Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34113/2015

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 8 January 2018	**On 31 January 2018**

Before

UPPER TRIBUNAL JUDGE LANE

Between

WB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Medley-Daley, ILAC, Leeds
For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, WB, is a female citizen of Bangladesh born in 1983. By a decision dated 19 June 2017, I set aside the First-tier Tribunal's decision (Judge Myers) and directed the decision be remade following a resumed hearing of the Upper Tribunal at Bradford. My reasons for finding an error of law in the First-tier Tribunal decision were as follows:

"1. I shall refer to the respondent as the appellant and to the appellant as the respondent (as they appeared respectively before the First-tier Tribunal). The appellant, WB, is a female citizen of Bangladesh born in 1983. She arrived in the United Kingdom as a spouse on 17 February 2010. Her visa was valid for the period 23 December 2009 until 23 March 2012. On 20 March 2012, she applied for indefinite leave to remain in the United Kingdom as the spouse of a settled person. That application was refused by a decision of the respondent dated 24 October 2014. On 30 January 2015, the appellant withdrew her appeal against that decision and instead submitted an application for leave to remain on the grounds she was a victim of domestic violence. The parties agree that it is the appellant's evidence that her relationship with her husband broke down on 8 January 2015. As the respondent states in the refusal letter "by your own admission, your marriage broke down 2 years 10 months after your probationary period as a spouse expired".

2. The appeal to the First-tier Tribunal (Judge Myers) was correctly determined under the "old" statutory regime and Judge Myers allowed the appeal under the Immigration Rules (paragraph 289A). Paragraph 289A of the Immigration Rules provides as follows:

> **Requirements for indefinite leave to remain in the United Kingdom as the victim of domestic violence**
>
> 289A. The requirements to be met by a person who is the victim of domestic violence and who is seeking indefinite leave to remain in the United Kingdom are that the applicant:
>
> (i) (a) the applicant was last admitted to the UK for a period not exceeding 27 months in accordance with sub-paragraph 282(a), 282(c), 295B(a) or 295B(c) of these Rules; or
>
> (b) the applicant was last granted leave to remain as the spouse or civil partner or unmarried partner or same-sex partner of a person present and settled in the UK in accordance with paragraph 285 or 295E of these Rules, except where that leave extends leave originally granted to the applicant as the partner of a Relevant Points Based System Migrant; or
>
> (c) the applicant was last granted leave to enable access to public funds pending an application under paragraph 289A and the preceding grant of leave was given in accordance with paragraph 282(a), 282(c), 285, 295B(a), 295B(c) or 295E of these Rules, except where that leave extends leave originally granted to the applicant as the partner of a Relevant Points Based System Migrant; and
>
> (ii) the relationship with their spouse or civil partner or unmarried partner or same-sex partner, as appropriate, was subsisting at the beginning of the last period of leave granted in accordance with paragraph 282(a), 282(c), 285, 295B(a), 295B(c) or 295E of these Rules; and
>
> (iii) is able to produce evidence to establish that the relationship was caused to permanently break down before the end of that period as a result of domestic violence

3. At [14], Judge Myers found as follows:

> "It was submitted by Ms Anderson that the appellant did satisfy the requirements of paragraph 289A(iii) because on 8 January 2015, the date the relationship permanently broke down, she had leave to remain in the United Kingdom under paragraph 281 which had been extended under the Immigration Act 1971, Section 3C. I accept this submission because the appellant must show that the relationship was caused to break down before the end of her probationary visa because of domestic abuse. Her visa expired on 23 March 2012 and she had made an in time application for indefinite leave to remain which therefore extended her leave. The respondent did not decide this application for one and a half years and when the application was refused the appellant lodged an appeal which again extended her leave. Whilst the appeal was pending she made her application on the basis of domestic violence."

4. At [15] the judge wrote:

> "I am satisfied from the oral evidence although the marriage was unhappy the appellant was prepared to try to make a go of things until the incident in January 2015. She was hopeful that she and her husband would finally have their own home and could start a family."

5. The Secretary of State appeals to the Upper Tribunal on the ground that the judge has misunderstood and has misconstrued the provisions of paragraph 289. In the grounds, the Secretary of State argues:

> "... 289(i) sets out the relevant periods of leave and the basis upon which they were granted. 289(iii) sets out the primary requirement at issue. It is clear from reading 289(iii) that "the end of that period" is a direct reference to the period set out in 289(i). There is no scope within the Rule to extend the period beyond that defined in the Rule."

6. The appellant relies upon Section 3C of the Immigration Act 1971:

> Continuation of leave pending variation decision
>
> (1) This section applies if—
>
> (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
>
> (b) the application for variation is made before the leave expires, and
>
> (c) the leave expires without the application for variation having been decided.
>
> (2) The leave is extended by virtue of this section during any period when—
>
> (a) the application for variation is neither decided nor withdrawn,
>
> (b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought [F18, while the appellant is in the United Kingdom] against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), or

(c) an appeal under that section against that decision [F19, brought while the appellant is in the United Kingdom,] is pending (within the meaning of section 104 of that Act).

(3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.

(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.

(5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).

7. The appellant's case falls to be considered under paragraph 289A(i)(a); the alternative sub-paragraphs of (b) and (c) do not apply to her. In addition to meeting the requirements of sub-paragraph (i)(a) the appellant was also required to meet the requirements of sub-paragraphs (ii) and (iii). The appellant was last admitted to the UK for a period of 27 months which expired on 23 March 2012. The parties agree that the relationship between the appellant and her spouse was subsisting at the beginning of that last period of leave. The parties agree that the marriage broke down irretrievably following an incident on 8 January 2015.

8. I find that the words in sub-paragraph (iii) "the relationship was caused to permanently break down before the end of that period" refers to the immediate preceding paragraph (ii) and to "the last period of leave granted in accordance with 282(a)". Stripping away the parts of paragraph 289A which do not apply in the case of this appellant it is clear that the period referred to in sub-paragraph (iii) is the period of initial leave of 27 months granted to the appellant and which expired on 23 March 2012. I accept that the operation of Section 3C(2) of the 1971 Act enabled the appellant to remain in the United Kingdom to pursue her appeal and extended her leave so that she might do so legally. However, the "last period of leave granted in accordance with paragraph 282(a)" is the finite period of 27 months; it is not, in my opinion, the extended and indefinite period of leave provided by Section 3C. Had the Rules intended to provide for the breakdown of the relationship to occur within any period of extended leave, I can see no reason why the Rule would not have stated so in terms. Significantly, sub-paragraph (iii) does not refer to a period of leave to remain but to the last period of leave granted in accordance with the Immigration Rules (that is, paragraph 282(a)). It follows from that analysis that Judge Myers erred in law by allowing the appeal under the Immigration Rules.

9. I set aside Judge Myers' decision. At the Upper Tribunal initial hearing, I heard argument relating to the application of the Immigration Rules to the factual matrix in this case but, as Judge Gibb indicated in granting permission [4], Judge Myers has not considered the appeal at all on Article 8 ECHR grounds. It is perhaps not surprising that she did not do so having allowed the appeal under the Immigration Rules. However, if the appellant wishes to continue her appeal on Article 8 ECHR grounds against the original immigration decision, then she may produce oral and documentary evidence and I will hear submissions for both parties at a resumed hearing. I shall fix a date for a resumed hearing before me at Bradford but, in the event that the appellant does not wish to pursue her Article 8 appeal, then she should notify the Tribunal as soon as possible so that the date may be vacated.

Notice of Decision

10. The decision of the First-tier Tribunal which was promulgated on 11 November 2016 is set aside. The Upper Tribunal shall remake the decision following a resumed hearing before Upper Tribunal Judge Clive Lane on a date to be fixed at Bradford."

2. At the resumed hearing, Mr Medley-Davey, who appeared for the appellant, sought to rely upon a bundle of documents which had been filed in connection with the Upper Tribunal hearing. That bundle contains documents which were not before the First-tier Tribunal or, indeed, before the Upper Tribunal at the error of law hearing. One such document comprises Home Office guidance entitled, "Victims of Domestic Violence" which is dated 29 May 2015. Mr Medley-Daley sought, in particular, to rely upon page 4 of 50 which reads as follows:

> 'Applicants granted limited leave as a partner of a settled person (before 1 December 2013 if the sponsor is British and a full time member of HM Forces) under paragraph 281, 284, 295A or 295D of the Immigration Rules. To be considered under paragraph 289A of the Immigration Rules, an applicant who is a victim of domestic violence and who applies for indefinite leave to remain in the UK must meet all of the following requirements:
>
> - the applicant was last admitted to the UK for a period not exceeding 27 months in accordance with sub-paragraph 282(a), 282(c), 295B(a) or 295B(c) of these rules
>
> - the applicant was last granted leave to remain as the spouse or civil partner or unmarried partner or same-sex partner of a person present and settled in the UK in accordance with paragraph 285 or 295E of these rules, except where that leave extends leave originally granted to the applicant as the partner of a relevant points-based system migrant
>
> - the applicant was last granted leave to enable access to public funds pending an application under paragraph 289A and the preceding grant of leave was given in accordance with paragraph 282(a), 282(c), 285, 295B(a), 295B(c) or 295E of these rules, except where that leave extends leave originally granted to the applicant as the partner of a relevant points-based system migrant
>
> - the relationship with their spouse or civil partner or unmarried partner or same-sex partner, as appropriate, was subsisting at the beginning of the last period of leave granted in accordance with paragraph 282(a), 282(c), 285, 295B(a), 295B(c) or 295E of these rules
>
> - **be able to provide evidence to show the relationship permanently broke down before the end of that period of leave or extension of stay** because they were the victim of domestic violence
>
> - not fall for refusal under the general grounds for refusal'
>
> [my emphasis]

3. Mr Medley-Daley submitted that at the bullet point "be able to provide evidence to show the relationship permanently broke down before the end of that period of leave *or extension of stay* because they were the victim of domestic violence" represented a departure from the text of the Rules

and an extension of the protection which the Home Office (through its guidance) was prepared to offer victims of domestic violence. Unlike paragraph 289A of HC 395 (as amended) the guidance offered protection to those during "an extension of stay" and not only those who suffered violence during the initial grant of leave to remain. Mr Medley-Daley submitted that, by refusing the appellant's application, the Secretary of State had breached her own stated policy; the appellant's marriage had broken down not during her initial grant of leave but while she had been on Section 3C leave.

4. The passage of the Home Office guidance upon which the appellant relies appears under a heading "Key Facts: victims of domestic violence". There follows what is, in essence, a paraphrase of paragraph 289A of the Immigration Rules; indeed, the paraphrase is headed "to be considered under paragraph 289A of the Immigration Rules, an applicant who is the victim of domestic violence and who applies for indefinite leave to remain in the UK must meet all of the following requirements …" A comparison of the text of paragraph 289A and the paraphrase in the guidance shows that, for the most part, the paraphrase uses exactly the same words as the text of the Immigration Rule. There are very minor textual differences: for example, "relevant points-based system migrant" appears without initial capital letters for each word in the paraphrase. However, the first four bullet points of the paraphrase are the same as the text of the Rule. At bullet point five it is correct to say that the words "or extension of stay" have been inserted and do not appear in the text of the Rule.

5. The first question, therefore, is whether the paraphrase in the guidance is intended simply to set out the "key facts", that is, the position under the Immigration Rules or whether it seeks to extend that provision to a wider category of applicant. In my opinion, having considered the guidance document and the rule very carefully, I find that the guidance is a misstatement of the rule and that the fifth bullet point does not seek to extend the protection provided by the rule. This passage of the guidance is intended simply to inform the respondent's officers of the relevant rule. I admit that it is not clear why the text of the Rule has not been inserted in the guidance *verbatim* and why it was felt necessary (albeit very slightly) to paraphrase the rule. However, I reject the suggestion that a substantially more generous provision than provided by the rule should be hidden away by the respondent in a part of a guidance document which does not purport to set out the Secretary of State's current policy at all but rather the relevant part of HC 395.

6. Mrs Pettersen, for the respondent, submitted that the words "extension of stay" as they appear in the guidance should refer to a grant of further leave to remain issued by the Secretary of State and not to an extension of leave arising under Section 3C of the 1971 Act. I agree and I refer to [8] of my error of law decision which is set out above. However, I stress that that finding is in the alternative to my primary conclusion that the guidance purports to set out the provisions of paragraph 289A but contains an error.

7. I have considered the appeal on Article 8 ECHR grounds. The standard of proof is the balance of probabilities in the Article 8 appeal. The appellant has filed and served a witness statement dated 19 December 2017 in support of her appeal. The appellant did not give evidence at court; there was no interpreter and Mrs Pettersen confirmed that she had no questions arising from the appellant's statement.

8. The appellant states that she is not divorced from her husband although separated from him almost three years ago. She is supported financially in the United Kingdom by her brother who lives here. Before she came to the United Kingdom she lived with her mother in Bangladesh (her father died in 2000). The appellant's mother now lives in Bangladesh with another brother whilst a further brother lives nearby with his family. The appellant continues to have contact with her mother and she says that her brothers in Bangladesh are "not happy about my marriage as my husband has been married before". The appellant states that she had fallen out with her brother in the United Kingdom but they have reconciled and he now assists her. She states that she could "not go back and live with my mother [in Bangladesh] as my brothers would not allow it". She states that she would be destitute in Bangladesh and "have nowhere to go to". She claims that her brothers in Bangladesh might harm her.

9. I have had regard to Section 117B of the 2002 Act (as amended). I acknowledge that the appellant is supported by her brother but the fact that she was unable to give evidence without the help of an interpreter would indicate that she is unable to speak English. She remains legally in the United Kingdom at the present time but under Section 3C leave; to that extent, her status here is precarious. I take no point against the appellant for her failure to be cross-examined on her statement as I have explained above, but her statement is somewhat brief as to the reasons why the appellant claims she could not return to Bangladesh. There is a letter from the appellant's brother in the United Kingdom supporting her appeal and I have had regard to that evidence. However, I agree with Mrs Pettersen's submission that there was no very clear evidence to show that the appellant could not return to live in Bangladesh with her mother as she had before she came to this country. She has reconciled with her brother in the United Kingdom who had fallen out with her regarding her marriage; there seems to be no reason why she could not similarly reconcile with her brothers in Bangladesh. There was no evidence from the mother indicating that the appellant could not return to live with her or, indeed, from the brother who lives with the appellant's mother who the appellant claims is opposed to her returning there. The appellant does not address the possibility of returning to live with her mother in a property where the two women might live together without the appellant's brother, a scenario which would replicate the arrangement which existed before the appellant came to the United Kingdom. As regards the appellant's ties to the United Kingdom, her inability to speak English appears to have impeded her integration into society; there was no evidence that her private life is such that it could not be pursued in Bangladesh as before. Given that she is

separated from her husband and has no children, there is no question of family life within this jurisdiction.

10. In the light of the observations which I have set out above, I have concluded that it would be proportionate for the appellant to return to Bangladesh. As a consequence, by removing the appellant, the Secretary of State would not be in breach of Article 8 ECHR. In reaching that conclusion I have had regard also to the fact that the appellant does not meet the requirements of HC 395. I therefore remake the decision dismissing the appeal against the respondent's decision dated 4 November 2015.

Notice of Decision

11. The appellant's appeal against the respondent's decision dated 4 November 2015 is dismissed under the Immigration Rules and on human rights grounds (Article 8 ECHR).

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 28 January 2018

Upper Tribunal Judge Lane

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 28 January 2018

Upper Tribunal Judge Lane