



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/17101/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke on Trent Decision & Reasons
On 8th June 2016 Promulgated
On 27th July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MRS TAZEEM AKTAR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Masih (Counsel)
For the Respondent: Mr A McVeety (Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge I F Taylor, promulgated on 26th October 2015, following a hearing at Nottingham Justice Centre on 14th October 2015. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant's Claim

2. The Appellant's claim is that she married her husband, Mr Ali Shan, in Pakistan on 1st March 2000 and she then applied for a spouse's visa to come to the UK which was issued to her for the period 1st September 2004 to 1st September 2006, a period of two years. The Appellant entered the UK in 2004 in November. On 22nd May 2009, she made a settlement application as the spouse of a British citizen. This was refused on 3rd June 2010. The Appellant had no valid leave to remain when she made her application and she had no right of appeal. It seemed from the papers that on 13th October 2010, the Appellant made a reconsideration request in respect of the refusal on 3rd June 2010. On 9th January 2015, the Appellant was served with removal directions. On 6th February 2015, she made a human rights claim for leave to remain in the UK. The Appellant's human rights claim was refused by way of a refusal letter dated 21st April 2015.
3. The Appellant's claim is that there has been an unconscionable delay between the date of reconsideration request of 13th October 2010 and 22nd January 2014 when the request was responded to. She claims that under Appendix FM, in particular EX1(b) there are insurmountable obstacles to family life if she were to go outside the United Kingdom. Under paragraph 276ADE of the Immigration Rules, there were very significant obstacles to the Appellant's integration into the country to which she would have to go. In relation to Article 8 there were compelling circumstances to justify Article 8 consideration outside the Immigration Rules.
4. The judge went on to consider why there had been over a two year long delay in the Appellant seeking to regularise her immigration status and found that it was not credible to suggest that Mr Shan simply forgot that the Appellant would need to review her visa before 1st September 2006. The Judge accepted that the family had suffered two family bereavements "and I accept that the consequences of this can be devastating to a family". The judge also accepted that after the bereavement "the Appellant's husband began drinking to excess" (paragraph 17). The judge did not accept that neither the Appellant nor her husband understood what the terms of the Appellant's visa were. They failed to regularise the Appellant's stay for a period of no less than two and a half years. The judge held that, "Overall I find their explanations lack all credibility and it may be that their family life was disrupted..." (paragraph 17).
5. Nevertheless, the judge went on to say that, "Be that as it may there is no real evidence that the Appellant and her husband are not currently at least in a genuine and subsisting relationship. All the evidence suggests that this is the case" (paragraph 18). The judge also accepted that the Appellant's husband was working in the UK as a takeaway delivery driver, "and most, if not all, of his relatives reside in the United Kingdom including his elderly mother with whom both he and the Appellant live" (paragraph 18).

6. However, since the normal course of action in such a case would be for the Appellant to return back to her country of origin and to make a proper spouse's application, given that she had overstayed for two and a half years, the judge went on to consider the arguments against this and found that there were no very significant obstacles to her integration into the country to which she would have to go (see paragraph 21). She had spent the majority of her life in Pakistan. The judge also held that, "there are no obvious grounds and nothing was canvassed in this respect of submissions" (as far as a consideration of compelling circumstances was concerned under Article 8 outside the Immigration Rules) (paragraph 22).
7. The appeal was dismissed.

Grounds of Application

8. The grounds of application state that the judge failed to properly consider the appeal of the Appellant for protection outside the Rules and in particular failed to follow the **Razgar** five step process. As far as Article 8 was concerned this was addressed only very briefly without reasons.
9. On 20th April 2016, permission to appeal was granted.
10. On 25th April 2016, a Rule 24 Response was entered by the Respondent and it was observed that the Appellant's representative, Mr Read, had himself stated that he would have to accept that the case was "not the strongest" under the Immigration Rules (see paragraph 14). As far as Article 8 was to be considered this had to be read in the context of Section 117 of the NIAA 2001. It was simply not credible that a delay of two and a half years to regularise one's stay could be explained away on the basis that there had been bereavement in the family.

Submissions

11. At the hearing before me on 8th June 2016, Ms Masih, appearing on behalf of the Appellant, relied upon her well compiled and comprehensive skeleton argument. She said that the judge had accepted in paragraph 17 that the Appellant and her husband suffered family bereavements and that the Appellant's husband began drinking to excess. In these circumstances, the adverse credibility findings were not open to the judge. Moreover, as far as Appendix FM EX1(b) was concerned, a consideration of insurmountable obstacles did not allow for a temporary separation of parties such that an application could be made outside the Immigration Rules. What "insurmountable obstacles" amounted to was the practical possibilities of relocation and not to obstacles which were impossible to surmount (see **MF (Nigeria)**). It had to be remembered that the parties were in a subsisting relationship. They had been so for a substantial period of time (see paragraph 18). The Appellant's husband's relatives all resided in the UK and his elderly mother lived with them (see paragraph 18). The husband had suffered family bereavement (see paragraph 17). The Appellant's husband drank to excess and there was alcohol abuse (see paragraph 17). The Appellant had not been in receipt of benefits contrary to the terms of her visa (see paragraph 15).

12. For his part, Mr McVeety submitted that the case of **SS (Congo)** left it open to the decision-maker to decide which way to strike the balance. Article 8 was not a backstop. Two and a half years was a substantial period of time to overlook the duration of the visa in circumstances where the grant had been for only two years. One was looking here not at a period of overstay of two months but of two and a half years.
13. In reply, Ms Masih submitted that the whole point was that the judge did not consider “insurmountable obstacles” as he should have. The judge had made a finding in relation to the mother but had failed to factor that into the application of the Rules (see paragraph 18). Ms Masih submitted that she would ask that I make a finding of an error of law and remit the matter back to the First-tier Tribunal because there was now emerging evidence that the Appellant’s husband had been so badly affected by substance abuse that there was also evidence of drug abuse. This would most certainly have led to the kind of delay that one has seen here, namely, a delay of over two and a half years. The Appellant had herself come over from Pakistan and she was unversed in the law and in the methods of officialdom in this country, and was dependent upon her husband, who could not take the necessary steps because he was undertaking substance abuse.

Error of Law

14. I am satisfied that the making of the decision by the judge did involve the making on a point of law (see Section 12(1) of TCE 2007) hence that I should set aside the decision. My reasons are as follows. This is a case where the judge has analysed the facts comprehensively, but has then ended with the statement (at paragraph 22) that “There are no obvious grounds” when considering the issue of “compelling circumstances” under Article 8 of freestanding jurisprudence. That conclusion cannot be right given that the judge had accepted that the Appellant had been living in the UK in circumstances where her husband had suffered two family bereavements and “began drinking to excess” especially where the judge held that, “I accept that the consequences of this can be devastating to a family” (paragraph 17).
15. The judge had observed that this was a genuine and subsisting relationship for a lengthy period of time and that the Appellant’s mother-in-law lived with them in the household, as well as the family relatives all being resident in the UK (see paragraph 18).
16. The judge had also held that, “Clearly, the Appellant’s partner who is a British citizen cannot and should not be compelled to leave the United Kingdom...” (paragraph 19).
17. In these circumstances, and particularly bearing in mind that the Sponsor was “in full-time employment and that the Appellant and her husband owned three properties, two of which they rent out” (paragraph 20) the judge should have considered whether the parties should be required to separate, if only for some months, in the application of Appendix FM

EX1(b) when applying the test of “insurmountable obstacles” which looks at the practical possibilities of relocation rather than an obstacle that is impossible to surmount.

18. In the same way, when the judge is considering freestanding Article 8 jurisprudence, it is wrong to conclude that there was “nothing obvious”, given the background to this determination in terms of the facts that the judge did find, which were substantially for the most part in favour of the Appellant.
19. The error of law having been found, the appropriate course of action is now for this matter to be remitted back to the First-tier Tribunal, to be determined by a judge other than Judge I F Taylor, especially given that Ms Masih submitted that there is emerging evidence that the Appellant’s sponsoring husband has been engaging in drug abuse, and were that to be the case, then the delay of two and a half years would be entirely explicable and would go directly to the whole question of whether there were “very significant obstacles” or whether there were “insurmountable obstacles” or there “compelling circumstances” to the determination of this appeal, especially in circumstances where there was an elderly mother that was living with the appellant.

Notice of Decision

20. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the First-tier Tribunal Judge.
21. I remake the decision by remitting this case back to the First-tier Tribunal under Practice Statement 7.2(b) to be determined by a judge other than Judge I F Taylor.
22. I direct that any further evidence that is to be filed by the Appellant should be filed two weeks before the hearing.
23. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

23rd July 2016