Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13486/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 8 January 2015	**On 15 January 2015**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MS KAVITHA THIYAGARAJAH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Chipperfield of counsel instructed by Thames Chambers
For the Respondent: Ms K Pal a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Sri Lanka who was born on 13 November 1984. She has been given permission to appeal the determination of First-Tier Tribunal Judge Jackson ("the FTTJ") who dismissed her appeal against the respondent's decision of 17 February 2014 to refuse to grant her further leave to remain in the UK as a victim of domestic violence under the provisions of paragraph 289A of the Immigration Rules.

2. The appellant entered the UK on 15 November 2011 with valid entry clearance as a spouse until 3 February 2014. She made the application for indefinite leave to remain as a victim of domestic violence on 27 January 2014.

3. The respondent did not accept that the appellant had been subjected to domestic violence or that she met the requirements of the Rules. The respondent also concluded that the appellant did not succeed under the Article 8 human rights provisions set out in the Rules and there were no exceptional circumstances which might justify allowing her to remain exceptionally outside the Article 8 provisions of the Rules.

4. The appellant appealed and the FTTJ heard her appeal on 22 September 2014. Both parties were represented. Oral evidence was given by the appellant and her sister. The FTTJ found that the appellant had not been the victim of domestic abuse. As a result the question of whether the marriage had broken down because of domestic violence was academic but the FTTJ found that even if she had accepted that the appellant was a victim of domestic abuse her marriage had not broken down as a result of this. There had been no appeal on Article 8 human rights grounds. The FTTJ dismissed the appeal.

5. The appellant applied for and was granted permission to appeal. There are three grounds of appeal which argue that the FTTJ erred in law. Firstly, by refusing to grant an adjournment to enable the appellant to argue that she had been persecuted in Sri Lanka and had made a claim both for asylum and Article 3 human rights protection or in the alternative by failing to consider these grounds. Secondly, by failing to give proper consideration to the evidence in relation to the complaints which the appellant had made to the police and by giving weight to the fact that the appellant had not provided supporting evidence from a GP or a women's support organisation. Thirdly, when concluding that the appellant had failed to establish that her marriage had broken down due to domestic violence by placing weight on the fact that the appellant had not raised the issue during the course of divorce proceedings.

6. I have been provided with Patel and others v SSHD [2013] UK SC72, SH (Afghanistan) [2011] EWCA Civ 1284, Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) and LA (para 289A): causes of breakdown) Pakistan [2009] UKAIT 00019.

7. Mr Chipperfield relied on the grounds of appeal. The refusal letter contained a notice under S120 of the Nationality, Immigration and Asylum Act 2002 and a one stop warning requiring the appellant to inform the respondent of any reasons why she thought she should be

allowed to stay in the UK. He said that she had raised asylum and Article 3 issues both in paragraph 29 of her grounds of appeal to the First-Tier Tribunal and also in paragraph 25 to 27 her witness statement dated 19 September 2014. Both of these were before the FTTJ and, he submitted, should have persuaded her that there were asylum and Article 3 human rights grounds which had to be considered. In reply to my question, he accepted that there had been nothing in the appellant's claim before the respondent which raised such issues and that as a result they had not been addressed in the reasons for refusal letter. He argued that the course of action which the FTTJ should have adopted was to direct the respondent to address these grounds and for the appellant to have a full interview followed by proper consideration and a fresh decision from the respondent.

8. In relation to the second and third grounds of appeal, Mr Chipperfield relied on his grounds of appeal. He took me through the documents relating to the appellant's complaints to the police all of which are contained in the respondent's bundle. Victims of domestic violence often had good cultural and other reasons for not going to the police either at all or until late in the day. He relied on Ishtiaq v SSHD [2007] EWCA Civ 386 in particular paragraphs 16, 17, 30 and 41.

9. As to the third ground of appeal, Mr Chipperfield relied on LA, in particular the headnote. If I found that there was an error of law in relation to the first ground of appeal I was asked to remake the decision and to send the asylum and Article 3 claims back to the respondent for full consideration. If I found errors of law in relation to the second and/or third grounds I was asked to send the appeal back to the First-Tier Tribunal to be re-determined without preserving any findings of fact or credibility.

10. In relation to the first ground of appeal, Ms Pal conceded that the FTTJ erred in law and should have adjourned or given a direction for the respondent to consider the asylum and Article 3 claims.

11. She submitted that second and third grounds were no more than disagreements with conclusions properly reached by the FTTJ on the evidence. There had been proper consideration of the evidence relating to the complaints made by the appellant to the police. It had been more than a year from the date of the separation from her husband before she complained. There were inconsistencies between the evidence of the appellant and her sister which were also properly taken into account. There was no error of law.

12. I reserved my determination.

13. Ms Pal concedes and I find that the FTTJ erred in law by either failing to adjourn to enable the respondent to consider the appellant's asylum and Article 3 human rights claims or to admit them and

determine what should be done, preferably by directing the respondent to consider them. It was an error not to accept that such claims had been made and needed to be dealt with. Whilst these issues had not been raised with the respondent either at the time of the application or prior to the decision, the respondent had issued a s120 notice and if the appellant had not raised these claims in her grounds of appeal to the First-Tier Tribunal she would have been at risk of having them rejected had she attempted to do so as a fresh claim after the appeal decision from the FTTJ. It was unfortunate that neither in the grounds of appeal nor her statement did the appellant referred to either “asylum” or “Article 3” in terms but nevertheless I find that it was sufficiently clear that these grounds were being raised. There was reference to “asylum” and “international protection” in the skeleton argument before the FTTJ.

14. The documentary evidence as to the complaints made by the appellant to the police is referred to in paragraph 7. The appellant’s written evidence about this is set out in paragraph 22 and her oral evidence, including why she did not go to the police earlier, is in paragraph 25. The FTTJ contrasts this with the witness statements referred to in paragraph 25 and the oral evidence from the appellant’s sister in paragraphs 33. The FTTJ did not say that further supporting documentary evidence was required and she was entitled to take into account and give what I find to be appropriate weight to the fact that the appellant had not contacted her GP or any women’s support organisation. Whilst it is correct to say that supporting documentary evidence is not always required in domestic violence cases I find that the FTTJ did make a proper assessment of the material before her and that which might have been but was not provided. No inappropriate weight was given to any of these factors.

15. As to the third ground the FTTJ was correct to state that in the light of her finding that there had not been domestic violence then the appellant could not show that her marriage had broken down because of domestic violence. In paragraph 46 the FTTJ gave proper consideration to the appellant’s position in relation to the divorce proceedings and her explanation as to why she had not made any counterclaim in relation to the reasons for the breakdown of the marriage. This was one of the factors which she was entitled to take into account and I am not persuaded that it was given inappropriate weight.

16. I find that the second and third grounds of appeal are no more than disagreements with conclusions properly reached by the FTTJ on all the evidence and do not disclose any error of law.

17. Before the FTTJ the appellant did not pursue her claim on Article 8 human rights grounds.

18. I have not been asked to make an anonymity direction and I can see no good reason to do so.

19. I uphold the FTTJ's decision to dismiss the appeal under paragraph 289A of the Immigration Rules. Having found that the FTTJ erred in law by rejecting the application to consider the appellant's claims on asylum and Article 3 human rights grounds I allow the appellant's appeal to the extent agreed by both representatives, that these claims must go back to the respondent for investigation and a fresh decision.

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Signed Date 10 January 2015
Upper Tribunal Judge Moulden