

## Asylum and Immigration Tribunal

LA (para 289A: causes of breakdown) Pakistan [2009] UKAIT 00019

### THE IMMIGRATION ACTS

Heard at Field House

On 5 March 2009

Before

SENIOR IMMIGRATION JUDGE GOLDSTEIN

Between

LA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

*In the light of AG (India) v Secretary of State for the Home Department [2007] EWCA Civ 1534, when deciding if an appellant who is the victim of domestic violence has proved that the "relationship was caused to permanently break down before the end of that period as a result of domestic violence" the Tribunal must be careful to assess the evidence in the round, looking at the totality of the evidence and remembering that a broken marriage may have ended before the parties separate and the marriage may have broken down as a result of domestic violence even if other grounds are given in matrimonial proceedings or raised before the Tribunal.*

### Representation:

For the Appellant: Mr M Symes, Counsel

For the Respondent: Mrs M Tanner, Home Office Presenting Officer

### DETERMINATION AND REASONS

1. The Appellant, a citizen of Pakistan, was granted an order for the reconsideration of the determination of Immigration Judge P-J White who, sitting at Surbiton on 12 December 2008, dismissed the appeal of the Appellant against the decision of the Respondent dated 17 October 2008 to curtail her leave to remain in the United Kingdom under paragraph 323(ii) of HC 395, the Respondent having decided that the marriage of the Appellant was no longer subsisting and that she no longer met the requirements of the Immigration Rule under which she had been admitted.

2. On 12 November 2008 the Appellant made an application for indefinite leave to remain as a spouse whose marriage had broken down as a result of domestic violence under paragraph 289A of HC 395 (as amended). In that regard on 21 November 2008 her appeal came before an Immigration Judge who granted two applications first permitting the Appellant to amend the grounds of appeal so as to rely expressly on paragraph 289A and the second was for an adjournment to enable the Respondent to consider and decide upon the application of 12 November.
3. The Immigration Judge records at paragraph 4 of his determination that in the event no decision had been reached when the appeal was re-listed before him and the Respondent was for operational reasons not represented. The Immigration Judge was not invited by either party to adjourn on that account and was satisfied that the interests of justice did not require any further adjournment.
4. In the event, the Immigration Judge determined that the Appellant did not satisfy the requirements of paragraph 289A (iv) and accordingly the Respondent was entitled to curtail her leave under paragraph 323(ii) and the appeal under the Immigration Rules thus failed. Paragraph 289A(iv) provides that a person who is the victim of domestic violence and who is seeking indefinite leave to remain in the United Kingdom *"is able to produce such evidence as may be required by the Secretary of State to establish that the relationship was caused to permanently break down before the end of that period as a result of domestic violence"*. The reference to *"that period"* is to the time that the appellant had leave to be in the United Kingdom as, inter alia, a spouse and is defined elsewhere in paragraph 289A.
5. In ordering reconsideration Senior Immigration Judge Latter considered the grounds, and in particular grounds 1 and 2, satisfied him that it was arguable that the Immigration Judge may have erred in law in his assessment of whether this appeal should have been allowed on immigration grounds.
6. The Appellant entered into an arranged marriage with her husband, Mufazzal Sham, a person present and settled in the United Kingdom, on 3 November 2006. She came to the United Kingdom on 1 June 2007 and was granted leave to enter until 1 June 2009 as his spouse.
7. The Secretary of State, having received information to the effect that the marriage was no longer subsisting from Mr Sham, decided to curtail her leave to remain as of 17 October 2008.
8. The Immigration Judge heard evidence from the Appellant who adopted her witness statement and explained that the Appellant's marriage to Mr Sham was unsuccessful from the start.

9. The Immigration Judge further summarised the Appellant's evidence as follows:

"She regarded it as her duty to be a good wife to him and tried to be so, but he was immature and temperamental and took out his frustrations on her. Initially the abuse was verbal, but later it progressed to physical abuse as well. When this happened she tried to protect herself and had to strike back.

He often told her to get out of the house and on occasions threw her out. At one stage he went away for 5 days, during which he told her family in Pakistan that she had had an affair. On their anniversary he said he wanted a divorce.

She described a number of specific episodes. One, on 9 December 2007, began with verbal abuse, including a threat to cancel her visa. He then pushed her face into the sofa, in self-defence she scratched his nose and he called the police. She felt disgraced and tried to slit her wrists. When the police came they gave first aid and called an ambulance but they also questioned her. She admitted hitting him and was cautioned.

On 3 March 2008 they attended Relate, she having made an appointment, but he was not interested in any counselling and they were asked to leave. There were further arguments that day, which led her to take refuge for an hour or so with a neighbour, but that night he slept in her bed which he usually did not. The next day there was a further argument and a fight, in the course of which she hit him, again in self-defence. He left the flat and she called the police to record the abuse, although she did not press charges. On 8 March he went to friends for two days. On 11 March the police came and arrested her, evidently on Mr Sham's report of the incident on the 4th. She was charged and bailed and went to the Mosque community centre. Her husband sent her belongings there."

The case was heard on 23 June and she was acquitted. She then went back to her own rented accommodation".

10. The Immigration Judge noted that in relation to the incident when she was cautioned the Appellant expressly stated that she did not tell the police the full extent of her husband's provocation.
11. The Appellant told the Immigration Judge that a condition of her bail was not to return to the matrimonial home.
12. I pause there, because in the course of the hearing before me, the parties confirmed that they had had no documentary evidence to substantiate the Appellant's understanding that this was indeed a condition of her bail.
13. There was, however, common ground between the parties that on the evidence, it was apparent, as accepted by the Immigration Judge, that the Appellant never returned to the matrimonial home following her arrest on 11 March 2008.

14. The Immigration Judge noted that it was the Appellant's evidence that after the trial she thought the marriage was over, that she understood that Mr Sham was going to file a petition. There was correspondence between solicitors about it.
15. The Immigration Judge also heard evidence from a Dr Idris Zainuddin who adopted his witness statement. He was an Amil at the Mosque in Northolt that the Appellant attended. Of particular relevance (though the Immigration Judge made no further reference to within his findings and reasons) was Dr Zainuddin's evidence that the Appellant was taken in:

"When she came to them in March saying she had suffered domestic violence"

16. The Immigration Judge recorded the submissions of Mr Symes (who also appeared before me) that the Appellant was in a subsisting marriage at the start of her two years' leave and it had now broken down. Mr Symes had pointed at various reports, witness statements and the Appellant's police interview that all showed that the Appellant had been the victim of violence. Mr Symes submitted before the Immigration Judge that this was the cause of the breakdown and he pointed to various passages in the Appellant's witness statement showing that she had contemplated ending the marriage but felt under pressure to continue. It was, however, the violence that drove the Appellant out of the house. She was too frightened to stay.
17. Mr Symes referred the Immigration Judge to the judgment in the Court of Appeal in Al v SSHD [2007] EWCA Civ 386 where at paragraph 30, Dyson LJ had stated the policy underlying paragraph 289A was clear:

"Spouses and partners who are the victims of domestic violence should not feel constrained to remain in an abusive relationship for two years solely in order to qualify for indefinite leave to remain".

18. Mr Symes had further submitted before the Immigration Judge that if there was some ambiguity, the Immigration Judge should favour an interpretation that brought the Appellant within the Rule for fear of defeating the policy underlying it.
19. No Presenting Officer appeared before the Immigration Judge.
20. The Immigration Judge had before him a facsimile letter from Hendon Magistrates' Court with the Justice's reasons for dismissing the assault charge. The Magistrates indicated that the bench having heard from Mr Sham and some of his family and also from the Appellant, rejected his evidence and accepted hers and they were satisfied that the Appellant had hit him, causing injury, but only in reasonable self-defence after he had attacked her.
21. The Immigration Judge continued:

"It necessarily follows from her acquittal that **she was innocent of the charge brought**, but the note makes clear that the acquittal was based not merely on a reasonable doubt but on a positive finding of fact in her favour. **I accept on that basis that on that occasion at least she was clearly the victim of domestic violence.**

**I further accept that Mr Sham was found not to be a credible witness with the implication that he had gone to the length of creating a false accusation. It does not necessarily follow from that that he was regularly violent, but it seems to me to indicate that he is a person with scant regard either for his wife or for the truth, which in turns increases the probability that he'd be violent to her if he wished.** I note in this regard that when he wrote to the Respondent in August to authorise use of his early letter against the Appellant, **the criminal case to which that letter referred had been heard and dismissed, a matter which he failed to mention**". (Emphasis added).

22. Notably at paragraph 23 of his determination the Immigration Judge continued:

"I have considered also the evidence from the GP and the Appellant's family, the Appellant answers in interview and her own evidence, which I found to be generally credible. I note her admission that when he became violent she would have to defend herself, involving hitting back and that on two occasions certainly this resulted in some degree of injury. She is not in any sense to be blamed for defending herself, but I regard her frankness about this as a factor in her credibility. **I am left in no doubt, weighing all of that evidence, that the Appellant has been the victim of domestic violence**". (Emphasis added).

23. The Immigration Judge continued that he accepted that domestic violence might take many forms, not necessarily involving physical abuse; that emotional abuse within the family might properly be classed as domestic violence. The Immigration Judge continued at paragraph 24 to state inter alia:

"I find the Appellant has suffered significant verbal abuse and threats, a good deal of emotional abuse and some physical abuse, although that may have been the least frequent of the forms of abuse to which she was subjected. **I see no reason to doubt the evidence that she has suffered as a result both physical and psychological injury**". (Emphasis added).

24. The Immigration Judge was further satisfied that the Appellant came to this country in a genuine and subsisting marriage that she was determined to see work.
25. The Immigration Judge concluded that the marriage had now broken down:

"... and that it did so finally in March 2008 when the Appellant left the matrimonial home for good, that being within her two-year probationary leave".

26. Notwithstanding those positive findings, the Immigration Judge found that the difficulty in the case was “*over the cause of the marital breakdown*”. Although the Appellant’s evidence on the issue was “*absolutely consistent and clear*” the Immigration Judge concluded at paragraph 26 that:

“When she left the house it was not because she was fleeing violence but because he had caused her to be arrested. When she went elsewhere it was because of her bail conditions. It was after the trial that she acknowledged the marriage was over”.

27. The Immigration Judge concluded that he was satisfied that the breakdown of the marriage was not caused by the domestic violence that had never led the Appellant to try and end the relationship. It was caused by the husband’s lack of commitment and eventual desire to be rid of his wife that he took to the length of making a false accusation. The domestic violence was in the Immigration Judge’s view:

“... a symptom of his attitude to the Appellant, one which, for cultural reasons, she was determined to endure in the hope of change”.

28. It would be right to say that in relation to that last mentioned paragraph, Mrs Tanner expressed her disquiet at the Immigration Judge’s reasoning. Mrs Tanner frankly told me that she found it difficult to understand, bearing in mind the totality of the Immigration Judge’s positive credibility findings, how he could conclude that the breakdown of the marriage was not caused by domestic violence, but by the husband’s lack of commitment and desire to rid himself of his wife.

29. As Mrs Tanner, in my view, rightly observed “*violence comes in many forms*”. Mrs Tanner continued that it was difficult to see how the Immigration Judge could ignore the Appellant’s husband’s false accusation that brought his wife before the Hendon Magistrates that stemmed from an incident in which, as the Magistrates found, the Appellant had acted in self-defence after her husband had attacked her. Mrs Tanner continued that “*underlying all this was the general antagonism and very unpleasant behaviour of the husband and I cannot see how the Immigration Judge would thus sustain the finding that domestic violence was **not causative of the breakdown***”. (Emphasis added).

30. I have emphasised the above words because they in my view dovetail not least with the views expressed by Laws LJ in AG (India) [2007] EWCA Civ 1534 to which I had drawn the parties’ attention. Indeed Mr Symes believed that in any event, the Court of Appeal decision in AG was before the Immigration Judge although he had not referred to it in his determination.

31. Before referring more particularly to AG it would be as well to begin by reference to the decision of the Tribunal in JL (Domestic Violence:

evidence of procedure) India [2006] UKAIT 00058 in which the Tribunal observed that:

“The question of whether domestic violence has occurred is to be determined on the basis of all the evidence before the Immigration Judge. Paragraph 289A (iv) is to be read down to reflect this”.

32. In Ishtiaq [2007] EWCA Civ 386 (a transcript of which was most helpfully provided to me by Mr Symes) the Court upheld the essential finding that perceivable evidence of a Rule 289A issue relating to the domestic violence was not limited to what was specified in the IDI.

33. Indeed Dyson LJ giving the judgement of the Court said inter alia this:

“In my judgment para 289A(iv) should be construed so as to further the policy of enabling persons whose relationships had permanently broken down as a result of domestic violence before the end of the probationary period to be granted indefinite leave to remain. A construction which precludes an applicant, whose relationship has in fact broken down as a result of domestic violence, from proving her case by producing cogent relative evidence would defeat the evident purpose of the Rule. The purpose of para 289A (iv) is to specify what an applicant has to prove in order to qualify for indefinite leave to remain during the probationary period: viz **that the relationship has been caused to break down permanently as a result of domestic violence**”. (Emphasis added)

34. In AG and in the course of his judgment, Laws LJ had this to say at paragraph 18:

“It is not clear whether, had the Immigration Judge accepted the factual case about the violence, he would have held **it had no causative force in the breakdown of the marriage**. I would not accept Mr Johnson’s submission that, as the evidence stands, no reasonable Immigration Judge could conclude (putting the evidence at its highest for the Appellant) that the violence was a substantial cause of the breakdown”.

35. At paragraph 19 of his judgment Laws LJ continued inter alia:

“... but on the Appellant’s case it may be said that the husband was a violent and cruel man and those characteristics of his could not be separated out from the end of the marriage”.

36. I would thus agree with Mrs Tanner’s most helpful and frank submission and one that was indeed echoed by Mr Symes before me, that in effect and as indeed accepted not least at paragraph 27 of the Immigration Judge’s determination, that the Immigration Judge made no adverse credibility findings. Indeed it was clear that believed everything that the Appellant had to say.

37. It was the inference that the Immigration Judge drew from those findings that satisfy me in all the circumstances that he materially erred in law. The Immigration Judge simply failed to appreciate that on the basis of his

factual findings, it was apparent that the violence the Appellant suffered at the hands of her husband, was the “*causative force in the breakdown of the marriage*”.

38. For the sake of completeness, I would agree with Mr Symes’ further submission that the Immigration Judge had at one point determined that the marriage had broken down in March 2008 but elsewhere concluded that it “*was after the trial that (the Appellant) acknowledged the marriage was over*”.
39. That was a material error of law given that the appeal failed on account of the Immigration Judge’s dissatisfaction with the evidence said to show that domestic violence was the reason for the breakdown of the marriage and hence the timing of its breakdown was a critical issue in the fact-finding process. The Appellant had actually left the matrimonial home after suffering further domestic violence early in March 2008 and then felt obliged to take refuge at a Community Centre and indeed never returned to the matrimonial home thereafter.
40. On the Immigration Judge’s factual findings, it should have been apparent to him that but for the domestic violence in this case, the marriage would not have ended. It was only the domestic violence and its consequences that forced the Appellant out of the family home.
41. I would add the observation, that whenever a relationship breaks down one or both parties to that relationship are likely to announce an intention to leave and/or in fact leave the matrimonial home. Whilst that might define when a relationship breaks down it does not explain the cause. In order to assess the cause of the breakdown it is also necessary to look at the relationship as a whole.
42. In that regard, the Immigration Judge in the present case, in deciding that the breakdown of the marriage was not caused by the domestic violence suffered by the appellant as a consequence of her husband’s conduct, failed to remind himself that he had accepted that the Appellant had been the victim of domestic violence, who had also been subjected to frequent verbal abuse. Her husband had threatened to cancel her visa. He had on one occasion pushed her face into the sofa. He had told the Appellant’s family in Pakistan that the Appellant had had an affair. He had called the police and brought false charges against the Appellant for an assault that in truth (as indeed found subsequently by the Hendon Magistrates) was in relation to his attack upon her in which the appellant had purely acted in self-defence.
43. There was no evidence before the Immigration Judge in the present case that the Appellant was in any way to blame for the breakdown of her marriage or for the deterioration in the relationship. The responsibility for the breakdown on the Immigration Judge’s findings lay fairly and squarely at the feet of the husband whose boorish conduct was on any view thoroughly reprehensible.



44. For the above reasons, I agreed with the parties, that the Immigration Judge thus materially erred in law. I was urged to proceed to make a fresh decision. In the light of the fact, not least that the Immigration Judge had accepted effectively in its entirety the Appellant's account as credible, I saw no reason why I could not proceed to do so.
45. Notably Mrs Tanner informed me that she did not intend to make any further submissions.
46. Mr Symes relied on his earlier submissions and indeed the grounds of application that he had authored, but he also interestingly provided me with a copy of the letter that the Appellant had submitted to the Respondent in support of her application for indefinite leave to remain. It would be as well to set out its content:
- “I can confirm that I no longer reside with my husband, Mufazzal Sham. I departed from our matrimonial home some months ago further to the breakdown of our marriage.
- I cite the cause of the breakdown of our marriage to be domestic violence – my husband was abusive towards me for some time until I felt it was no longer safe for me to be living with him”.
47. I would agree with Mr Symes that as such, the contents of that letter in support of the Appellant's application aptly and accurately summarises the Appellant's case. It was a letter before the Immigration Judge that he would appear to have overlooked.
48. I find in the light of the Immigration Judge's positive findings and for the reasons that I have outlined above, that it cannot be said that the husband's behaviour towards his wife did not demonstrate the characteristics that could be separated out from the end of the marriage.
49. I find that the Appellant has on the balance of probabilities, discharged the burden upon her to show that the violence of the Appellant's husband towards her was the causative force in the breakdown of the marriage.
50. I therefore find that the decision of the Secretary of State was not in accordance with the law and the Immigration Rules applicable to this case.
51. I will, therefore, substitute a decision allowing the Appellant's immigration appeal.

### **Decision**

52. The Immigration Judge materially erred in law.
53. The decision I have substituted for that of the Immigration Judge is to allow the appeal in respect of the Immigration Rules.

Signed

Senior Immigration Judge Goldstein