Management on a course which was to run from 1st September 2014 to 30th December 2015. He was not funded by an official financial Sponsor.

The Explanation for Refusal

3. The Respondent's refused the Appellant's application for variation of leave because the Appellant failed to meet the requirements of paragraph 319C(i) of the Immigration Rules. Her husband's previous leave was not as a Tier 4 (General) Student and his course of study was less than six months in length. The Appellant's previous leave was therefore not as the partner of a Tier 4 (General) Student or student undertaking a course of study longer than six months either.

The Relevant Immigration Rules

4. Besides having to comply with the general grounds for refusal (which are not relevant in this case) paragraph 319C(b) provides for certain general requirements which dependents must meet. The dependant applicant must be (inter alia) the spouse of a person who has valid leave to enter or remain as a relevant points-based system migrant or is at the same time being granted leave to remain as a relevant points-based system migrant or has indefinite leave to remain as a relevant points-based system migrant where the applicant is applying for further leave to remain and was last granted leave as the spouse of that same relevant points-based system migrant at a time when that person had leave under another category of the Immigration Rules. The paragraph then goes on to set out various requirements as to the genuineness of the relationship which are not in issue in this case.

5. Sub-paragraph (i) of paragraph 319C provides that where the relevant points-based system migrant (in this case the Appellant's husband, Mr Afsar) has been granted leave to remain in the United Kingdom as a Tier 4 (General) Student he must be a government-sponsored student who is applying for or who has been granted entry clearance or leave to remain to undertake a course of study longer than six months.

6. The important point at issue in this case is what is said at sub-sub-paragraph (ii) of sub-paragraph (i). This provides that the relevant points-based system migrant (in this case Mr Afsar) must himself be applying for

or have been granted entry clearance or leave to remain in order to undertake a course of study at postgraduate level that is twelve months or longer in duration. He must also be sponsored by a Sponsor who is a recognised body or a body in receipt of funding and must either be applying for or had been granted leave to remain as a Tier 4 (General) Student or must meet certain other conditions. Those are that he must be applying for leave to remain to undertake a course of study that is longer than six months and either have leave to remain as a Tier 4 (General) Student to undertake a course of study longer than six months or have last had leave to remain within the three months preceding the application as a Tier 4 (General) Student or as a student to undertake a course of study longer than six months. What the Appellant must satisfy is that she must have leave to remain as the spouse of a Tier 4 (General) Student or a student with leave to remain to undertake a course of study longer than six months or have last had leave to remain within the three months preceding the application of her husband as a Tier 4 (General) Student or as a student to undertake a course of study longer than six months and both she and her husband must be applying at the same time.

7. The paragraph is not entirely easy to read containing as it does a number of potentially confusing sub-paragraphs but in effect the requirement is that the Appellant's husband had himself to have had leave to remain as a Tier 4 (General) Student and had to be applying himself for leave to remain to undertake a course of study longer than six months. The Appellant must have had leave to remain as the partner of a Tier 4 (General) Student (which she did not because Mr Afsar had leave to remain as a Tier 1 (Post-Study Work) Migrant. Alternatively she required leave to remain as the spouse of a student with leave to remain to undertake a course of study longer than six months. Mr Afsar did not have that because he had only made an application on the same date as the Appellant which had not therefore been granted at the time that the Appellant's application was made. The overall effect of paragraph 319C is to raise serious barriers to a non-Tier 4 (General) Student Migrant and their dependant changing to a Tier 4 (General) Student Migrant and dependant as the Appellant and her husband were seeking to do in this case.

The Hearing at First Instance

8. The matter came before Judge Quinn on 9th April 2015 when there was no appearance on behalf of the Appellant. The Judge had a letter from the Appellant's representatives dated 8th April 2015 which he referred to it at paragraph 6 of his determination. The letter stated "we shall not attend the hearing and request the appeal to be considered on paper only". In the light of that the Judge proceeded to determine the matter after receiving brief submissions from the Presenting Officer.

9. In his determination the Judge summarised the remaining contents of the letter of 8th April at paragraph 5 of his determination:

> "… it was claimed that the removal of the Appellant from the UK would be disproportionate in the context of the legitimate aim of control of immigration and I took this to be an Article 8 claim although no other grounds were set out".

In fact what the letter of 8th April had said at paragraph 2 was:

> "The main issue in this case is only one. The Appellant applied for leave to remain as the dependent partner of a Tier 4 (General) Student which was refused on the ground that the Appellant's partner is not a government-sponsored student and is not undertaking a course of study with a Sponsor who is either a recognised body or a higher education institution. The Appellant submits that she meets all requirements under the relevant Immigration Rule as a previous dependant. In support of the appeal we particularly refer to paragraphs 5 to 10 of the grounds of appeal, we urge the grounds to be considered adequately."

The reference in the Appellant's letter to paragraphs 5 to 10 of the grounds of appeal against the Respondent's decision dealt with the "switching" point (which I have referred to above, see paragraph 7). The remainder of the letter then dealt as the Judge summarised with the claim under Article 8 which as he correctly observed was unparticularised.

10. Judge Quinn dismissed the appeal stating at paragraph 25:

> "The Appellant wanted the Rules interpreted in a way that would permit her to remain. Her fallback position was that it was unreasonable and irrational for the Respondent to require her to leave the UK and be separated from her husband. I thought that the Rules set out the position quite clearly".

The Judge continued at paragraph 26 that the Appellant had only been in the United Kingdom since 2014 and had come as a dependant with no reasonable expectation that she would be allowed to remain. He gave little weight to the time that she had spent in the United Kingdom as her situation was always precarious under the leave that had been granted to her. Mr Afsar was a student who had no legitimate expectation he would be allowed to remain in the United Kingdom beyond the period of his study. The Appellant did not meet paragraph 276ADE and there were no exceptional circumstances that required consideration of the case outside the Rules. The Appellant had failed to discharge the burden of proof to show that her removal would be disproportionate to the legitimate public end sought to be achieved and he dismissed the appeal.

The Onward Appeal

11. The Appellant appealed that decision arguing that the Judge had failed to take into account the representations made in the letter dated 8th April 2015 (which as I have indicated in turn relied on the grounds of appeal against the original respondent's decision). The grounds of appeal acknowledged that the Rules had been amended from October 2013 to make sure that points-based system dependants would not have to be

unnecessarily separated from their partners in order to make an application from abroad. The Appellant's case in effect was that she would have been granted further leave to remain and not be refused if she had last been granted leave to remain or enter as a Tier 4 Migrant's dependant. As she was not last granted leave as a dependant of a Tier 4 Migrant the present refusal of her application as a Tier 4 dependant was irrational, inconsistent and contrary to the other requirements of the Rules.

12. The grounds cited a decision of the High Court in the case of **Zhang [2013] EWHC 891**, a judicial review decision. **Zhang** focused on the effect under Article 8 of the requirements of what was then the wording of paragraph 319C(h)(i). Mr Justice Turner held that the application of a blanket requirement to leave the country imposed by that sub-paragraph was unsustainable. It was not consistent with the ratio of the decision in **Chikwamba**. He added:

> "I am not prepared to make a formal declaration on the matter. It is not the function of the court to re-draft the Rules but I would predict that the Secretary of State would in future face difficulties in enforcing requirement (h)(i) as presently worded in all but the small number of cases in which Article 8 is engaged".

13. The application for permission to appeal came before First-tier Tribunal Judge Shimmin on the papers on 25th June 2015. In granting permission to appeal he stated that it was arguable that at paragraphs 24 and 25 of the decision the Judge had failed to address or adequately address the detailed submissions set out in the grounds of appeal. The remaining ground (that it would be disproportionate to remove the Appellant while her husband was still lawfully present in the United Kingdom) was less meritorious but was not rejected.

14. The Respondent replied to the grant of permission by letter dated 3rd July 2015 stating that Judge Quinn had directed himself appropriately. The Appellant did not meet the requirements of the Rules as her husband did not have the required status. At the date of hearing she had been in the United Kingdom for a bare thirteen months and could not succeed under the provisions for Article 8. No properly directed Tribunal could have found compelling circumstances to allow the appeal outside the Rules.

The Hearing Before Me

15. The matter was called on for hearing on 30th September 2015 when there was no attendance on the part of the Respondent. In a very brief submission the Presenting Officer indicated that he relied on the Rule 24 reply. On the same day the Tribunal at the Arnhem Support Centre received written submissions from the Appellant's solicitors dated 29th September regarding this appeal. Although this document was not passed on to the Field House Hearing Centre until the following day, 1st October 2015, I nevertheless have taken it into account in preparing my decision in this matter. The letter states that neither the Appellant nor her legal

representatives proposed to attend the hearing on 30th September to save costs and requested the Tribunal "to decide the permission to appeal matter on papers". The Tribunal was urged to find a material error of law and either allow the Appellant's appeal outright or to remit the matter back to the First-tier Tribunal for a different First-tier Tribunal Judge.

16. The substance of the letter (which enclosed a copy of the decision of Mr Justice Turner in the case of **Zhang**) was that following the decision in **Zhang** the Home Office had amended the Immigration Rules to allow dependants to apply from within the United Kingdom provided they were not here illegally as visitors or on temporary admission or temporary release but they would still need to satisfy all other existing requirements. The letter argued that the Minister's announcement gave rise to a legitimate expectation that as an existing points-based system spouse the Appellant would continue to be granted leave to remain as the spouse of her husband. Alternatively it was unreasonable for the Respondent not to exercise discretion in favour of the Appellant. The First-tier Tribunal Judge also ought to have exercised judicial discretion and made findings in the light of the Respondent's duty of common law fairness.

Findings

17. The difficulty with the Appellant's argument in this case is that the relevant section of paragraph 319C which is the subject of the Appellant's complaint, (sub-paragraph (h)) was amended in October 2013 by HC 628 subject to savings for applications made before that date. As the application in this case was made in August 2014 those savings cannot apply. In short Judge Quinn was dealing with a decision under the Immigration Rules which postdated the decision of Mr Justice Turner in **Zhang**. The provision of paragraph 319C which Mr Justice Turner was concerned about was very different to the Rules as they are presently constituted. When Mr Justice Turner examined 319C(h)(i) on 18th April 2013 in the High Court the requirement which a dependant applicant had to satisfy was that they must have or have last been granted leave as the partner of a relevant points-based system migrant. In the case of **Zhang** the claimant had been granted leave previously not as a partner but under the general category and was therefore precluded from making an application for leave to remain in the United Kingdom. Mr Justice Turner held that it was disproportionate under Article 8 to require the claimant in that case to return to China to make an application from there to come back to the United Kingdom to join her husband who was already here. Separation of about two months that this would entail was contrary to Article 8.

18. As I have indicated and as has been accepted by the Appellant in her grounds of onward appeal before me the Rules were changed in October 2013. What the appellant seeks to argue is that the Rules remain irrational after the change. That contention is not supported by authority. **Zhang** referred to a different wording of the Rules, not the one which I have to consider.

19. What the October 2013 changes did was to narrow the scope of those persons who could not apply for further leave to remain. If Mr Afsar had had leave to remain as a Tier 4 Migrant then the Appellant's application for further leave to remain would have succeeded. In short the blanket ban on partners applying in country for further leave to remain had been lifted, the ban which Mr Justice Turner found objectionable, and replaced with a more specific ban on partners of persons switching categories. I see no reason why that amended provision should be considered to give rise to a disproportionate result under Article 8.

20. In any event there is a further difficulty with the Appellant's argument that the Respondent's decision is procedurally unfair and/or irrational and/or breaches Article 8 in that the provisions of Article 8 have been amended by statute since the decision of the High Court in **Zhang**. The new provisions contained in Section 117A to D of the Nationality, Immigration and Asylum Act 2002 inserted therein by the Immigration Act 2014 were very much in the forefront of Judge Quinn's mind when considering the Article 8 provisions. The Appellant's status was precarious and as such any private and/or family life which she may have established in the relatively short time she was in the United Kingdom could only have little weight attached to it. Against that she could not meet the Immigration Rules. There were substantial grounds on the other side of the argument that the decision in this case to refuse her leave to remain was proportionate. I can see nothing irrational or procedurally unfair in the decision of the Respondent in this case which followed the provisions of the amended Immigration Rules which applied to this Appellant.

21. Permission to appeal was granted because it was arguable that Judge Quinn had not taken into account the Appellant's case on proportionality in the light of the criticism of the previous Rule under 319C made by Mr Justice Turner in **Zhang**. I am not at all sure that Judge Quinn had in fact overlooked the contents of the argument made in the letter of 8th April 2015. He referred specifically to the letter at paragraph 5 of his determination and at paragraph 25 in referring to the Appellant's fallback position was aware that the Appellant was seeking to interpret paragraph 319C in a way that would permit her to remain. He was well aware that the Appellant sought to argue that it was unreasonable and irrational for the Respondent to require her to leave the United Kingdom and be separated from her husband.

22. The Appellant's principal argument was based on a misconception of the status of paragraph 319C which had been amended after Mr Justice Turner's criticisms of it. It was not a material error of law for Judge Quinn to fail to deal with the Appellant's arguments since they had no validity for the reasons I have set out above. I have set the Appellant's case out because permission to appeal was granted and the Appellant is entitled to know why her onward appeal has been unsuccessful. However given that the argument itself was a false one it was not a material error of law for the Judge to deal with the matter in the way that he did. The Judge's conclusions as to Article 8 outside the Rules are unimpeachable. He

predicated them on the assumption that the Appellant did not meet the Rules and that was correct. He then analysed the claim on the basis of current statute law requirement and jurisprudence. It was open to him to find as he did that any interference caused by the Respondent's decision was proportionate. I therefore dismiss the Appellant's onward appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I dismiss the Appellant's onward appeal against that decision.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 27th day of October 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 27th day of October 2015

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Deputy Upper Tribunal Judge Woodcraft