Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13141/2015

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 19 September 2016 **On 18 May 2017**

Before

UPPER TRIBUNAL JUDGE STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PREETI BONTHRON
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Mr R Singer, Counsel, instructed by Wellers Law Group

DECISION AND REASONS

1. The respondent (hereafter the claimant) is a citizen of India. She first came to the UK in May 2010 as a visitor. Subsequently she obtained entry clearance as a fiancée. This

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was granted in March 2011. On 3 June 2011 the claimant's fiancé, Mr Bonthron, sadly passed away. On 8 September 2011 she applied for leave to remain outside the Immigration Rules. The SSHD granted a short period of leave until May 2012 to allow her to recover from her sponsor's death and complete her affairs. After returning to India the claimant applied successfully for a Tier 4 (General) Student visa and commenced her Finance and Management MSc degree on 10 November 2014. On 22 January 2015 she applied for leave to remain on Article 8 grounds.

2. On 18 March the appellant (hereafter the SSHD) made a decision refusing to vary leave to remain and giving directions for removal. She appealed. In a decision sent on 14 March 2016 First-tier Tribunal Judge (FtT) Judge Pears allowed her appeal on the basis that the decision was not in accordance with the law. The basis for the judge allowing the appeal was that he accepted the submissions of Counsel for the claimant that the SSHD had failed to consider whether the claimant had suffered an historic injustice by not being advised in 2011 to apply for ILR. Those submissions had argued that the Secretary of State had enacted a specific immigration rule for ILR for bereaved spouses namely para 287(6) which provided:

> "287(b) The requirements for indefinite leave to remain for the bereaved spouse or civil partner of a person who was present and settled in the United Kingdom are that:
>
> (i)(a) the applicant was admitted to the United Kingdom for a period of not exceeding 27 months or given an extension of stay for a period of 2 years as the spouse or civil partner of a person present and settled in the United Kingdom in accordance paragraphs 281 and 286 of these Rules; or
>
> ---(b) the applicant was admitted to the United Kingdom for a period not exceeding 27 months or given an extension of stay for a period of 2 years as the unmarried or same-sex partner of a person present and settled in the United Kingdom in accordance with paragraphs 195AA to 295F of these Rules and during that period married or formed a civil partnership with the person whom he or she was admitted or granted an extension of stay to join; and
>
> (ii) the person whom the applicant was admitted or granted an extension of stay to join died during that period; and
>
> (iii) the applicant was still the spouse or civil partner of the person he or she was admitted or granted an extension of stay to join at the time of the death; and
>
> (iv) each of the parties intended to live permanently with the other as his or her spouse or civil partner and the marriage or civil partnership was subsisting at the time of the death; or

(v) the applicant does not have one or m ore unspent convictions within the meaning of the Rehabilitation of Offenders Act 1974."

3. The SSHD's grounds submitted that the judge was wrong to allow the appeal on the above basis because the aforesaid rule was confined to bereaved spouses who had been admitted to the UK for a period not exceeding 27 months or given an extension of stay for a period of two years "as the spouse .... of a person present and settled in the UK ...". The claimant had been admitted as a fiancée, not as a spouse (para 287(6)). The SSHD's grounds also failed to give reasons "as to whether there were any exceptional circumstances in order to consider Article 8 outside of the Rules".

4. I am grateful to both parties for their submissions.

5. I have no hesitation in finding that the judge materially erred in law. Whether through oversight or some other reason the judge was simply wrong to consider that the claimant had a potential basis for being granted ILR under the Rules in force in November 2011. The SSHD is entirely right in pointing out that the old Rules only provided for a grant of ILR to bereaved spouses, not bereaved fiancé(e)s. There being no "historic" rule under which the claimant stood to benefit, there could not have been an "historic injustice" arising from the failure of the SSHD to consider the claimant under it. The judge's decision cannot be construed as an allowance under Article 8 because he expressly stated that it would "not be appropriate to decide the case finally and consider the [claimant's] rights under Article 8" and "I make no decision in relation to Article 8" ([21]).

6. Mr Singer sought at one point to argue that the judge's "not in accordance with the law" decision was still justified even though there was in fact no immigration rule because the SSHD could have granted ILR on a discretionary basis. However even assuming the SSHD had a policy at the time making it possible to grant ILR (Mr Singer did not provide chapter and verse), it is clear that she did exercise her discretion by way of making a grant of DLR and the claimant did not seek to challenge that - and indeed decided to leave the UK to return to India. Hence there cannot be said to be any kind of historic injustice in the SSHD's treatment of the claimant's case.

7. Accordingly I find that the FtT judge materially erred in law and her decision is set aside.

8. Both the representatives urged that if I set aside the judge's decision I should remit it to the FtT to consider the claimant's Article 8 grounds of appeal. I am in agreement with them that this would be the fairest course as the claimant has effectively had no assessment of her Article 8 grounds of appeal. Mr Singer said the claimant would want to give evidence and call witnesses. I am not sure that is necessary, since it would appear that there is little or no dispute as regards the facts of the claimant's case. However, I direct that the claimant's representatives produce witness statements, presumably updated from before, from the claimant and any other

persons whose evidence she intends to rely on in her appeal, at least 7 days before the date fixed for the next hearing which will be a CMR, so that the new FtT judge can decide whether in any oral evidence is necessary.

No anonymity direction is made.

Signed Date: 30 September 2016

Dr H H Storey
Deputy Judge of the Upper Tribunal