



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

Appeal Number: IA278382014

THE IMMIGRATION ACTS

**Heard at Field House
On 16 February 2017**

**Decision & Reasons Promulgated
On 4 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A V

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms Shaw of counsel

For the Respondent: Mr F Walker, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. In this appeal, I will continue to refer to the parties by their designations before the First-tier Tribunal (FtT).
2. This is a respondent's appeal to the Upper Tribunal (UT) with permission of First-tier Tribunal Judge Parkes on 18 January 2016. Having reviewed the grounds submitted on behalf of the respondent, Judge Parkes concluded

that First-tier Tribunal Judge Manyarara (the Immigration Judge) may have erred in law in the way she dealt with the fact that the appellant was in the UK under discretionary leave rather than under the Immigration Rules. Judge Parkes pointed out that this situation had been considered in the case of **Guzman Barrios [2011] UKUT 352 (IAC)**, where the appellant satisfied the requirements for leave to enter or remain. The appellant, who had been granted leave to remain in the UK on a discretionary basis, should not, it was submitted, be in a more favourable position vis-a-vis their immigration status than those who had a right to be here under the Immigration Rules. This ground was thought by Judge Parkes to be arguable.

Background

3. The appellant first came to the UK as a student in 2008. Her leave was subsequently extended but she overstayed. On 20 December 2011, the appellant made an application to remain in the UK outside the Immigration Rules based on her relationship with a British man. However, that application was unsuccessful. I was told at the hearing before the UT that this was because she did not meet the spouse visa requirements. Nevertheless, the appellant was given three-and years discretionary leave to remain. Before the three years expired in April 2014, the appellant applied for further leave to remain based on domestic violence. This was considered under Rule 289A of the Immigration Rules which allows a person who is a victim of domestic violence to seek ILR in the UK if they satisfy certain criteria.
4. The respondent rejected that application on 6 May 2014. The refusal was said to carry no right of appeal, but the appellant's solicitors applied for a review of the refusal and on 18 June 2014 she was assured that the decision would be reviewed. She also received a letter on 25 June 2014 informing her that the refusal decision resulted in a curtailment of her leave with effect from 25 June 2014.
5. At the subsequent appeal hearing before the Immigration Judge, sitting at Hatton Cross on 5 August 2016, the appellant was treated on the basis that since 2008 the appellant's relationship had broken down. The appellant therefore relied solely on Article 8 of the European Convention of Human Rights (ECHR).

The Appeal Proceedings

6. The appeal before the Immigration Judge followed an earlier hearing in which the appellant had been unsuccessful before the FtT but a subsequent appeal before Deputy Upper Tribunal Judge Mailer resulted in the matter being remitted to the FtT for a further hearing. The hearing before the Immigration Judge, was thus that remitted hearing.

7. After she heard the evidence, the Immigration Judge decided the case on the basis that there were compelling circumstances for deciding the case under Article 8. There are a small number of cases where a person falls outside immigration policies or the Immigration Rules. This appellant had been the victim of domestic violence from her husband, [SR]. The implementation of the family and private life Rules in Appendix FM allowed exceptions. The Immigration Judge accepted that the respondent was entitled to lay down rules to prevent persons coming to the UK to set up home without regard to immigration control. However, the respondent was bound to respect private and family life. Having regard to the circumstances of this case, the public interest did not outweigh the requirement on the respondent to respect the appellant's human rights. Accordingly, the Immigration Judge found the interference to be disproportionate and allowed the appeal on Article 8 grounds, having dismissed it under the Immigration Rules.

The Hearing in the UT

8. At the hearing, I heard oral submissions by both representatives. Mr Walker did not seek to go any further than the grounds of appeal, pointing out that he had appeared at the hearing before Judge Mailer. I was reminded that paragraph 9 of the Immigration Judge's decision suggested that she had considered "all aspects" of the appellant's private and family life. Mr Walker did not seek to argue that domestic violence was not a relevant factor for the judge to consider when assessing the appellant's Article 8 rights.
9. Ms Shaw referred me to numerous paragraphs within the decision of the FtT, pointing out that the Immigration Judge had done exactly what had been asked of her by the UT when Judge Mailer pointed out it was necessary to carry out an analysis of the competing public interest at play. Mr Walker had accepted before the UT that there had been an error of law in the approach taken by the original FtT Judge (Judge of the First-tier Tribunal Wylie (Judge Wylie)). Contrary to the grant of permission, the Immigration Judge had not misunderstood the case of **Bossade**. The Immigration Judge had not allowed the appeal under the Immigration Rules but under the ECHR. I was particularly referred to paragraph 9 of **Bossade** where the UT (Lord Matthews and Upper Tribunal Judge McKee) decided that domestic violence is a relevant factor when carrying out an Article 8 assessment but it does not necessarily lead to an appeal being allowed. There is no difference in principle between a case where domestic violence is considered within the context of Article 8 to one where it is considered within the paragraphs 289A-C of the Immigration Rules. However, the Immigration Judge in that case went on to say that the discretionary leave did not confer the same benefits as leave under the Rules. Discretionary leave did not confer the same benefits and it was not unfair or discriminatory for the First-tier Tribunal in that case to treat the matter as one which did not give rise to the same considerations as an application under the Rules.

Discussion

10. The appellant was an illegal overstayer and subsequent grantee of discretionary leave to remain. She was not therefore in the same category as a person who satisfied the requirements of the Immigration Rules for leave to enter or remain. I find that this is a difference which ought to materially affect the outcome of this appeal. The appellant's application was considered by the Immigration Judge under the ECHR. The Immigration Judge, gave a detailed and thorough decision, in which she considered the relevant authorities before reaching her own evaluation of the significance of domestic violence allegations. She had regard to the need to respect for private and family life weighed up against the respondent's need for effective immigration control. The Immigration Judge had heard the oral evidence and considered the argument that the private or life family the appellant had established in the UK was "precarious" in the terms of Sections 117A-C of the Nationality, Immigration and Asylum Act 2002. The Immigration Judge also considered the impact of Section 289A of the Immigration Rules and the fact that this application failed under that Rule. She claimant to be aware of the case of the case of **BOSSADE** and it followed that she ought to have been aware of the distinction between those present in the UK with substantive leave and those merely discretionary leave to remain. She, nevertheless, went on to find that the appellant qualified under Article 8.
11. Article 8 of the ECHR is an instrument which is prone to subjective and widely differing interpretations by different judges, it is not the function of this Tribunal to interfere with a decision if it has been reached following a proper assessment of the evidence and application of the law to the facts as found. I bear in mind the matter has already been remitted to the First-tier Tribunal, in the form of the hearing before Judge Mailer. The Immigration Judge asked to assess the competing public interests with the appellant's claimed circumstances. However, the problem with the Immigration Judge's decision is that she exceeded the ambit of what was required of her by finding that the relevant rules (289 A of the Immigration Rules) "unfair" and did not adequately deal with the circumstances appellant found herself in. The Immigration Judge failed to consider adequately or at all whether the domestic violence rule already provided for the correct balance to be struck between the protection of individuals and the enforcement of effective immigration controls. As the respondent's grounds of appeal state, there seems little justification for finding that the respondent's decision was disproportionate. There was nothing irrational or unreasonable about confining domestic violence rules to those with leave to remain. The Immigration Judge appears to have objected to the Immigration Rule which she was considering without any proper justification.

12. Since the hearing before the Immigration Judge the case of **Agyarco [2017] UK SC 11** has been decided by the Supreme Court. The court emphasised the need for proper respect to be accorded to the Immigration Rules. This appellant here had no legal right to be in UK. It would not be accurate to characterise her circumstances as falling within a “lacuna” created by the Immigration Rules. Indeed, there was nothing particularly exceptional about her circumstances. It appears to be accepted that the appellant could safely return to Philippines, where she has a supportive family. I can find no evidence that to require her to do so would cause an excessive degree of hardship or disruption to her.

Conclusions

13. I am satisfied that for the reasons given above the Immigration Judge materially erred in law. Accordingly, it is necessary to set aside her decision.
14. No party dissented from the suggestion that I should re-make the decision, which is to dismiss the appeal against the respondent’s refusal to grant her further leave to remain in the UK. The appeal is dismissed under both the Immigration Rules and on human rights grounds.

Notice of Decision

15. The respondent’s appeal against the decision of the FtT to allow the appeal on human rights grounds is allowed. Accordingly, the decision of the FtT he set aside and I remake the decision which is to dismiss the appeal against the respondent’s refusal of further leave to remain.

Direction regarding Anonymity

An anonymity direction was made by the FtT and I continue that anonymity direction in an absence of any direction or new representation to the contrary.

Signed

Date 20 April 2017

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT **FEE AWARD**

Fee Award

No fee award was made by the FtT and I make no fee award.

Signed

Date 20 April 2017

Deputy Upper Tribunal Judge Hanbury