



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

Appeal Number: IA/24562/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 8th May 2017**

**Decision & Reasons Promulgated
On 17th May 2017**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

[N R]

(~~ANONYMITY DIRECTION NOT MADE~~)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Khan, Counsel (Direct Access)

For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission granted by Upper Tribunal Judge Lindsley against First-tier Tribunal Judge O'Malley's decision of 29th September 2016 to dismiss her appeal under the Immigration Rules and under Article 8. The appellant is a citizen of Bangladesh, born on [] 1982, and she arrived in the UK in February 2008 as the dependent of her then husband [JR]. He returned to Bangladesh on 23rd December 2010, has not returned to the UK and she has not seen him since that date.
2. She was left behind in the UK and her leave was curtailed after her then husband informed the Home Office that she was no longer his wife. She

obtained a non-molestation order against [JR] in February 2011. On 13th April 2012 she was awarded discretionary leave on the basis of domestic violence. The discretionary leave was to 12th April 2015.

Grounds for Permission to Appeal

3. The grounds for permission to appeal submitted that the First-tier Tribunal Judge misdirected herself in not applying the UKBA policy on discretionary leave. The policy was in existence at the time of the hearing and was a policy that applied to the appellant as she was granted her discretionary leave prior to 9th July 2012 immigration changes. It was submitted that the judge failed to consider the appeal grounds at paragraph 4 and 13.
4. It was accepted by all parties that the appellant was granted discretionary leave based on her domestic violence prior to the 9th July 2012 changes. Therefore, any assessment should have been carried out in accordance with the policy prior to that date. The policy was within the transitional provisions of the Immigration Rules. The policy was directly relevant to the issue on discretionary leave, especially that the Secretary of State had failed to assess her own policy and that the Tribunal failed to take account of a policy or law that existed at the time. The Secretary of State and the First-tier Tribunal had clearly failed to follow that policy which stated
“... apply, a further period of three years’ DL should normally be granted. Caseworkers must consider whether there are any circumstances that may warrant departure from the standard period of leave. See Section 5.4”.
5. The grounds of appeal at paragraph 4 state:
“Appellant was granted discretionary leave on 13th April 2012 on the basis that she is a victim of domestic violence. Since then appellant has been living in the United Kingdom. Appellant’s life remains volatile in Bangladesh. Scenario from a letter of the Chancellor of Archdiocese of Dhaka also be witnessed as the difficulties of appellant in Bangladesh. Pain and sufferings are there. She is not available by her father who has been suffering from cancer and now on dying bed”.
6. Paragraph 11 stated:
 - “11. A discretion under the Immigration Rules should have been exercised differently.*
 - 12. This decision is unlawful because it is incompatible under the Convention on EU Human Rights.*
 - 13. The appellant’s previous leave was granted based on domestic violence pre 9th July 2012 and her circumstances remain the same. It is submitted that her current decision looks at the new Rules and is caught unfairly. That has not been considered”.*

The Hearing

7. At the hearing before me Mr Khan submitted that the First-tier Tribunal Judge had not considered whether the circumstances were still the same under the discretionary policy.
8. Mr Kotas rejoined that at page 2 the Secretary of State's decision had specifically considered the change of circumstances in relation to the discretionary policy and the representative must have had that in mind when she attended the hearing. The First-tier Tribunal had recorded the submissions in detail at paragraph 25 of the decision and had noted that the case had been put on the basis of a private life whether she faced obstacles on her return. It was not put on the basis of the application of discretion.
9. The judge had not failed to address the relevant issues as they were put.
10. Mr Khan also referred to the Guidance Note 2011 No 1 Permission to appeal to the UTIAC. Paragraph 9 identifies that
*"Where there may be a duty to consider points that are '**Robinson obvious**' (see **R v Secretary of State for the Home Department, ex parte Robinson [1997] 3 WLR 1162**) there is power to consider any other point arising from the decision if the interests of justice so require".*

Conclusions.

11. The Secretary of State's decision clearly addressed the decision under discretionary leave noting that:
"On 13th April 2012 you were granted discretionary leave to remain in the United Kingdom under Article 8 European Convention on Human Rights, on the basis you were recovering from domestic violence and that you were training to be a dental nurse and your employer was supporting you through this period. Since the last grant of discretionary leave you have had time to recover from the domestic abuse you were subjected to, you have now qualified as a dental nurse and are in a position where you are able to support for yourself. Therefore, after carefully reviewing your application for active review of discretionary leave, the Secretary of State is not satisfied that the grounds under which you were previously granted discretionary leave still persist and your application for further discretionary leave is refused".
12. The decision then went on to consider the applicant's family life and she had not raised anything to suggest that she had a partner or dependant, and her application was considered on the basis of private life.
13. I am not persuaded that there is any 'Robinson obvious' point. What is clear is that the grounds of appeal were not based on the failure of the Secretary of State to have regard to the policy on discretion and indeed it

is clear from the reference above that the Secretary of State indeed realised and recorded that the appellant was granted discretionary leave on the basis of domestic violence and did consider her policy on that discretionary leave. Mr Khan supplied me with the Asylum Policy Instruction Discretionary Leave document published on 18th August 2015. There was no indication that this was supplied to the judge, and I note that under Section 10 of the Transitional Arrangements the policy states that “all decisions made on discretionary leave on or after 9th July 2012 will be subject to the criteria set out in this guidance”. At 10.1 applicants granted discretionary leave before 9th July 2012 it is stated:

“Those granted leave under the DL policy in force before 9th July 2012 will normally continue to be dealt with under that policy through to settlement if they continue to qualify for further leave on the same basis as their original DL was granted (normally they will be eligible to apply for settlement after six years’ continuous DL (or where appropriate a combination of DL and LOTR, see Section 8 above)) unless at the date of decision they fall within the restricted leave policy.

Caseworkers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of decision. [my emphasis] If the circumstances remain the same, the individual does not fall within the restricted leave policy and the criminality thresholds do not apply, a further period of three years’ DL should normally be granted. Caseworkers must consider whether there are any circumstances that may warrant departure from the standard period of leave. See Section 5.4.

If there have been significant changes that mean the applicant no longer qualifies for leave under the DL policy or the applicant falls for refusal on the basis of criminality (see criminality and exclusion section above), the further leave application should be refused”.

14. It is quite clear from the decision letter that the Secretary of State had taken into account the fact that there had been changes of circumstance.
15. There was no challenge before the First-tier Tribunal Judge on the basis of the application of the Asylum Policy Instruction on discretionary leave and I have set out above the terms and framework of the appeal before the First-tier Tribunal Judge who cannot be criticised for considering the grounds of appeal as they were before him. There was vague reference to the decision not being in accordance with the law but this was not particularised and certainly not referenced to or framed in the light of the policy on discretionary leave.
16. As Mr Kotas set out the appeal was made on the basis of the appellant’s private life, maintaining that there were very significant obstacles to her integration in Bangladesh on the grounds that she was a divorced woman, her ex-husband had family and friends with influence who would make it impossible to return. The judge carefully considered this matter and found

that it was not. Acknowledged at paragraph 29 was that the appellant had a Bachelors degree and could go back easily and get a job and took into account the assertion that the character assassination was an obstacle in her restarting her life in Bangladesh.

17. There was no mention of the discretionary policy in the submissions from Ms Qureshi and indeed, as identified at paragraph 38 by the judge, the appellant's claim is brought on the basis that there are very significant obstacles to a return to Bangladesh. The judge's finding in this regard was that these assertions did not "bear scrutiny".
18. The judge in paragraphs 38 to 68 made a careful and detailed assessment of the appellant's evidence and her ability to return to Bangladesh and was not satisfied that she would face very significant obstacles on return for a variety of reasons.
19. The grounds specifically identified paragraph 4 and 13 of the pleadings but these merely refer to the fact that she was granted discretionary leave and refer to the difficulties of her returning back, and at 13 that there was a discretion "under the Immigration Rules" which should have been exercised differently. There was no discretion under the Immigration Rules. At paragraph 13 it is stated that the appellant's previous leave was granted on the basis of domestic violence and her circumstances remain the same but merely states that the decision under challenge "looks at the new Rules and is caught unfairly". That does not specifically raise the issue of the discretionary policy or particularise any challenge thereunder.
20. I hasten to add that it was quite clear that the Secretary of State considered the change of circumstances and this I have outlined above, and there can be no material error in the judge's decision. The judge noted the change of circumstances at [36] noting that the Appellant had received assistance from Adult Support Services but that in January 2012 the 'case was closed' [36]. She had had training, was qualified, and sent money back to Bangladesh to support her family there [37]. The judge clearly found the decision was in accordance with the law because he proceeded directly to a consideration of proportionality at [63] outside the Immigration Rules, noting that she had no right to remain under those Rules. At [64] the judge found that the appellant had obtained useful transferable skills and was capable, at [63], of replicating her life in Bangladesh. Further, the appellant did not claim any family or relationships in the UK which required particular attention. The judge clearly found that she had skills and experience in dentistry and accountancy to bring to the workplace in Bangladesh and found that she had an ability to find employment on return.
21. For the reasons given above, I find there is no material error of law in the decision of Judge O'Malley and that decision shall stand.

No anonymity direction is made.

Signed Helen Rimington
Upper Tribunal Judge Rimington

Date 15th May 2017