



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

Appeal Number IA/40992/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 2 October 2014**

**Decision & Reasons promulgated
On 28 May 2015**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Virika Tinaitamana Maloca
(Anonymity order not made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation

For the Appellant: Mr I Kumi of Counsel instructed by A K Solicitors.

For the Respondent: Ms J Isherwood, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Morris promulgated on 23 May 2014 dismissing the Appellant's appeal against the decision of the Respondent dated 19 September 2013 to curtail leave to remain and to remove her from the UK pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

Background

2. The Appellant is a national of Fiji born on 1 February 1984. The Appellant's immigration history is set out in the second paragraph of the Respondent's 'reasons for refusal' letter (RFRL) dated 19 September 2013: unfortunately this is not a well drafted paragraph and does not disclose the history with any great clarity. Be that as it may, what is particularly germane, and clear, is that the Appellant was last granted leave to remain on 7 March 2013 until 7 March 2017 as the dependent partner of a person in the Armed Forces. In this context the Appellant was the spouse of Mr Poasa Maloca (date of birth 9 January 1980), who was serving in the British Army. (See further below in respect of the Appellant's immigration status.)
3. On 4 September 2013 the Appellant applied for indefinite leave to remain on the basis of being a victim of domestic violence, such violence having caused the marital relationship to breakdown.
4. The Respondent refused the Appellant's application for reasons set out in the RFRL. The Respondent accepted that the Appellant was a victim of domestic violence and that this had been the cause of the marital breakdown. However the Respondent was not satisfied that the Appellant met the requirements of section DVILR.1.1 of Appendix FM, essentially because she had not been the partner of a British citizen or a person settled in the UK. The Respondent also considered the Appellant's Article 8 rights with reference to paragraph 276ADE and Appendix FM, determined that the Appellant did not satisfy any of the Rules, and also considered that nothing exceptional had been shown in her case to justify allowing her to remain notwithstanding that she did not meet the requirements of the Rules.
5. In the circumstances a decision was taken to curtail the Appellant's leave, and a decision was also taken to remove the Appellant pursuant to section 47 of the 2006 Act.
6. The Appellant appealed to the IAC. At the appeal hearing before the First-tier Tribunal, amongst other things, the Appellant's representative placed reliance upon policy applicable to the partners of those serving in the British armed forces.
7. The First-tier Tribunal Judge dismissed the Appellant's appeal for reasons set out in her determination.
8. The Appellant sought permission to appeal which was initially refused on 12 June 2014 by First-tier Tribunal Judge Heynes, but granted by Upper Tribunal Judge Pitt on 18 August 2014.
9. The Respondent has filed a Rule 24 response dated 29 August 2014 resisting the Appellant's challenge to the decision of the First-tier Tribunal.

Consideration

10. As the Respondent noted in the RFRL the Appellant did not qualify under the provisions of the Immigration Rules in respect of victims of domestic violence because she had not been granted leave to enter or remain under Part 8 of the Rules. The Appellant's partner was not a British citizen or a person settled in the UK: he was a foreign national member of the British Army, and as such was exempt from immigration control pursuant to section 8(4) of the Immigration Act 1971. (The Respondent's representative before the First-tier Tribunal indicated as much – see paragraph 7.) Whilst the Appellant was not exempt from immigration control, her particular position was not covered by the Immigration Rules and accordingly her previous leaves as a partner to enter/remain were granted outside the Rules.
11. It was argued before the First-tier Tribunal that although the Appellant's case was not covered by the Rules, it was covered by published policy. A print-out of web pages at www.gov.uk were submitted in support. Those pages are on file and I have had regard to them. The Judge refers to these pages from paragraph 16 of her decision.
12. It seems to me plain beyond any doubt that the webpages produced before the First-tier Tribunal indicate that a person who has "*experienced domestic violence as the partner of a... member of HM Forces who has served for at least 4 years*" "*can apply*" to settle in the UK. His/her eligibility will depend upon his/her "*last visa (or permission) [having been] as the partner of... a member of HM Forces who served for at least 4 years*", and the applicant must prove that the "*relationship was genuine and ongoing when... last given permission as a partner*", and that he/she was "*the victim of domestic violence from [his/her] partner... and this is why [the] relationship has broken down before the end of [his/her] visa*". In my judgement it really is impossible to read the document in any other way. The document is clear evidence of a policy existing outside the Immigration Rules in respect of the partners of members of HM forces are the victims of domestic violence.
13. I pause to note that whilst it is not for the Tribunal to make a substantive decision by applying policy outside the Rules, on the face of it the Appellant would appear to have been present in the UK as they partner of a person who has served at least 4 years in the Forces; furthermore the Respondent acknowledges that she was the victim of domestic violence and that her relationship had broken down before the end of her visa because of the domestic violence.
14. Be that as it may, the Judge erred in failing to recognise the effect of the www.gov.uk document. The Judge's reasoning at

paragraph 17 to 20 in this context is unsustainable, and plain wrong.

15. As much is acknowledged before me by Ms Isherwood, on behalf of the Respondent, who accepts that there had indeed been a policy in respect of the partners of non-settled members of the armed forces. In fact it was once the proposal of the Respondent in a document dated July 2013 headed 'Family members of HM Forces. Statement of Intent: changes to the Immigration Rules from December 2013', (see in particular under the section headed 'What if a relationship breaks down?'), to incorporate such changes into the Immigration Rules - although in the event it is not apparent that there has been such an amendment to the Rules.
 16. Further, Ms Isherwood does not dispute that on the face of the RFRL the Respondent's decision-maker had no regard to the Respondent's own policy.
 17. It follows that the Respondent's decision was not in accordance with the law, and the decision of the First-tier Tribunal in misconstruing the evidence before it in respect of the existence of a relevant policy was a material error of law. Such an error meant that the First-tier Tribunal not only failed to recognise that the Respondent's decision was not in accordance with the law, but also meant that the Judge's approach to the Appellant's case under Article 8 of the ECHR was also in error. This is because the Judge failed to recognise that the Appellant's circumstances were not adequately covered by the Rules (her leave to enter/remain having been granted outside the Rules, and such a circumstance inevitably preventing her from qualifying under the domestic violence provisions of Appendix FM), and her circumstances otherwise being the subject of policy considerations rather than consideration under the Rules
 18. In all such circumstances the decision of the First-tier Tribunal is set aside.
 19. It was common ground between the parties that given the basis of the finding of error of law the inevitable consequence was that the decision in the appeal was to be remade by allowing the appeal on the ground that the Respondent's decision was not in accordance with the law, and that accordingly the Appellant's application required to be reconsidered by the Respondent in accordance with the law.
- Notice of Decision**
20. The decision of the First-tier Tribunal contained a material error of law and is set aside.
 21. I re-make the decision in the appeal. The Respondent's decision was not in accordance with the law and accordingly the appeal is

allowed to the extent that the case is remitted to the Respondent to make a decision in accordance with the law.

Deputy Judge of the Upper Tribunal I. A. Lewis 26 May 2015