Upper Tribunal
(Immigration and Asylum Chamber)

Guzman Barrios (domestic violence – DLR – Article 14 ECHR) Colombia [2011] UKUT 00352 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28 July 2011	**5 August 2011**

Before

Lord Matthews

Upper Tribunal Judge McKee

Between

YESID ALONSO GUZMAN BARRIOS

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr Tomor Bahja , instructed by Lords Solicitors LLP

For the Respondent: Mr Peter Deller, Specialist Appeals Team UKBA

Someone who is married to a person settled in the United Kingdom but who only has discretionary leave to remain cannot, if his marriage breaks down because of domestic violence, claim an entitlement to indefinite leave by analogy with paragraph 289A of the Immigration Rules. There is no unlawful discrimination in terms of 'other status' under Article 14 of the ECHR. That the rule only benefits those given leave to enter or remain under Part 8 of HC 395 does not itself engage the Convention, although the circumstances of the marital breakdown may be relevant to the assessment of any Article 8 claim that removal would be disproportionate.

DETERMINATION AND REASONS

1. The appellant, a citizen of Colombia now aged 49, came to this country as an illegal entrant on New Year's Eve 2001, and in September 2004 he applied for leave to remain on the basis of his marriage to a woman settled in the United Kingdom. It took a long time for this application to be decided, but eventually the appellant was granted three years' discretionary leave to remain ('DLR'). As an illegal entrant, he was not eligible for two years' leave to remain as a spouse under paragraphs 284 and 285 of the Immigration Rules. The discretionary leave was due to expire on 21 August 2010, but as early

as 2007 the marriage had begun to break down, and on 6 August 2010 the appellant applied for indefinite leave to remain ('ILR') on the basis that his marriage had been caused to break down because of domestic violence on the part of his wife. The application was made on form SET(M), which was the wrong form. It is used for applications where the marriage is subsisting, not where it has broken down.

2. The application was re-submitted on 2 September on form SET(DV), and when a decision was made on 28 September 2010 to refuse the application, the appellant was told that, because his application had been made after the expiry of his discretionary leave, he had no right of appeal against the refusal of leave to remain. An appeal was lodged nonetheless, and Immigration Judge Cockrill resolved the jurisdictional point in the appellant's favour by holding that the initial application, which had been made in time, was not invalid. That decision, we observe, is wholly in keeping with the reasoning of Richards LJ in JH (Zimbabwe) [2009] EWCA Civ 78.

3. Judge Cockrill also found that, contrary to the stance taken in the refusal letter of 28 September last, the marital relationship had indeed been caused to break down permanently as a result of domestic violence. But he did not accept an "ingenious" argument advanced by Mr Bahja that the refusal of further (or indefinite) leave to remain was a discriminatory breach of the appellant's right to respect for his private life under Article 8, read with Article 14 of the ECHR. The discrimination was said to arise from the fact that a person who is given leave to enter or remain as a spouse under the Immigration Rules, and whose marriage breaks down as a result of domestic violence during the 'probationary period', is normally granted ILR. The appellant was in exactly the same position, argued Mr Bahja, save that he had not been given leave under the Immigration Rules. To discriminate against him on that basis was contrary to Article 14, in particular the ground of " other status " – none of the specific grounds listed at Article 14 actually being in point.

4. Judge Cockrill went on to observe that the appellant's marriage was already breaking down when DLR was granted in 2007, and that had the Secretary of State known about this, leave might not have been granted at all. In any event, the judge reasoned, the appellant had lived most of his life in Colombia, his illegal status had been regularised only on the basis of a marriage which turned sour, and although the decision under appeal interfered with his private life, it would not be disproportionate to expect him to go back to Colombia.

5. Permission to appeal to the Upper Tribunal was initially refused, but was granted on renewal, and before us Mr Bahja expanded on the argument which he ventilated before Judge Cockrill and subsequently in his grounds of appeal to the Upper Tribunal. He took us to a number of cases, both domestic and at the Strasbourg court, which he thought lent support by analogy – there being no case directly in point. We were also shown that part of the Immigration Directorate Instructions of August 2010 which guides caseworkers in the application of paragraphs 289A-C of the Immigration Rules. Mr Bahja presented his argument very attractively and persuasively, but in the end we agree with Mr Deller that there has been no unlawful discrimination in this case. Indeed, we regard the following passage, taken from Senior Immigration Judge Waumsley's initial refusal of leave, as summing the matter up rather succinctly.

"It is in the very nature of legitimate immigration control that foreign nationals who can satisfy the requirements for leave to enter or remain in the United Kingdom as laid down from time to time in the Immigration Rules are treated more favourably than those foreign nationals who cannot. There would be no purpose in attempting to have any form of immigration control if that were not the case. The fact that those foreign nationals who can satisfy the requirements for leave to enter or remain are in a

more favourable position vis-à-vis their immigration status than those who cannot manifestly does not constitute unlawful discrimination in breach of Article 14.”

6. Mr Bahja insisted that if the appellant had gone back to Colombia after getting married, and had applied successfully from there for entry clearance as a spouse, he would have got ILR if his marriage had broken down before the end of the probationary period because of domestic violence. But that does not make it unlawful for him not to have been granted ILR. He chose not to apply for entry clearance under the Rules, but stayed on in the hope of getting leave to remain outwith the Rules. Mr Bahja did not contend that DLR has a discriminatory effect in other respects. For example, discretionary leave normally leads to ILR only after six years, and Mr Bahja was not saying that it should lead to ILR after two years, if it is based on marriage. Nor was he saying that it is unfair to have, as it were, a ‘probationary period’ of six years rather than two years when someone who cannot meet the requirements of the Immigration Rules is given leave on a discretionary basis.

7. But it is exactly the same with the domestic violence rule. In order to come within its scope, a person must have been “ admitted to the United Kingdom for a period not exceeding 27 months or given an extension of stay for a period of 2 years as the spouse or civil partner of a person present and settled here .” That people outside this category are treated differently does not constitute unlawful discrimination. Immigration control necessarily involves treating some people more favourably than others. British citizens are generally treated more favourably than foreigners, although nationals of other EU Member States are in some ways treated more favourably than British citizens when it comes to family reunion. But none of that is unlawful.

8. The history of the ‘domestic violence concession’ and the reasons for its introduction were canvassed at the hearing, but are not really relevant. The concession was introduced specifically to assist women from the Indian Subcontinent who entered into arranged marriages with men settled here and were subsequently mistreated. They often felt compelled to stay in an abusive relationship rather than go back to their own country, where they would be regarded as having brought shame on their family, and might be rejected. Of course, the domestic violence rule also benefits people who are not in that position. The appellant is not in that position. But that does not mean that he should have the benefit of the domestic violence rule.

9. We are far from saying that in an Article 8 appeal, the fact that the appellant’s marriage broke down as a result of domestic violence is not a relevant factor in assessing the strength of his private life ties to the United Kingdom. Just such an assessment was in fact carried out by Judge Cockrill. At paragraph 20 of his determination he looked at the appellant’s circumstances in the round, and specifically states that he has placed the domestic violence suffered by the appellant “ appropriately in the scales in looking at the factors that speak for and against the proportionality of the decision. ” That, in our judgment, is the correct approach. Domestic violence is a relevant factor in an Article 8 appeal, but it will not necessarily lead to the appeal being allowed, although required in an appeal under paragraphs 289A-C of the Immigration Rules. But that is no different in principle from, say, a Tier 2 migrant being able to ‘switch’ to being a Tier 4 migrant, whereas someone who is here as a visitor cannot change his status to that of student, even if he has a Confirmation of Acceptance for Studies from a licensed sponsor and has the funds required by Appendix C. The latter scenario would not found an allegation of unlawful discrimination.

10. We agree with Mr Deller that the appellant’s position as someone who was an illegal entrant and was granted discretionary leave is not an “ other status ” in terms of Article 14 of the ECHR. Nor is a person who has leave under paragraph 284 and whose marriage breaks down because of domestic

violence an appropriate ‘comparator’. Discretionary leave simply does not confer all the benefits of leave under the Rules. That is not unfair or discriminatory. In respect of the First-tier decision under appeal, there has been no error of law.

DECISION

11. The appeal is dismissed.

Signed

Upper Tribunal Judge McKee

Immigration and Asylum Chamber