Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24815/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 03 October 2017	**On 01 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

Ms Venera Petrova
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Briddock, instructed by Lighthouse solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Russia, born in 1982. She entered the United Kingdom on 20 October 2008 with leave to remain as a student. Her leave to remain was extended, initially as a student and then under Tier 1 Post Study provisions until 21st of March 2014. On 23 July 2011, the appellant had undergone a religious marriage to a Bengali citizen Mohammed Arif Imran Khan, who had been here since 29 September 2014, and whom she had met when they were both on an MBA course at

Cardiff University, and she has worked for Marriot Hotels Ltd since 2011 in various locations and different positions, and her husband has been working to qualify as a chartered management accountant with, on 16 October 2016, only one paper left to complete. On 3rd of March 2014 the appellant was included as a dependent on her husband's family and private life application. On 22nd of June 2015 the application was refused on the basis that as at the date of application the appellant's husband had not obtained the necessary 10 years lawful residence. The appellant's husband appealed the decision to the First-tier tribunal, and in the course of those proceedings, and at the repeated request of the appellant, the respondent agreed to withdraw the decision and reconsider the appellant's husband's application given that he had in the interim achieved further lawful residence. On 22nd of June 2015 the husband was granted leave to remain on the basis of having achieved 10 years lawful residence, limited 2 years in the 1st instance with an invitation to reapply with evidence of having achieved the Knowledge of Life and English-language requirements.

2. On 22nd of June 2015 the respondent at the same time refused the appellant's application on the basis that there was no provision for the dependents of applicants who are successful in obtaining limited leave to remain on the basis of long residence to be granted leave to remain in line. The appellant's application was accordingly refused under the immigration rules, the respondent considered the article 8 position but found it proportionate that she should be removed, concluding in essence that it was open to the appellant's husband to accompany her, or if he chose to remain, to maintain their relationship from the United Kingdom, or support an application to return from Russia. The appellant appealed to the First-tier Tribunal.

3. In July 2016, the appellant's husband went in person to apply for indefinite leave to remain and he was granted indefinite leave to remain on the same date.

4. The appellant's appeal to the First-tier Tribunal was heard on 30 December 2016 and Judge Malcolm dismissed her appeal. Judge Malcolm recorded counsel's submission that there were "exceptional circumstances", including the failure by the respondent to reconsider the appellant's husband's application to take account of the fact that he had, subsequent to the date of application, completed 10 years lawful residence, and that when the husband appellant was granted leave to remain for a period of 2 years on 22 June 2015, it was the appellant's husband contention that the evidence of the knowledge of life in the United Kingdom/English-language requirements had already been submitted and if the Home Office had dealt with his case properly on 22 June he would have been granted indefinite leave to remain rather than the 2 years limited leave, and had he been granted indefinite leave to remain the couple would have had a legitimate expectation that the appellant's application as his dependent would have been granted in line. Expecting the appellant's return to Russia was disproportionate. Making a fresh application would take 30 to 60 days, financial evidence extending back to a period of 6 months would be required which would put the appellant and her husband under a burden in respect of providing the proof, the appellant would also have to undertake the K0LL test and there would be difficulty with the accommodation which they have, so that the parties would have

difficulty in meeting the requirements, and it would be likely that they would have a gap of several months before a valid application could be made so that a lengthy separation would result. Mr Khan had a fluctuating salary shown at page 125 of the appellant's bundle to be, in April 2016, gross earnings of approximately £23,519. And his continuing income to vary between £1200-£2900 a month. On qualification, he expected to earn between £30-£35,000 a year. He would not accompany her to Russia because his income would be required in order to support an application for her return to the United Kingdom and the couple wanted to live in the United Kingdom because when the appellant's husband had visited with his wife to Russia there had been an incident when he had been racially abused in a supermarket when someone had said that he should go home, and he would be unable to obtain suitable employment given his language difficulties. There was no issue that the couple would have the support of the appellant's family and the appellant herself would be likely to obtain employment.

5. Judge Malcolm found that the appellant's husband would have to make a decision as to whether they both went to Russia or if it was just the appellant, but concluded that any separation would only be for a short period of time. Noting that the appellant did not meet the requirements of the rules, and despite the history of the case, the judge concluded that the history of the case did not meet the test of "exceptional circumstances".

6. The appellant was granted permission to appeal to the Upper Tribunal on the basis that the judge had failed to make any findings regarding the appellant's contention that her and her husband's relationship would not be accepted by Russian society, all the difficulties the appellant would face meeting the financial and accommodation requirements, and had applied an exceptional circumstances test rather than the test of whether or not there were compelling circumstances. The grounds also averred that the judge had failed to factor in to the question of proportionality the procedural unfairness in how the respondent had dealt with the application. The judge granting permission did not accept that that argument had been raised before judge Malcolm.

7. In the rule 24 response the respondent defended the judge's decision on the basis that the judge was bound to consider the position through the lens of the rules and that there needed to be evidence of compelling circumstances to warrant consideration outside of the rules, further that it was not for the judge to decide whether or not an application might or might not succeed, but simply to take into account that an application could be made.

8. Before me Mr Briddock reiterated the history of the case and submitted that the Home Office had made a mistake when failing to grant the appellant's partner indefinite leave to remain in June 2015. The appellant husband's assertion that the relevant evidence had been before the Home Office prior was born out by the fact that he was granted indefinite leave to remain effectively across the counter in July 2016. Judge Malcolm had inadequately reasoned why only a short separation would be required in the event that the appellant's husband chose not to accompany the appellant to Russia, and the inference was that the reason the judge concluded that

the appellant could go to Russia was because it was for a short period. There was evidence that the appellant would have difficulty meeting the financial and accommodation requirements, so that the conclusion that it would only be for a short period was unsustainable. The judge's reference to the history of the application failing to meet the exceptional circumstances test was a straightforward incorrect self-direction amounting to an error of law.

9. Mr Melvin asked me to find that the judges use the word exceptional rather than compelling circumstances was not relevant. The decision in the round showed that there had been sufficient consideration of the appellant's circumstances including the submission that but for the respondent's mistake the appellant's husband would have achieved settle status in 2015. Counsel on the day Mr Rahman had submitted that the delay of the respondent in agreeing to withdraw the decisions and the time taken to reconsider the applications amounted a circumstance that made the decision disproportionate, but the reality is that at time when these applications were made neither the appellant nor her husband had any legitimate basis to remain under the rules. Even when the husband's application was granted the appellant's application as the partner would have to have been considered subject to the financial requirements, and there is no evidence as to that position so that it was not a certainty, as suggested by counsel, that the respondent would have granted the application of the appellant "in line with" her husband.

10. He submitted there was nothing in the point about the history of dealing with the application that revealed unfairness, and the judge's conclusion that the history did not reveal circumstances warranting leave outside of the immigration rules was adequately reasoned when the decision was read as a whole.

11. In terms of the judge's reference to exceptional circumstances it was wrong to isolate the use of the term exceptional circumstances. When reading the decision in the round it becomes clear that the judge was simply dealing with the submission of the appellant which had been framed in the context of the circumstances constituting "exceptional circumstances". The reality was that the factual matrix did not meet the threshold whether the test was described as compelling or exceptional.

12. In reply Mr Briddock invited me to infer from Mr Melvin's submission that he accepted that the judge had fallen into an error of law by not looking at compelling circumstances but looking at exceptional circumstances, and that the issue before me was the question of materiality. The judge had referred to exceptional circumstances at both paragraph 67 and 68. On the face of the decision the judge had applied too high a threshold, the application of the incorrect test can't be brushed aside. So far as the issue of delay was concerned the point being made before me was not about the delay but about the fact that there had been a mistake made by the Home Office because the appellant's husband should have been granted indefinite leave to remain. The husband did not need the life in the UK test and the English language requirements were met by his degree. Although Mr Melvin said that the evidence did not show that the financial requirements were met, so that it could not be certain that the respondent would have granted the appellant's application as the partner of

someone with indefinite leave to remain, the evidence of the appellant and her husband recorded by the judge in the decision, indicated that the salaries of the appellant and her husband at the time were well above what was required, so that it was very likely that the application would have been granted.

Discussion

13. I find that when the judge refers to Mr Rahman's reliance on the history of the respondent's dealing with the appellant's application it is quite clear that the judge had in mind the arguments reiterated by Mr Briddock today, because they are set out in the context of the submissions recorded between paragraphs 41 and 49 of the judgement, albeit that it appears that counsel on the day did not go so far as to allege unfairness of process. I find that the judge who dealt with permission was right to identify that there is no merit in the assertion of error of law for failing to deal with an argument of unfairness because the case had not been argued in that way. I accept Mr Melvin's submission that the position that the respondent ought to have granted indefinite leave to remain is at best speculative. I note that it wasn't the appellant's case that at the point of reconsideration she, through her legal representatives, had invited the respondent, whether by varying the application following the respondent's withdrawal of the decision, or informally by dint of the representations submitted, had proposed to the respondent that she should be considered as the partner of someone with indefinite leave to remain, and provided the necessary supporting evidence. Whilst the respondent might have dealt with the application differently that falls far short of establishing unfairness of process given that she was dealing with the application in the way in which the appellant's representatives had invited her to do so. In the context of contested proceedings where the appellant was represented Mr Briddock's assertions that the fact of the appellant's partner being granted indefinite leave to remain in 2016, one year later, even if over-the-counter, is not determinative of the respondent having made a mistake in June 2015. Indeed, as much is recognised by Mr Rahman's submission to judge Malcolm, when he describes the evidence as suggestive rather than clear. I find no merit in ground one.

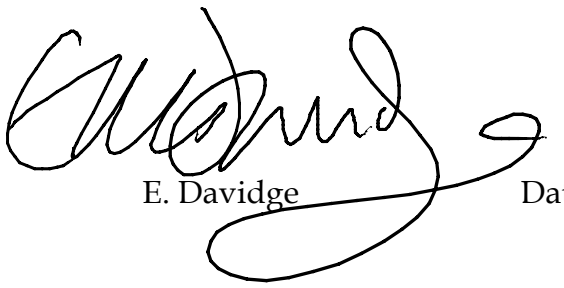
14. I turn to ground two, asserting incomplete findings upon which the judge conducted the proportionality test. The grounds refer to the appellant's integration into the community, of her activities in the UK, and of her friends. It is also said that the judge failed to make any findings in respect of the evidence of the racist incident, or factored into the balance the length of time the appellant has lived in the United Kingdom, or that expecting the appellant to return to Russia to make an application for entry clearance from abroad was, on the facts, for reasons of formality as opposed to substance. Mr Briddock put the case slightly differently, arguing that the judge had inadequately reasoned the conclusion that any separation would be for a short time. I find no merit in that submission because the judge's decision makes it plain that counsel on the day submitted that the difficulties in meeting the requirements were not substantive, but related to the length of time he estimated was needed to obtain and collate the necessary evidence including the taking of the KOLL test. His estimate was that it was likely that there would be a gap of several months followed by 30 to 60 days that the embassy would take. The judge was entirely entitled to

conclude at paragraph 66 that even if the couple decided that only the appellant returns to Russia "it is likely that such separation would only be for a short period of time." Similarly, is quite clear from the judge's findings at paragraph 63 to 66, in which all of the difficulties that the appellant relied on in terms of her and/or her husband returning to Russia together are mentioned, and apparently taken at their highest, did not persuade the judge on balance that it was unreasonable to expect the husband to go, because the judge concludes that the choice remains open to them. It is not suggested that that is a perverse conclusion. I find no merit in the 2nd ground.

15. The third and final ground of appeal relates to the reference in the final paragraphs of the decision, at 67 and 68 to a test of exceptional circumstances. The ground fails to read the decision in its entirety. It overlooks the correct self-direction at paragraph 58 where the judge identifies the judicial task as assessing the extent of the interference with the appellant's private and family life and balancing that against the legitimate aim of the maintenance of effective immigration controls and of public confidence in their maintenance. Mr Melvin was right when he remarks that the choice of words may have reflected the way in which counsel on the day referred to "exceptional circumstances". This was the language of the refusal letter too. The case of Agyarko [2017] UKSC 11 has made it explicit that there is nothing inherently wrong in referring to exceptional circumstances so long as it is not too narrowly interpreted to reveal a threshold of unique or a one off. Reading the decision as a whole it is apparent that the judge has not applied a threshold that is too high. I find, taking account of the decision as a whole, the correct self-direction, and the way in which the case was argued, that the judge's reference to a test of exceptional circumstances was merely infelicitous, simply a reflection of the language used, and that the correct substantive test of compelling circumstances was applied.

Decision

16. The decision of the First-tier Tribunal dismissing the appeal is not vitiated by legal error and it stands.



Signed E. Davidge Date 26 October 2017

Deputy Upper Tribunal Judge Davidge