



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/07884/2016

THE IMMIGRATION ACTS

Heard at Field House

On 19 January 2018

Decision & Reasons

Promulgated

On 06 February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**MARY [O]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs S Praisoody, Counsel instructed by Deccan Prime Solicitors

For the Respondent: Mr D Milis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Hawden-Beal sitting at Birmingham) dismissing her appeal against the decision of the Secretary of State to refuse to grant her further leave to remain as the partner of a person present and settled here, or to grant her further leave to remain outside the Rules on compassionate grounds.

The Reasons for Granting Permission to Appeal

2. On 6 November 2017, First-tier Tribunal Judge Maller gave his reasons for granting the appellant permission to appeal to the Upper Tribunal.
3. In her decision promulgated on 28 April 2017, First-tier Tribunal Judge Hawden-Beal found the refusal decision to be proportionate. The situation the appellant found herself in was not of her own making. Her husband's aggressive behaviour towards her on account of his brain damage had resulted in separation. She was still in contact with him and he still regarded her as his wife. There was no supporting statement from the husband. The grounds contended that there were no proper reasons for supporting the finding that there were no compelling circumstances. The Judge had failed to engage with the effects on the appellant of her husband's debilitating illness. A similar approach should have been taken to comparable cases where spouses have suffered domestic violence:

"It is arguable that there has been a failure properly to assess the impact on the appellant arising from her husband's brain damage when considering proportionality under Article 8 and whether there were compelling/exceptional circumstances in this case justifying considering the case outside the Rules."

The Rule 24 Response

4. On 30 December 2017, a member of the Specialist Appeal Team settled a Rule 24 response opposing the appeal. As this was an appeal reliant upon Article 8, it was incumbent upon the appellant to provide evidence of the strength of her connections to the United Kingdom, and for her to provide evidence that any decision to expect her to leave the UK would be disproportionate. It was noted that the appellant did not even attend the hearing, and was content to rely on her witness statement. At paragraphs 17 and 18 of her determination, the First-tier Tribunal Judge had noted the compassionate circumstances, but she concluded that the decision of the respondent was proportionate. The grounds appeared to focus on why the decision of the respondent was disproportionate, not the decision of the First-tier Tribunal Judge.

The Hearing in the Upper Tribunal

5. At the hearing before me to determine whether an error of law was made out, Ms Praissoody developed the arguments put forward in the grounds of appeal. Her instructions were that the appellant had been ready to attend the hearing in the First-tier Tribunal with her husband, but he had a violent episode which prevented this. He was being looked after by his daughter. She agreed that there was no medical evidence relating to the husband's condition.
6. She submitted that, if the Judge had heard from the appellant, it would have been a different story. Her instructions were that the separation was not a permanent one. Their relationship was on and off. The appellant should be given another chance. She should be given the opportunity to attend a fresh hearing in the First-tier Tribunal with her daughter. The

Secretary of State had a policy of granting leave to remain to persons whose marriages had broken down irretrievably due to domestic violence. It was unfair that the appellant's situation was not also covered by a policy.

7. Since the hearing in the First-tier Tribunal, the circumstances which would await the appellant in Kenya had changed. Last Saturday her mother had died. This meant that she no longer had any relatives in Kenya.
8. On behalf of the respondent, Mr Milis submitted that it was hard to see what the error of the Judge was, and indeed why permission had been granted. The appellant did not turn up for her appeal hearing, and there was no evidence from her daughter. There was also no medical evidence. The appellant's solicitors had asked for the appeal to be decided on the papers. In order to rely on evidence that was not put before the First-tier Tribunal, she could make a fresh claim.
9. In reply, Ms Praisoody insisted that the relationship between the appellant and her husband was still subsisting. She had not had the opportunity to explain her situation. Accordingly, the Judge had made an unformed decision. The Judge ought to have given more weight to the appellant's difficulties.

Discussion

10. The relevant factual background is that the appellant was granted entry clearance as a student, and was subsequently granted leave to remain as a spouse from May 2012 until October 2015. On 1 October 2015, she applied for further leave to remain. She said that her husband was a very sick man and had brain damage as the result of a serious condition he got into in July 2013. This was tuberculosis meningitis. She was not living with him at the moment, as he had become very aggressive due to this condition, and he did not want her to be near him. The situation was beyond her control, and she hoped that as soon as he recovered he would remember her and that they could be together again.
11. The application was refused on 1 March 2016. The respondent's reasoning was that, as they had not been residing together since 2013, and as there was no evidence of her having contact with her partner, their relationship was not subsisting. She had family in Kenya who might be able to support her in adjusting to life outside the UK.
12. In her grounds of appeal to the First-tier Tribunal, the appellant accepted that she was no longer living with her husband. As the result of his TB and meningitis, he had suffered from memory loss for several weeks, and he then seemed to have a change of personality. The appellant had put up with this for about three months, after which she had to move out. She did her best to manage the situation, but it had become intolerable. She wished to rely on the concept of "*particularly difficult circumstances*" as she had a reasonable expectation of settlement in due course, either via

the marriage route, or via the 10-year private life route.

13. The appellant asked for an oral hearing, and one was scheduled to be heard in Birmingham on 19 April 2017. As stated by Judge Hawden-Beal, the day before the hearing a fax was received at the Tribunal from the appellant's solicitors stating that she wished her appeal to be considered without a hearing. The solicitors did not offer any explanation for this change of position. Mr Lawson, who appeared on behalf of the Home Office, did not object to the appeal proceeding in the appellant's absence, so the Judge proceeded with the hearing of the appeal in the appellant's absence pursuant to Rule 28 of the Tribunal Procedure Rules 2014.
14. In her witness statement signed on 15 April 2017, the appellant said that soon after his discharge from hospital, her husband no longer wanted to see her. She still loved him and she remained hopeful that he would soon make a full recovery and they could start living together again. She regularly spoke to him on the phone and occasionally met him. When she had last spoken to him, which was about a week ago, he had said that she was still his wife and that he would visit her lawyer with her to prepare a witness statement to support her appeal, and also to provide evidence of his medical condition and the treatment he was undergoing. However, he had failed to attend as agreed. Hence, she had been unable to submit a witness statement or supporting documents about his medical condition.
15. In her decision, the Judge Hawden-Beal rehearsed the background, the evidence and the way in which the appeal had proceeded. At paragraph [14], the Judge held that the appellant could not show that her relationship with her husband was subsisting. At paragraph [18], she said that the situation in which the appellant found herself was unfortunate and not of her own making. The husband had suffered brain damage and as a result had become aggressive, and had effectively turned against her to such a degree "*that she felt unable to continue residing in the matrimonial home*". She had not cohabited with her husband for the last four years. She claimed that she was still in contact and that he still regarded her as his wife, and that he was going to make a statement to that effect, "*but he has not*". There was therefore, regrettably, nothing to support her claim that the marriage was subsisting.
16. The Judge went on in paragraph [19] to say that, in the circumstances, she was satisfied that the evidence did not outweigh the public interest considerations which justified the maintenance of the refusal decision.
17. In **South Bucks District Council v Porter (2) [2004] UKHL 33** Lord Brown said at [26]:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues

falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example, by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need only refer to the main issues in the dispute, not to every material consideration.”

18. I consider that the Judge has given adequate reasons for dismissing the appeal, notwithstanding the compassionate circumstances relied upon by the appellant. In essence, the grounds of appeal are an attempt to re-argue the case, and to bring forward additional arguments not raised below as to why the appeal should exceptionally have been allowed outside the Rules. The appellant claimed that her marital relationship with her husband was subsisting, but the evidence did not support this claim. The appellant claimed that her husband’s condition was not permanent, and she indicated that he was likely to recover in the foreseeable future, thus enabling the marital relationship to be resumed. But again the appellant did not produce the medical evidence to substantiate this claim.
19. At all material times, the appellant had the benefit of legal advice and assistance from Deccan Prime Solicitors LLP, but nonetheless she did not avail herself of the opportunity to attend the hearing of the appeal, where she could have explained more fully her situation. By electing for the hearing to proceed in her absence, the appellant also chose to forego the benefit of having a legal representative to present her case in the most effective way.
20. However, for the avoidance of doubt, I do not consider that the root cause of the appellant’s failure before the First-tier Tribunal was a lack of effective representation. The attempt to re-argue the appeal in the Upper Tribunal does not disclose any point of real merit. It is not alleged that her marriage to her husband broke down irretrievably due to him being violent towards her, and so the appellant does not come within the scope of the policy governing proven victims of domestic violence, a policy which has been codified in Appendix FM. As there is no policy relating to someone in the appellant’s situation, it would have been quite improper for the Judge to proceed as if there was one; or to find that there were exceptional circumstances because the appellant’s situation was analogous to someone who came within the scope of the policy. It is trite law that Article 8 is not a consolation prize to be awarded to those who cannot bring themselves within the Rules and/or an applicable policy.
21. It is also argued in the grounds of appeal to the Upper Tribunal that the appellant had a legitimate expectation of being allowed to settle in the UK, either as a spouse or on the grounds of accruing 10 years’ continuous lawful residence from 2009, when she first entered as a student. The Judge gave adequate reasons for rejecting this line of argument in paragraph [17] of her decision. She observed that when the appellant came as a student in 2009, she knew that she could not settle here. She acknowledged that when the appellant was granted a spousal visa in

2013, she had an expectation of being allowed to settle here in due course. For this reason, the Judge said that she attached some weight to her private life. But her status was precarious because, until she was given leave to remain indefinitely, her status was always going to be dependent upon another successful application for leave to remain as a spouse, with the attendant risk that such an application would be refused.

22. The Judge found that the situation in which the appellant found herself was unfortunate, and it was not of her own making. The Judge thereby acknowledged that there were compelling circumstances in the case. Thus, it is not true, as contended in the grounds, that the Judge found that there were no compelling circumstances. The Judge did what she was supposed to do, which was to assess the strength of the appellant's case under Article 8(1) against the public interest considerations arising under Article 8(2), and to reach a conclusion as to whether the decision appealed against was proportionate or disproportionate. The Judge's reasoning was sound, and no error of law is made out.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Anonymity

The First-tier Tribunal did not make an anonymity direction, and I was not asked to make an anonymity direction for these proceedings in the Upper Tribunal. Further, I do not consider that an anonymity direction is warranted.

Signed

Date 1 February 2018

Judge Monson
Deputy Upper Tribunal Judge