



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00005/2014

THE IMMIGRATION ACTS

Heard at Field House
On 26 August 2014

Determination Promulgated
On 18 September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellant

MRS RONA QUINTO DAPILAGA

Respondent

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: Miss J Smeaton, Counsel instructed by Healys LLP

DETERMINATION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but I shall refer to the parties as they were described before the First-tier Tribunal that is Miss Dapilaga, the appellant, and the Secretary of State as the respondent.

2. The appellant is a citizen of the Philippines born on 11 September 1979 and she appealed against the decision to refuse to vary her leave to remain in the United Kingdom and to remove her by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.
3. The appellant was initially granted leave to remain as a Tier 4 (General) Student but her leave was curtailed to expire on 20 August 2013 and on that date she applied for leave to remain as a partner.
4. In a Reasons for Refusal Letter the Secretary of State noted that the appellant had applied as a partner as defined in paragraph GEN1.2 of Appendix FM but it appeared that she had only been living with her partner at Atis zamir since January 2013 and therefore did not fulfil the definition of a partner and could not meet the requirements of Section R-LTRP.
5. The application was refused under paragraph D-LTRP.1.1 of the Immigration Rules.
6. The Secretary of State was not satisfied EX.1 applied as she did not have children.
7. Further it was maintained that she had not lived in the UK for twenty years under Rule 276ADE and she had spent 28 years of her life in the Philippines and in the absence of evidence to the contrary the Secretary of State did not accept that she had lost her ties with her home country.
8. First-tier Tribunal Judge Martins allowed the appeal under the Immigration Rules and on human rights grounds on 30th May 2014.
9. An application for permission to appeal was made by the Secretary of State on the basis that the appellant did not satisfy the requirements of the partner as set out in GEN1.2 of Appendix FM. This stated that "partner" means
 - (i) the applicant's spouse;
 - (ii) the applicant's civil partner;
 - (iii) the applicant's fiancé or proposed civil partner, or
 - (iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of the application.
10. The Secretary of State submitted that the individual circumstances of the appellant and her sponsor did not fall within any of the definitions outlined above and as such the appellant could not satisfy GEN1.2 and could not benefit from paragraph EX.1 which is not a stand alone provision.
11. Further there was a material misdirection of law under Article 8. The judge found that it was of note that the appellant had always abided by the Immigration Rules, having arrived as a student. The Secretary of State submitted that this should not

enhance her human rights claim as per **Nasim & Others (Article 8) [2014] UKUT 00025**. The appellant as a student was aware that her stay in the UK was only temporary and therefore could have no legitimate expectation she would remain beyond her studies.

12. The judge concluded there were insurmountable obstacles to family life continuing in Pakistan or in the Philippines and cited difficulties with language culture as the predominant reason along with the appellant's concerns over the husband's death threats. The Secretary of State submitted that in either case the partners could assist one another with integrating in the respective societies. The judge made no findings on the practicalities of relocation or why the appellant or partner could not avail themselves of protection of the state.
13. The difficulties raised by the appellant and her sponsor did not disclose insurmountable obstacles rather they disclosed the ordinary difficulties that people may face in establishing a new life in another country and there was nothing to suggest that the fundamental rights would be breached by a decision to relocate nor that it was unjustifiably harsh.
14. Therefore the judge took a divergent view to the authority established in **Gulshan (Article 8 - new rules - correct approach) [2013] UKUT 640** and **Nagre v Secretary of State for the Home Department [2013] EWHC 720** by not applying the correct assessment of the compelling factors that she made a material error.
15. Permission to appeal was granted by Judge Lambert who noted that the permission to appeal was made out of time.
16. The reason given for the late filing of the appeal was a "temporary lack of resources" which would not normally be adequate reason for failing to comply with time limits
17. The judge continued "time is however extended because the grounds have merit".

The Hearing

18. At the hearing it was submitted by Miss Smeaton that there had been a further application for judicial review proceedings of the decision of Judge Lambert to grant permission to appeal out of time. The grounds argue that the Tribunal acted unreasonably in extending time and referred the Tribunal to the determination in **BO & Others (extension of time for appealing) Nigeria [2006] UKAIT 00035**.
19. Miss Smeaton requested that the proceedings before me be stayed on the basis that this application had been submitted.
20. I note this is the second time that an application for judicial review proceedings have been submitted and Upper Tribunal Judge Latta not only considered the previous application for judicial review against the wrong party (the Secretary of State was named rather than the First-tier Tribunal) but he also stated that he was not satisfied

that it was arguable that the decision to extend time was not a decision properly open to the judge.

21. Judge Latta stated that Judge Lambert's decision was "consistent with the guidance given in **BO & Others**. He stated there was no reason to believe that the judge did not take into account all relevant material before reaching his decision.
22. I concluded that there was merely a renewed application for permission to appeal and I was not persuaded to stay the proceedings before me.
23. At the hearing I pointed out that it was an obvious point that the appellant could not succeed under the Immigration Rules further to ELTRP1.12 as a fiancée as she had been in the UK on a Tier 4 (General) Student visa and had not entered the UK as a fiancée. During the course of the proceedings Mr Avery made an application to amend the grounds for application for permission to appeal which I grant.
24. The judge notes at paragraph 49 of her determination that the couple did not actually start living together to any extent until 2013 and therefore they cannot comply with GEN1.2 as they have not lived together akin to a marriage for at least two years prior to the date of the application.
25. I therefore find there was an error of law in the judge's determination in relation to the Immigration Rules.
26. I turn to a consideration of the human rights grounds and acknowledge that the determination may have been set out more clearly but do note that the judge considered the Immigration Rules and cited **Gulshan (article 8 - new rules - correct approach) [2013] UKUT 00640**.
27. As was pointed out the case of **Nasim & Others (Article 8) [2014] UKUT** apply to education cases and in this case the judge had found that there was a genuine and subsisting relationship between the parties not least that they live together now and she had suffered a miscarriage of a baby in 2011. To this extent I am not persuaded that **Nasim** assists the respondent's case.
28. Clearly it is open to the judge to take into account the immigration history of the appellant and indeed this is particularly important in relation to decisions following **Nagre** where the concept of precarious immigration history and developing a relationship within the context of a precarious immigration status was highly relevant. The appellant may not be able to fulfil the Immigration Rules as at the First-tier Tribunal hearing but the fact that she has remained in the country and regularised her status as the judge identified at paragraph 52 is very relevant.
29. The question of insurmountable obstacles to family life continuing in Pakistan or the Philippines, as the judge identified do not mean obstacles which were impossible to surmount but go to the practical difficulties of relocation.

30. Nonetheless, at paragraph 55 the judge stated “it was argued in the alternative that there are compelling circumstances which make an arguable case for considering the application’s Article 8 rights outside the Immigration Rules.” At this point the judge states, “given the features outlined above, I believe there are”. Here the judge had identified the difficulties of being a Christian in Pakistan and the requirement for her to convert and secondly the difficulties of the language barrier.
31. The judge also identified that the appellant’s husband was settled in the UK and that he had close family in the UK and worked here. Indeed the judge recorded that he owned his own business and in the light of his very strong connections with the UK and the number of years he had lived here (although I note the judge erred in stating he had lived here for twenty years) I find that the judge did set out reasoning as to why she found there were compelling reasons for allowing the appeal under Article 8.
32. The judge did err in concluding that in fact the appellant fulfilled the requirements of the Immigration Rules but I do not find that this affected her decision in relation to Article 8 which she considered separately. The judge also took into account the appellant’s private life but it was in relation to her family life that she granted the appeal. In **MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985** the Court upheld the approach in **MF (Nigeria)** and at paragraph 130 stated that it was necessary to apply a proportionality test in order to be compatible with the ECHR and the judge found that interference would not be disproportionate to the legitimate aim.
33. I find that the objections by the Secretary of State were mere disagreements with the judge’s finding and although those findings by the judge might have been set out more clearly, I find that there is no error of law which is material. The case of **MM Miss Smeaton** submitted indicated that **Gulshan** was wrongly decided. I do not accept this but I do not find that there was an error allowing the appeal on human rights grounds.
34. In respect of the Immigration Rules only and for the reasons given above I set the decision aside and dismiss the appeal in relation to the Immigration Rules. However, I found that there is no material error of law in the determination regarding the human rights claim and the decision shall stand in respect of human rights only.

Signed

Date 16th September 2014

Judge Rimington

Deputy Judge of the Upper Tribunal