



Upper Tribunal

(Immigration and Asylum Chamber

Appeal Number: HU/26491/2016

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons Promulgated

On 11th September 2018

On 24th October 2018

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Ms K J

(Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer.

For the Respondent: Mr Z Raza, instructed by Marks and Marks Solicitors

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First Tier Tribunal that is Ms J as the appellant and the Secretary of State as the respondent.
2. The Secretary of State was granted permission to appeal a determination of First-tier Tribunal Judge Chamberlain, allowing the appellant's appeal, on human rights grounds, against a decision of the Secretary of State dated 22nd September 2016.
3. The respondent's decision refused the application dated 16th May 2016 for leave to remain on the basis of the appellant's family and private life in the UK under Appendix FM of the Immigration Rules. The appellant did not meet the eligibility requirements because her husband notified the Home Office that she had left her husband on 22nd May 2016. She was no longer in a relationship. Further, no evidence was provided with regard to the financial requirements. Her application was also refused under paragraph 276ADE. It was not accepted that there would be very significant obstacles to her integration into Pakistan. She had spent the majority of her life in Pakistan (she was born in 1990) and she only entered the UK on 11th August 2013. She had stated on her application form that she retained social and cultural ties in Pakistan and her parents and family still lived there. There were thus no compelling circumstances to warrant further leave.
4. Judge Chamberlain in a decision promulgated on 3rd April 2018 made, inter alia, the following findings when allowing the appeal

“While the appellant applied under the partner route, I find that her relationship has broken down, and that the reason for the breakdown is the domestic violence she suffered at the hands of her husband. I find that she was also mistreated and abused by her mother in law. [11]

Although the appellant did not apply under the domestic violence concession, I find that the behaviour of her husband meets the government definition of domestic violence set out in the skeleton argument. I find that were she to apply now, she would meet the requirements of E-DVILR.1.3. of Appendix FM. [12]

...

On 22 May 2016 the appellant was forced out of the marital home following an argument. She was insulted and abused by her sister-in-law and then her mother-in-law kicked her out. She contacted her brothers and asked them to collect her. [16]

The appellant was not cross-examined on the abuse she received from her husband or his family ... [17]

...

Taking into account all of the evidence, I find the appellant's marriage broke down due to domestic violence. [19]

...

Further, I find that the appellant's family in Pakistan do not approve of the fact that she not returned to her husband ... [20]

The appellant was asked in cross-examination why the elders of the family get together and sort out the problem, given that she and her husband are paternal and maternal first cousins ... [24]

I find that the appellant would be returning as a lone woman who suffered domestic violence and who is at risk of 'honour' violence. She is perceived to have transgressed society by leaving her marriage. She would not have any family support or any male "protector" or "guardian"... [31]

Application for Permission to Appeal

5. The application for permission to appeal contended that the first-tier Tribunal Judge found the appellant met the requirements of E-DVILR.1.3. of Appendix FM, [12], and accepted the appellant had been subject to domestic violence. That matter had not been before the Secretary of State to make a decision. It was submitted that the judge had acted as a primary decision-maker on the point and allowed the appeal on that basis. In preventing due process to be followed the judge had erred in law.
6. Permission to appeal was granted on the basis that it was arguable that the judge erred as the decision did not suggest that the respondent consented to this course of action.

The Hearing

7. At the hearing, Mr Raza accepted that it was the new matter, but the issue of 'new matter' was not challenged by the respondent at the First-tier Tribunal hearing. I was referred to the skeleton argument placed by Mr Raza before First-tier Tribunal, which noted the issues being raised (a) whether there were very significant obstacles to the applicant's integration within Pakistan (b) whether there were any exceptional and compelling circumstances (c) '*was the appellant a victim of domestic violence - this is material to both a and b*'. Mr Raza submitted that the Presenting Officer was aware of the issue and proceeded and that there was implicit consent. I was also referred to the Guidance on Rights of Appeal Version 7 published on 30th July 2018.
8. Mr Avery submitted that the Presenting Officer ran the case and dealt with it on the basis of the decision made by the Secretary of State, which was not on the basis of domestic violence. The application for leave to

remain was made on the basis of her relationship with her husband and not on the basis of separation or domestic violence. This was clearly a new matter and permission had not been granted. That was evident from the decision, and a careful reading of the decision. The judge's record of cross examination showed that the presenting officer approached the case without making a decision on the new matter.

Conclusions

9. Section 85 of the Nationality Immigration and Asylum Act 2002 (as amended) sets out with reference to matters to be considered on appeal as follows:

"85 Matters to be considered

- (1) An appeal under section 82(1) against a decision shall be treated by [the Tribunal] as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).
- (2) If an appellant under section 82(1) makes a statement under section 120, [the Tribunal] shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in [section 84] against the decision appealed against.
- (3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.
- (4) On an appeal under [section 82(1)] against a decision [the Tribunal] may consider [...] any matter which [it] thinks relevant to the substance of the decision, including [...] a matter arising after the date of the decision.
- (5) **But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.**
- (6) A matter is a "new matter" if –
 - (a) it constitutes a ground of appeal of a kind listed in section 84, **and**
 - (b) **the Secretary of State has not previously considered the matter** in the context of –
 - (i) the decision mentioned in section 82(1), or
 - (ii) a statement made by the appellant under section 120."

10. **Mahmud** (S. 85 NIAA 2002 – 'new matters') [2017] UKUT 00488 (IAC) (promulgated on 14th August 2017) sets out that whether something is or is not a 'new matter' goes to the jurisdiction of the First tier Tribunal. Further, the tribunal must therefore determine the issue, as to whether

something is a new matter, for itself. A matter is the factual substance of the claim and should be

'factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter'

11. In this instance and prior to the hearing, domestic violence had not been raised. Indeed, Mr Raza conceded that the issue of domestic violence was indeed a new matter. It was his case that the tribunal had implicitly accepted that it was indeed a new matter and proceeded accordingly. However, the 'Rights of Appeal' guidance put before me makes clear, at page 27, that

"Even if the new matter is not identified until shortly before or at the hearing, if it can be considered and a decision reached quickly, that should be done. If the new matter cannot be considered before the appeal hearing, for example because the PO needs to check whether a document is genuine and there is insufficient time to do so, the PO should inform the Tribunal that a new matter has been raised and that the SSHD does not consent to it being considered by the Tribunal".

12. An application based on domestic violence is a specific and distinct application from that under the partner route and in this instance no primary decision had been made by the Secretary of State on that basis. It was indeed a new matter. Although the question of domestic violence was raised during the hearing, and obliquely in the appellant's skeleton argument, the questioning by the Home Office Presenting Officer demonstrates that the approach taken was that the relationship may be resumed. That is clear from the line taken in cross examination (as identified above). Nothing in the skeleton argument of Mr Raza obviously identified domestic violence as a 'new matter'. The Home Office did not proceed on that basis.
13. The guidance confirms that 'a decision' [on the question of the new matter] should be reached quickly. In other words, there must be a clear decision by the Home Office on the 'new matter'.
14. There is no record of any decision made by the Home Office Presenting Officer. It was not for the Tribunal to merely proceed on the basis of 'implicit' consent of the respondent. The Tribunal and the parties appeared to proceed on the basis of misunderstanding. The Tribunal should have clearly identified the fact of the 'new matter', specifically raised it as a 'new matter' and put it to the Presenting Officer so that a decision could be made and formally recorded. Nothing in the decision suggests that this approach was taken which was a procedural error. The error applies equally to appeals on human rights grounds. The Tribunal acted as the primary decision maker and without jurisdiction.

The approach of the Tribunal undermines the findings made. That was an error of law.

15. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made, specifically following the consent or otherwise on the new matter, the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Direction

The Secretary of State is on notice to decide whether consent is given to the Tribunal considering the 'new matter' of domestic violence. The decision should be filed and served at least 14 days prior to the resumed substantive hearing before the First-tier Tribunal.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. This direction is made because of the sensitive nature of the appeal.

Signed

Helen Rimington

Date 12th September 2018

Upper Tribunal Judge Rimington