Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14226/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 11th January 2019	**On 28th January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

Ms NUSRAT HUSSAIN
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Salam, of Salam & Co Solicitors Ltd
For the Respondent: Mr Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1 This is the appeal against the decision of Judge of the First tier Tribunal Herwald dated 18 September 2018, dismissing the appellant's appeal against the decision of the respondent dated 20 June 2018 refusing her leave to remain and refusing her human rights claim.

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2 The appellant is a citizen of Pakistan and entered the United Kingdom in November 2014 with entry clearance as a visitor, valid until 27 April 2015. Her husband, MMH, was a British citizen, and was present in United Kingdom with the appellant. They both stayed with the appellant's adult daughter, and that daughter's husband and daughter. The appellant's husband was suffering from dementia. The appellant applied for and obtained further leave to remain. I refer below to further information about the nature of that leave to remain. This was granted from August 2015 to 17 February 2018.

3 Regrettably, on 19 November 2017 the appellant's husband died of renal failure and vascular dementia. The appellant made an application for further leave to remain on 16 February 2018 on form FLR(FP). Representations dated 14 February 2018 accompanying the application asserted that the application was being made outside of the rules. It was asserted that the appellant wished to remain living in United Kingdom with her adult daughter and family, that the appellant herself was elderly and in poor health, and there was nobody available to look after her in Pakistan.

4 The application was refused in the decision dated 20 June 2018 on the basis that the appellant did not qualify for leave to remain under appendix FM or on private life grounds under paragraph 276ADE(1), and that there were no exceptional circumstances warranting a grant of leave to remain outside of the rules.

5 The appellant appealed, and the matter came before the judge.

6 At the appeal hearing, Ms Hulse, appearing for the appellant, sought to argue that the appellant satisfied the requirements for leave to remain under Section BPILR, Indefinite leave to remain (settlement) as a bereaved partner under Appendix FM. The judge required Ms Hulse to set out her case in a skeleton argument, which she provided. The judge ultimately appears to have agreed to consider the appellant's potential satisfaction of BPILR of appendix FM. Although Mr. Tan suggested before me that the Presenting Officer before the judge had not given their consent for this 'new matter' to be considered by the Tribunal, it seems to me, and on reflection Mr. Tan appeared to agree, that the judge ruled at [6] that the appellant's potential satisfaction of this rule was *not* in fact a 'new matter', the respondent effectively being already aware of the factual matrix that the appellant relied upon.

7 However, the judge held that the appellant did not satisfy the requirements of Section BPILR on the grounds that she had not made a valid application for indefinite leave to remain on that basis [20(a)]. Further, although the judge appears to have found in the same paragraph that the appellant's last grant of limited leave to remain had been as the partner of a British citizen, the judge was not satisfied that the requirements of the rules under BPILR that "each of the parties must have intended to live permanently with the other in the UK" was met [20(b)].

8 The judge also made the following findings:

(i) even if the appellant had some 'mobility' issues, she was able to walk and care for herself; the judge noted that the appellant had travelled independently to Pakistan as recently as early 2018 to make arrangements for her husband's funeral [20(d)];

(ii) there were no "very significant obstacles" to the appellant's integration in Pakistan [20(e)];

(iii) the judge did not accept that it was the case that there was nobody that would be able or willing to care for the appellant in Pakistan; the appellant's brother now lived in a property that had been owned by their mother; the appellant had stayed with that brother recently; the appellant had savings in Pakistan, and the appellant's daughter in the UK, who had a respectable income, could financially support the appellant in Pakistan [20(f)];

(iv) there was extensive family in Pakistan [20(g)];

(v) in relation to the judge's findings on Article 8 ECHR regarding the appellant's family and private life, I quote from paragraph 24 as follows:

> "The appellant has what might be described as a degree of family life, with adults in this country, including her adult granddaughter who gave evidence. Bearing in mind the cases cited above, I am not persuaded in this case that the relationships between adults acquire protection of Article 8 without evidence of further elements of dependency which I found do not exist here. No evidence was put before me as to private life over and above that which would naturally have been obtained in a brief period in this country. There was no evidence that the appellant has any relationships outwith her own immediate family here. As I say, I am not persuaded that there is interference with the right to respect for private or family life. Had that been the case, I am not persuaded that it would have been had consequences of such gravity as to engage the operation of Article 8 but it would have been in accordance with the law had done so. It would also have had the legitimate aim (*sic*) affording the economic well-being of the United Kingdom, taking into account the appellant's reliance on the health service in this country, and her financial dependence on others. Furthermore, it would, I find, have been proportionate. The Appellant had to give evidence through an interpreter, she is not financially independent, and her immigration status is precarious in that she had limited leave to remain, taking into account the issues I am referred to in Section 117B, above."

9 The appeal was consequently dismissed.

10 The appellant applied for permission to appeal against that decision in grounds dated 2 October 2018, which argue that the judge erred in law, in summary, as follows:

(i) GEN.1.9(a) of Appendix FM did not require the appellant to have made a valid application for leave to remain under section BPILR, given that the issue was raised in an appeal;

(ii) the judge's finding that the couple did not intend to live permanently with the other in the United Kingdom was made without adequate regard to the appellant's and other witness's evidence;

(iii) the appellant therefore met the requirements for indefinite leave to remain under BPILR, which would have been a highly material consideration in determining the proportionality of the decision challenged;

(iv) a challenge under the title 'Human Rights and 276ADE(1)(vi)' reads as follows:

> "14. While dealing with the human rights claim and 276ADE, the IJ either dismissed or gave little weight to the evidence that at the age of 70 with health and mobility issues the Applicant had no reasonable prospect of survival if her present care was withdrawn and placed at the mercy of unable and unwilling family members in Pakistan.
>
> 15. No weight was given to the claim of private life of the appellant with her daughter and her family in the UK.
>
> 16. The IJ brushed aside the internet evidence[20(i)] that there were no care homes in Pakistan and the ones referred to were poor homes for shelter and food for the needy.
>
> 17. The IJ also did not accept the argument/evidence about the impossibility of the elderly lady to live on her own Pakistan due to the crime situation. The Respondent's COI report on Pakistan (7.5.1) openly states that it is next to impossible for a lone woman to live in Pakistan and they are vulnerable. The IJ did not give weight to the compelling and compassionate circumstances of the Appellant.
>
> 18. If there was a Razgar proportionality exercise, it would be clear that the removal of this elderly applicant would be disproportionate and unduly harsh in breach of article 8 rights."

11 Permission to appeal was granted by First-tier Tribunal Judge Mailer in a decision dated 22 October 2018 on the basis that the grounds were arguable.

12 I heard from Mr Salam for the Appellant and from Mr Tan for the Respondent.

Discussion

13 It is appropriate to set out the relevant requirements for indefinite leave to remain under Section BPILR:

> "**Section BPILR: Indefinite leave to remain (settlement) as a bereaved partner**
>
> BPILR.1.1. The requirements to be met for indefinite leave to remain in the UK as a bereaved partner are that-
>
> (a) the applicant must be in the UK;

(b) the applicant must have made a valid application for indefinite leave to remain as a bereaved partner;

(c) the applicant must not fall for refusal under any of the grounds in Section S-ILR: Suitability-indefinite leave to remain; and

(d) the applicant must meet all of the requirements of Section E-BPILR:

Eligibility for indefinite leave to remain as a bereaved partner**.**

Section E-BPILR: Eligibility for indefinite leave to remain as a bereaved partner

E-BPILR.1.1. To meet the eligibility requirements for indefinite leave to remain as a bereaved partner all of the requirements of paragraphs E-BPILR1.2. to 1.4. must be met.

E-BPILR.1.2. The applicant's last grant of limited leave must have been as-

(a) a partner (other than a fiancé(e) or proposed civil partner) of a British Citizen or a person settled in the UK; or

(b) a bereaved partner.

E-BPILR.1.3. The person who was the applicant's partner at the time of the last grant of limited leave as a partner must have died.

E-BPILR.1.4. At the time of the partner's death the relationship between the applicant and the partner must have been genuine and subsisting and each of the parties must have intended to live permanently with the other in the UK."

14 Mr. Tan initially argued that on the proper construction of GEN.1 .9, the appellant could not meet the requirements of BPILR unless she had made a valid application. However, upon further consideration of the provisions under GEN.1 .9, Mr. Tan accepted, that given that the judge had considered the appellant's potential satisfaction of BPILR within the context of an appeal, that she need not have made a valid application under BPILR.

15 However, Mr. Tan defended the judge's decision that the appellant did not meet the requirements of E –BPILR1.4, on the grounds that on the evidence before the judge, it had been sustainable to find that the appellant had not demonstrated that each of the parties intended to live permanently with the other in the UK.

16 However, Mr Salam referred to the following evidence before the judge, quoted within the grounds of appeal, to demonstrate that the judge had erred in law in relation to this finding:

"... It was my father's wishes before he passed away that my mother spends the rest of her life with me in my home where they lived as a husband to wife before he passed away" (appellant's daughter, paragraph six).

"My grandfather was a British national and spent his last days here in the UK and all of his last memories are attached to the UK, he also wished and

> requested us that in case of anything happens to him he would keep our grandmother and will continue to provide the care which she was getting....” (appellant’s granddaughter, paragraph six).

17 As is almost inevitable in a case such as the present, there was no direct evidence from the appellant’s husband (even in the form of some statement he made before he died) as to what his wishes might have been. However, the evidence quoted above appears to me to speak to the issue of what the appellant and her husband’s intentions had been whilst he was still alive. The judge suggested that the written statements of the parties did not address this issue, but I find that the above passages are relevant. In the light of such evidence, which is not directly referred to by the judge, I find that it is not sustainable for the judge to suggest that the evidence before him ‘clearly’ indicated that they did not have the intention of remaining in the UK.

18 Further, I agree with the appellant’s contention in the grounds of appeal that the judge’s observation that “No evidence was given before me which would persuade me other than the fact that the parties intended to return to their homeland, subject to the husband’s recovery”, was unsustainable. All the relevant indicators were that the appellant’s husband would not make any recovery, and there does not appear to be any evidential basis to support the suggestion that the appellant’s husband had intended to return to Pakistan if he recovered; he clearly wasn’t going to recover.

19 Therefore, the reasons which the judge gave for finding that the appellant did not meet the requirements of the immigration rules under section BPILR do not appear to be sustainable.

20 However, I raised an issue with Mr Salam, which was whether the judge was correct in law in treating the appellant as meeting the requirement of E-BP ILR.1.2 (a), that the applicant’s last grant of limited leave to remain had been as a partner of a British citizen or a person settled in the UK. I heard submissions from both parties on this point.

21 Mr Salam argued that even if, as he accepted, the grant of leave to remain to the appellant from 2015 to 2018 been outside of the immigration rules, it had still been granted on the basis that the appellant was her husband’s partner; if she were not his partner, she would not have been granted such leave to remain. However, Mr. Tan argued that notwithstanding that E-BP ILR.1.2 does not specifically state that the leave to remain must have been as a partner under Appendix FM, the construction to be given to E-BPILR.1.2(a) was that leave to remain must have been under that Appendix. The leave to remain as a partner was to have been given as partner of a *British citizen or person settled in the UK*. He argued that this was a clear indication that the term ‘partner’ in this context meant partner under Appendix FM; although leave to remain as a partner was available elsewhere under the rules, for example as partner of a PBS migrant with limited leave to remain, that leave would clearly not be as partner of a British citizen or a person settled in the UK.

22 Notwithstanding that I have raised this issue of my own motion, I have decided not to make a ruling in relation to it. The issue is not necessarily a Robinson obvious one, and was not raised by the respondent in any Rule 24 reply. I have decided, on reflection, that it would be procedurally unfair to take issue with this part of the judge's decision.

23 However, whatever errors of law may be present in the judge's decision about the appellant's satisfaction of Section BPILR, I am compelled to find that such errors are not material to the outcome of the appeal. As is clear in authority, such as Adjei (visit visas – Article 8) (Rev 1) [2015] UKUT 261 (IAC), in cases such as the present where the jurisdiction of the Tribunal is limited to determining whether refusal of a human rights claim is unlawful under section 6 Human Rights Act 1998, then irrespective of whether an appellant meets immigration rules for leave to remain or entry clearance, an appeal cannot succeed unless private or family life rights are actually engaged under Article 8(1) ECHR, and that any interference with such rights is disproportionate.

24 In the present case, although the judge found that the appellant had 'what might be described as a degree of family life with adults in the United Kingdom, including her adult granddaughter', the judge held that this family life was not sufficient to amount to family life for the purposes of Article 8 EC HR, as it lacked the further elements of dependency which would need to be established between adult family members. The judge was also the view that the evidence as to the appellant's private life in the United Kingdom was, in summary, sparse.

25 I find, with respect to the authors of the grounds of appeal paragraphs 14 – 18, that the grounds of appeal do not advance any properly articulated challenge to the judge's findings in relation to the appellant's private or family life. Paragraphs 14 to 16 could properly be described as a mere summary of the immigration judge's findings. There is no error of law actually argued within those paragraphs.

26 Paragraph 17 of the grounds of appeal suggest that the judge did not give weight to the compelling and compassionate circumstances of the appellant. This assertion is rather vague, and is not made out. The judge sets out the nature of the evidence before him, including the lack of any medical evidence suggesting that the appellant had any serious health problems. He suggested that she was sufficiently mobile, and did not require personal care. The grounds of appeal do not satisfactorily identify what evidence has been left out of account by the judge.

27 I do not therefore find any material error of law in the judge's decision.

28 Even if the decision were to be set aside, and the appeal decided again, the appellant may *potentially* be able to demonstrate that she meets some elements of Section BPILR; the fact that she had not made a valid application would not appear be an obstacle to satisfaction of the rules; and the appellant may argue that she and

her late husband had the requisite intent, prior to his death, to remain living together in the United Kingdom. The question about whether or not the appellant met the requirement to have had leave to remain as her husband's partner would be more difficult to determine.

29 However, there is no need for these matters to be re-decided, because however they are to be decided, the appellant's appeal could not succeed, on the basis that the judge has found that the appellant does not have a private or family life in the UK, and that finding has not been successfully challenged.

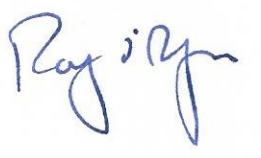
Decision

The judge's decision did not involve the making of any material error of law

I do not set aside the judge's decision

The appellant's appeal is dismissed

Signed: Date: 16.1.19



Deputy Upper Tribunal Judge O'Ryan