



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: HU/18001/2019 (P)

THE IMMIGRATION ACTS

**Decided under rule 34
On 29 October 2020**

**Decision & Reasons Promulgated
On 3 November 2020**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**SAMINA ALVI
(ANONIMITY DIRECTION NOT MADE)**

Respondent

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Pakistan born on 18 December 1962. Her appeal against the refusal of leave to remain was allowed by First-tier Tribunal Judge Lucas on 23 March 2020 on human rights grounds.
2. The Secretary of State appealed on the grounds that the judge failed to consider the requirements for bereaved partners in Appendix FM and section 117B of the 2002 Act when considering proportionality.
3. Permission to appeal was granted by Upper Tribunal Judge Kekic, on 29 June 2020, on the grounds that it was arguable that “the very brief determination and brief findings contained no consideration of the relevant rules or indeed any reference to them and no clarification as to the basis on which the appeal was allowed. The assessment is arguably inadequate.”

4. There was no objection to the error of law hearing proceeding without an oral hearing in response to specific directions. I have considered the submissions made by the Appellant and the Respondent in response to directions. I am satisfied that, in the interests of justice, this appeal can be decided without a hearing.

The Respondent's submissions

5. The Respondent submitted the Appellant could not satisfy paragraphs BPILR 1.1(b) or E-BPILR 1.2 because she did not make an application for indefinite leave to remain and her last grant of leave was not as a partner or bereaved partner, but under Article 8. Further the judge failed to consider section 117B of the 2002 Act. The judge failed to consider the public interest in the proportionality balancing exercise. The error of law was material and the decision should be set aside.

The Appellant's submissions

6. The Appellant submitted that the failure to refer to the relevant Immigration Rules was not fatal to the decision and the conclusions reached were lawfully open to the First-tier Tribunal. The judge approached the appeal as a human rights appeal which was the only ground available to the Appellant. It was accepted the Appellant had not applied for indefinite leave to remain and had made a human rights application. It was submitted this was immaterial in the context of this appeal and the judge's subsequent findings as well as acknowledgment of the public interest.
7. The Appellant submitted the judge correctly referred to the previous decision allowing the Appellant's appeal under Article 8 on account of her marriage to a British citizen. It was open to the judge to find that the Appellant was a bereaved partner which encapsulated the eligibility requirements of paragraph E-BPILR of Appendix FM. The judge's conclusion that there was no realistic public interest in the Appellant's removal was open to him on the evidence.
8. On the facts, the Appellant satisfied the eligibility requirements as a bereaved partner. Her application for leave to remain, as opposed to indefinite leave to remain, was not capable of attracting material weight in the proportionality assessment.

Conclusions and reasons

9. The Appellant came to the UK as a visitor and overstayed. She married a British citizen on 9 November 2016. Her application for leave to remain outside the Immigration Rules was refused, but her appeal was allowed in January 2017. Judge Swaney found that, if the Appellant made an

application for leave to remain on the basis of her relationship, her application would be successful under the partner provisions of Appendix FM. Judge Swaney concluded the Appellant's removal would be disproportionate. The Appellant was granted leave to remain from 5 March 2017 to 5 September 2019. Sadly, the Appellant's husband died in December 2017.

10. Judge Lucas quite properly relied on the decision of Judge Swaney and concluded that the Appellant was married to a British citizen and granted leave to remain on the basis of that relationship. He found that it was difficult to see how the Appellant was anything other than a bereaved partner for the purpose of the Immigration Rules.
11. I am of the view that this finding was open to the judge on the evidence before him. On the facts, the Appellant satisfied the eligibility requirements as a bereaved partner. Her last grant of limited leave was as a result of her marriage to a British citizen and the relationship was genuine and subsisting at the time the Appellant's husband died.
12. This is a human rights appeal not an appeal under the Immigration Rules. The Appellant's ability to satisfy the Immigration Rules is relevant to the weight to be attached to the public interest. The Appellant made a valid application for leave to remain on the basis that her husband had died. It was immaterial that she did not apply for indefinite leave to remain. This did not affect the weight to be attached to the public interest such that it outweighed the Appellant's Article 8 rights. The judge's finding that the Appellant's removal would be disproportionate was open to him on the evidence before him.
13. There is nothing in section 117B of the 2002 Act which would lead to a different conclusion given the findings in the previous decision of January 2017. The brevity of the decision of Judge Lucas and the failure to refer to specific paragraphs of the Immigration Rules was not material to the decision to allow the appeal on human rights grounds. The grant of leave pursuant to the appeal being allowed is a matter for the Respondent.
14. I find there was no material error of law in the decision of the First-tier Tribunal, dated 23 March 2020, allowing the appeal under Article 8. I dismiss the appeal.

Notice of decision

Appeal dismissed

J Frances

Signed
Upper Tribunal Judge Frances

Date: 29 October 2020