Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08550/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 July 2015	**On 14 August 2015**

Before

MR JUSTICE KNOWLES
UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A B L M
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms Ashika Fijiwala, Home Office Presenting Officer
For the Respondent: Mr A. Slatter, instructed by Farani Javid Taylor Solicitors

DECISION AND REASONS

1. On 9 April 2015 First-tier Tribunal Judge Braybrook allowed the appeal of Mrs M on Article 8 grounds against the decision of the Secretary of State to refuse to vary her leave to remain in the United Kingdom and to remove her. The judge also dismissed an appeal by Mrs M under the Immigration Rules in which her position was that her marriage had permanently broken down by reason of domestic violence. Mrs M appeals with permission on the grounds, in summary, that the judge failed to give adequate reasons for finding that she had not established that the cause of the breakdown of her marriage was domestic violence.

2. The Secretary of State appeals in turn, with permission, on the ground that the judge's consideration under Article 8 is said to have failed to include a proper proportionality balancing exercise or that adequate reasons were not given for the judge's finding that the decision to remove Mrs M was disproportionate. In particular it is to be noted that the judge's finding that the removal was disproportionate was stated in terms of a conclusion that Mrs M's removal "at the present time" would not be proportionate.

3. As the decision of the judge recorded, Mrs M arrived in the United Kingdom on 28 September 2011 with entry clearance valid to 22 December 2013 as the spouse of a Mr Y M. The decision of the Secretary of State to refuse to grant her indefinite leave to remain was made on 10 January 2014.

4. On Mrs M's behalf, Mr Slatter of Counsel advanced submissions by reference to the decision made under the Rules under five headings. First it was his submission that paragraph 16 of the decision of the judge contained a misdirection. That paragraph is in these terms:

> "The burden of proof is on [Mrs M] to establish that she meets the requirements of paragraph 298A. [Mrs M] is required to produce evidence to establish that the relationship was caused to permanently break down as a result of domestic violence."

5. We detect no misdirection in that paragraph. Under further discussion and by reference to written materials supplied on behalf of Mrs M it does appear that the objection is not in fact to the terms of paragraph 16 but to the possibility that the judge required the evidence from Mrs M to include independent third party evidence over and above evidence that she herself contributed. From a fair reading of the decision of the judge as a whole and from his treatment of the evidence in that decision we detect no presence of a requirement on the part of the judge for independent evidence. Of course there is observation from the judge, in particular at paragraph 20, about the absence of independent party evidence in a particular respect but that is a legitimate comment by reference to the evidence in the case rather than an indication of a direction on the part of the judge to himself as to what evidence must be made available.

6. The second point advanced by Mr Slatter was to the effect that the judge had not considered the available evidence on domestic violence cumulatively. The judge had taken different types of domestic violence in turn, moving from, for example, evidence of physical violence through evidence of emotional violence through evidence of sexual violence. We see no problem with the judge examining the evidence in this type by type fashion and do not detect, again reading the decision of the judge fairly and as a whole, any failure on his part, having divided the evidence, to have regard to the evidence as a whole on the fundamental question of presence or absence of domestic violence.

7. The third point advanced by Mr Slatter concerned the evidence of the aunt of Mrs M. He pointed in particular to a passage in the judgment at paragraph 24 which reads: "There was no evidence for example from the appellant's aunt to corroborate this". That sentence was a reference to evidence of sexual violence. Mr Slatter contrasts the sentence with the presence of a letter signed by Mrs M's aunt, Mrs T R, dated 1 November 2013 in which the following appears:

> "Their married life did not work out pretty well as her husband preferred always to stay with his mother most of time. We noticed numerous arguments regarding the said matter but the husband just kept saying he must be with his mother as he loves his family too. A foul word was even overheard sometimes. Just a few months after A B L M revealed us an appalling story of abuse physically and sexually but we did not get involved deeper as it will be a bit personal in our part to go beyond."

8. Mrs M's aunt also gave a witness statement which did not in terms refer to sexual domestic violence. It did refer more generally, without particularisation, to "cruelty … both mental and some physical". She gave evidence at the hearing before the judge as well and indeed the judge analyses some of that evidence in the course of his decision.

9. Doing the best we can and again with the advantage of considering the judgment of the judge as a whole we conclude that the sentence at paragraph 24 is talking about direct evidence of the aunt rather than indirect evidence from the aunt of what she has been told by Mrs M. Thus when the judge refers to no evidence from the aunt to corroborate the evidence of Mrs M herself of sexual violence the judge is indicating simply that the aunt's evidence was not that of a first-hand witness to the sexual violence that was being alleged, and in the letter from which I have quoted it is clear that the aunt is referring to the account that she was given from Mrs M. As to Mrs M's own evidence on this aspect, that is the aspect of sexual violence, the judge with the advantage he had of hearing Mrs M, described her account as "rather confused and very general". He assessed, as he recorded in his decision, that evidence against certain background factors but his overall conclusion with the advantage that he had was that he could not give any significant weight to Mrs M's evidence of sexual violence. That was an assessment that the judge was in our conclusion entitled to make.

10. The fourth ground of challenge raised by Mr Slatter attacks the references that are to be found in the decision, and in some of the evidence and submissions that contributed to the decision of the judge, to a hope of reconciliation. The attack suggests that hope of reconciliation between Mrs M and her husband is not mutually exclusive, to use the phrasing of Mr Slatter, to the presence of abuse, and with that submission there could be little disagreement. But the important thing for the purpose of this appeal is that we do not, reading the judge's decision as a whole, see him to suggest hope of reconciliation is mutually exclusive of abuse. He simply

includes that matter, as he should, in his review of the evidence of the case as a whole. He does not use it to drive his conclusion.

11. The fifth area of submission from Mr Slatter contended that there was no basis for a final sentence to be found at paragraph 22 of the decision of the judge. That read:

> "There was no emotional abuse of this sort [that is a cross-reference to 'blackmail, mental torture and threats to disown or kill an individual or the individual's children'] in this relationship; it was on the evidence a decision by the husband; that the relationship was a mistake but no more."

12. Again, with the advantage of considering the judgment as a whole and seeing the judge's overall process of reasoning, we see the reference in that sentence to "a decision by the husband that the relationship was a mistake but no more" as a statement made not because there was positive evidence to that effect but as a process of reasoning by way of elimination of other possibilities. In any event we do not regard that statement by the judge, that on the evidence there was a decision by the husband that the relationship was a mistake, to have been central to the decision by the judge made under the Rules. It is ultimately, in our assessment, neither here nor there.

13. With gratitude to Mr Slatter for very usefully compartmentalising the argument for Mrs M within the five categories that I have mentioned, for the reasons given we must reject each of those lines of argument and uphold the decision of the judge on the Rules.

14. I turn then to the judge's decision under Article 8. The judge had this to say at paragraphs 27 to 29 of his decision:

> 27. Mr Turner's submission [for Mrs M] was that [Mrs M] was prejudiced by the fact that she would be unable to remarry in the Philippines because she could not obtain a divorce in the UK unless she was 'ordinarily resident'. It was unclear whether or not [Mrs M] could have started divorce proceedings in the period since December 2013 since when she had had 3C leave and her appeal rights were not exhausted. For the purposes of this appeal I have accepted Mr Turner's submission on this point and accepted that [Mrs M] could not file for divorce herself and that this was an exceptional circumstance not covered by the Immigration Rules.
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> 28. [Mrs M's] family life is limited to her aunt and uncle. However she is adult and I was not satisfied that such a relationship amounted to family life for Article 8 purposes. As to private life I accept that she had established some private life through her work. As to proportionality [Mrs M] asserts she will be destitute in the Philippines. However she did live there until the age of 24. There was evidence submitted of remittances from her aunt from

2008 to 2012 and no indication such help would not resume. [Mrs M] stated she had no one to rely on but she had two uncles present at the wedding which indicates that she does have a family circle with whom she is in contact.

29. I accept however that she has no parents and that she is particularly close to [her aunt and uncle]. She entered with valid leave. She speaks English and with her work and support from her aunt and uncle is financially self-sufficient. Her private life was established while she was in the UK lawfully although her private life has since January 2014 been precarious. Applying paragraph [sic] 117B there was no strong public interest in [Mrs M's] removal. I also accept that a limited period of leave may enable [Mrs M] to regularise her matrimonial situation rather than returning to the Philippines in legal limbo. On the evidence overall I concluded that her removal at the present time would not be proportionate."

15. The Secretary of State challenges that reasoning and the conclusion that derives from it. The Secretary of State emphasises in particular that the burden is on Mrs M to show that the Article 8 considerations produce a conclusion in her favour. She starts of course from a position that she does not meet the requirements of the Immigration Rules. The judge does not record the public interest in the maintenance of effective immigration control nor do we detect that that consideration is contained implicitly in his reasoning. Indeed his brief reference to the application of section 117B where he observed that applying that paragraph there was no strong public interest in the appellant's removal is a reference that unfortunately in our assessment tends against rather than towards weighing the public interest in the maintenance of effective immigration control. This will always be an assessment by reference to the reasoning in any particular case but we are not in this respect, and with respect, content with the reasoning that has been expressed in the present case.

16. The Secretary of State further identifies as is clear from the reasoning of the judge that the equation here is one that has reference to private life grounds and not family life grounds. Overall the Secretary of State urges that the proportionality assessment has been inadequately reasoned, has ignored the public interest and has failed to engage sufficiently or at all with a balancing exercise. Our assessment with the benefit of submissions on both sides is that the judge has fallen into error. Our conclusion is that his decision on Article 8 should be reversed and we do reverse that decision.

17. It is very important that the public interest under Section 117 takes a proper part in the balancing exercise to be undertaken, even taking, and there was some discussion about this, the facts as recorded by the judge at paragraphs 27 to 29. Some of the facts are left inconclusive where in our assessment it was for Mrs M to produce material which would have allowed a more confident or conclusive understanding of them, particularly

when it comes to the question of the availability of divorce proceedings either hitherto or hereafter and in one jurisdiction or another.

18. We are troubled by the result of the decision of the judge which is in effect to allow a period of time in this country for the purpose of seeking a divorce in this country which has not on the material before us been sought hitherto and with the implication from the reasoning of the judge that the Article 8 point might then fall away and therefore Mrs M might then be returned to the Philippines potentially with the benefit of a divorce in circumstances where on Mrs M's own case the legal regime in that country would have a different approach to the question of divorce. We do see the judge as envisaging a temporary arrangement by his reasoning and do not see that temporary arrangement as having been properly underpinned by the required balancing exercise.

19. It is of course open to Mrs M to make any points she may wish to make to the Secretary of State in this regard if she has a particular plan as to what it is she would wish to do in relation to her marital status and that approach can be considered by the Secretary of State on its merits, but for the purpose of the matters before us Article 8 is not, we are sure, made out in the circumstances of this case. Therefore, as I have indicated, the decision of the judge below that Mrs M is unsuccessful on the Rules is a decision that we uphold and the decision of the judge below that Mrs M is successful under Article 8 is a decision that we reverse.

Notice of Decision

20. The appeal of Mrs M is dismissed under the Immigration Rules. The appeal of the Secretary of State in relation to human rights grounds is allowed. The decision of the First-tier Tribunal to allow the appeal on Article 8 grounds is set aside and remade as follows: The Appellant's appeal is dismissed on Article 8 grounds.

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 her or any member of her 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 7th August 2015