VW ("Extension"; curtailment of leave) Jamaica [2007] UKAIT 00042

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Birmingham

Date of Hearing: 30 March 2007

Date of Promulgation: 25 April 2007

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Designated Immigration Judge French
Immigration Judge Grimmett

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr Ahmed, instructed by Immigration Assist Limited
For the Respondent: Mr Khan, Home Office Presenting Officer

(1) An "extension" of leave requires existing leave: a grant of leave following a period without leave is not an "extension". (2) Leave granted outside the Immigration Rules cannot lawfully be curtailed under paragraph 323(ii) of HC 395.

DETERMINATION AND REASONS

1. The appellant is a citizen of Jamaica. She appealed to an Immigration Judge against the decision of the respondent on 11 October 2006 to curtail her leave. The Immigration Judge allowed the appeal. The respondent sought and obtained an order for reconsideration. Thus the matter comes before us.

2. The appellant entered the United Kingdom on 12 May 2000 and was granted six months leave to enter as a visitor. Within a short period of time she had met a man whom we will call "the sponsor", with whom she began a relationship. When her leave expired she remained in the United Kingdom without leave. Her daughter by the sponsor was born in

August 2001. She married the sponsor in February 2002. In March 2003, when she had been an overstayer for well over two years, she applied for leave to remain on the basis of her marriage. On 27 July 2004 a second child was born. On June 2005, in response to her application of March 2003, the appellant was granted three years to remain on a discretionary basis outside the Immigration Rules. Difficulties developed in the marriage in the winter of 2005, and the sponsor became violent towards the appellant. The appellant left the matrimonial home with the children in 2006. The parties to the marriage are now divorced and the sponsor does not see either the appellant or the children. On 5 July 2006 an application was made on the appellant's behalf for indefinite leave to remain in the United Kingdom as a victim of domestic violence. That application was refused on the ground that the appellant could not meet the requirements of the Rules, and in addition the appellant's existing leave was curtailed because, as the relationship had broken down, the circumstances under which discretionary leave was granted no longer existed. The Notice of Decision is headed as follows:

"REFUSAL TO VARY LEAVE or VARIATION OF LEAVE

Paragraph 289C with reference to 289A(i), 289A(iv) and 323(ii) of HC 395 (as amended)."

3. Paragraph 289A(i) of the Statement of Changes in Immigration Rules, HC 395 requires an applicant to have been "admitted to the United Kingdom or given an extension of stay for a period of two years as the spouse or civil partner of a person present and settled here". Paragraph 323 is as follows:

> "323. A person's leave to enter or remain may be curtailed:
> (i) on any of the grounds set out in paragraph 322(2)-(5) above; or
> (ii) if he ceases to meet the requirements of the Rules under which his leave to enter or remain was granted; or
> (iii) if he is the dependant, or is seeking leave to remain as the dependant, of an asylum applicant whose claim has been refused and whose leave has been curtailed under section 7 of the1993 Act, and he does not qualify for leave to remain in his own right.
> (iv) on any of the grounds set out in paragraph 339A (i)-(vi) and paragraph 339G (i)-(vi)."

4. The Immigration Judge thought that the appellant met the requirements of paragraph 289A(i). She reasoned that as there is in the Immigration Rules no definition of "extension", and as the application for indefinite leave to remain had been dealt with as though it were an application under paragraph 289A, the grant of three years leave to remain must be regarded as having been an extension of leave as a spouse. We are confident that the Immigration Judge was wrong. First, it is not quite right to say that there is no definition of "extension" in the Immigration Rules. So far as extension of leave to remain as a spouse is concerned,

the provisions are in paragraph 284, and we cannot see that there is in the Immigration Rules any provision for having extension of leave to remain as a spouse save under paragraph 284. That paragraph requires existing leave: so a person without existing leave cannot have an extension of leave to remain as a spouse under paragraph 284 or, therefore, at all. Secondly, it is inherent in the meaning of the word "extension" that the entity so described touches and continues the entity of which it is said to be an extension. An extension of leave therefore necessarily means the adding of a period of leave to a period already in existence, so that the period as a whole is longer. A grant of a period of leave to a person who had no leave cannot be an "extension", even if the person had had, in the past, some other period of leave. It is a grant of new leave, not an extension of previous leave.

5. For these reasons the appellant did not, at the time of her application, meet the requirements of paragraph 289A. She did not meet the requirements of any other paragraph and was thus not entitled under the Rules to indefinite leave to remain.

6. The decision against which she appeals did not merely refuse her indefinite leave: it purported to cancel the leave that she had. That leave was not leave granted under the Rules. We were shown the Asylum Policy Instructions (APIs) under which it was, apparently, granted. (That is because grants of discretionary leave to remain are most frequently (though not exclusively) made to those who have unsuccessfully claimed asylum.) The APIs we were shown indicate that a grant of leave to remain on the basis of a relationship with a person in the United Kingdom must not be made unless the officer dealing with the case is satisfied that there is a right under Article 8. It follows that such questions as whether family life can be enjoyed abroad, and whether the applicant can be expected to go abroad for a short time in order to obtain entry clearance, must already have been resolved in the applicant's favour. The precise nature of the necessary relationship, and whether it was a relationship between adults or whether it might be a relationship between a parent and child, is not set out in any detail in the APIs. These are all considerations quite different from those arising under paragraph 289A.

7. As we have indicated, the curtailment of the appellant's leave was purportedly under paragraph 323(ii). That paragraph provides only for the curtailment of leave granted under the Immigration Rules. The appellant's leave was not granted under Immigration Rules and it is difficult to see that it was appropriately curtailed by reference to paragraph 323 at all. Because the circumstances under which it was granted depend not on the Rules but on the APIs, and because there was no indication at the time of its grant precisely why it had been granted, this is a point of some substance. What the officer dealing with the application for indefinite leave to remain seems to have done is indeed to treat the application as though it were an application under paragraph

289A, when it could not be because of the nature of the leave which had been granted. The officer's mistake about that could neither change the nature of the leave nor make it subject to the provisions of paragraph 323(ii).

8. We have no doubt that the Secretary of State is entitled, under s3(3) of the Immigration Act 1971, to curtail existing leave. But in the present case that decision would need to be made after a full consideration of the circumstances under which the leave was granted and the reasons why it was granted, rather than by a misunderstanding of the position, misapplication of the Immigration Rules and (apparently) a failure to consider all relevant factors.

9. The appellant's original grounds of appeal assert at paragraph 9 that the decision to curtail under paragraph 323(ii) is wrong in law. The issue we have been considering is not removed from the Tribunal's jurisdiction by s86(6) of the 2002 Act, because nobody is asking the Secretary of State to depart from the Immigration Rules. The argument is simply that he should not purport to apply paragraph 323 of the Immigration Rules to circumstances in which it does not apply. The Immigration Judge ought to have found that the purported curtailment under paragraph 323 was a decision which was not in accordance with the law and should have allowed the appeal on that ground only. She materially erred in law in allowing the appeal under the Immigration Rules. We substitute a determination allowing the appellant's appeal on the curtailment point only on the ground that that decision was not in accordance with the law.

10. The effect of this is as follows. The appellant has discretionary leave to remain until 21 June 2008. It is open to the Secretary of State to curtail that leave on any grounds that may be appropriate or to allow it to run its course. The appellant can have no expectation that it will be renewed. So far as concerns the appellant's claim under paragraph 289A, the position is, as we have indicated, that she cannot meet the requirements of the Immigration Rules. The decision to refuse her application for indefinite leave to remain did not, however, leave her without any extant leave, because her discretionary leave continued. For that reason she had and has no exercisable right of appeal against the refusal of indefinite leave to remain.

11. The appellant's appeal is allowed for the reasons and to the extent set out above.

C M G OCKELTON

DEPUTY PRESIDENT
Date: