



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/23580/2013

THE IMMIGRATION ACTS

Heard at Field House

On 2nd July 2014

Determination

Promulgated

On 9th July 2014

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MARK KENJI DEL RASARIO YAMAGUCHI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Jeshani, Counsel, instructed on behalf of Aston Broke Solicitors

For the Respondent: Mr Lawrence Tarlow, Senior Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, a citizen of the Philippines with permission, appeals against the decision of the First-tier Tribunal (Judge Morris) who in a determination promulgated on 15th April 2014 dismissed his appeal against the decision

of the Respondent to refuse to grant leave to remain in the United Kingdom on the basis of his private and family life and the decision to remove him pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006.

The background to the appeal:

2. The history of the appeal is as follows. The Appellant was born on 3rd March 1976 and is a national of the Philippines. He was granted leave to enter the United Kingdom as a Tier 4 (General) Student Migrant between 11th December 2009 and 31st July 2011. He entered the United Kingdom on 27th December 2009. He studied for an NVQ level 3 in Health and Social Care which he achieved in May 2011 and completed various online training courses. In October 2012 he achieved level 5 Diploma in Leadership for Health and Social Care for Children and Young People's Services. It was the Appellant's case that his plan was to switch to a Tier 2 category as a senior carer on completion of his course because that was a position on the shortage occupation list however he could not do so because the Rules changed in April 2011 and he did not obtain his NVQ until May 2011 and a further Rule change in June 2012 which required NQF level 6 but all care related positions were only skilled to NQF level 4.
3. Shortly after he arrived in the UK in December 2009 he began working at a care home in Beaconsfield known as Sunrise, a residential care home for the elderly. He has remained in that employment as a part-time employee working twenty hours per week.
4. As to his circumstances in the Philippines, he graduated in 1999 and worked for ten years before he came to the UK and was able to raise money for his support. He lived there with his girlfriend, who became his wife on 11th October 2012. Subsequently she entered the United Kingdom in October 2013 as a Tier 4 (Student) whose visa expires in February 2016.
5. The Appellant was granted an extension of stay until 14th April 2013 subject to a condition restricting employment and recourse to public funds being prohibited. That leave was as a student.
6. On 14th April 2013 the Appellant applied for a variation of his leave to enter. That was accompanied by a letter dated 28th March 2013 from his solicitors setting out his background noting that he would "not be able to put his qualifications and experience within the health sector into practice in the Philippines, and is hoping to use his skills and qualifications to help in the community in the UK and secure a position that he enjoys." Thus it was submitted that the Appellant had a private life right under Article 8 of the Convention and thus should be granted leave to remain in the United Kingdom.
7. In a notice of immigration decision dated 3rd June 2013 the application was refused under Appendix FM of the Immigration Rules and under paragraph 276ADE when considering his private life.

8. The Appellant sought permission to appeal that decision on the basis that the Secretary of State had not considered Article 8 of the ECHR stating that the Appellant had been in the United Kingdom since December 2009 and had developed “strong links with friends in the UK.”

The appeal before the First-tier Tribunal:

9. The appeal therefore came before the First-tier Tribunal (Judge Morris) sitting at Taylor House on 1st April 2014. Mr Jeshani, Counsel represented the Appellant and a Presenting Officer Miss Laverack represented the Respondent. The judge heard evidence from the Appellant and that is reflected at [6] and [7] and [8]. The judge heard no evidence from the Appellant’s wife nor was there any statement in the bundle of documents that had been prepared on behalf of the Appellant. At paragraphs [9] to [10] the judge set out the submissions from each of the advocates. Miss Laverack relied upon the refusal letter and submitted that the Appellant did not meet the requirements of the Rules. It was further submitted that applying the decision of the Tribunal in **Gulshan** that this was a case which did not have any “unusual” or “unique” features and that it was not exceptional taking into account his immigration history that he derived as a student in 2009 was always aware that he had temporary admission which did not give a right to remain indefinitely. She made reference to his past history in the Philippines having graduated in 1999 and worked there for ten years before coming to the UK in 2009 during which time he was able to raise money for his financial support. At that time he lived with this girlfriend, now his wife, and he did not rely upon his family before coming to the United Kingdom. If returned he would be able to live as he did before. As to his private life he had only been in the UK for four years and his friendships and contacts could be maintained if returned. His wife had a visa which expects her to return at the end of her studies. Whilst it was the Appellant’s plan that he came to the United Kingdom to switch to Tier 2 on completion of his course, the opportunity was no longer available due to a change in the Rules, however, it would not be unjust or harsh to require him to return to the Philippines where he had spent the majority of his life and would be able to find employment and support himself as he did before he arrived.
10. Mr Jeshani had provided a skeleton argument and it was conceded that the requirements of the Immigration Rules could not be met. However he submitted that notwithstanding **Gulshan**, a two-stage approach should still be followed and therefore the five-stage test in **Razgar** should be applied to the circumstances. It is further recorded at paragraph 10 “he accepted that the Appellant’s Article 8 claim was in respect of private life only because the evidence of family life is with his wife who is in the United Kingdom temporarily.” In relation to his private life Counsel submitted that the Appellant was in part-time employment but letters in support of his application showed his private life, he entered in 2009 with a plan and brought with him some savings and wanted to Tier 2 but did not obtain his NVQ until May 2011 by which time the Rules had changed. It was further submitted the work of the Appellant in the healthcare

industry with vulnerable members of society reduced the public interest in removing him from the United Kingdom and his strong ties over the four year period tipped the balance into being a disproportionate interference in his private life. It is further stated that he submitted that the Appellant's marriage engaged Article 8 and that it would not be proportionate to return him whilst his wife was studying in the United Kingdom. Thus he concluded that the judge should allow the appeal under family life until February 2016 when his wife's visa expired. If, on the other hand the judge allowed the appeal under private life he asked that the order should be made for leave to remain.

11. The judge set out his conclusions at paragraphs [11] to [18]. The judge noted that he had considered all the evidence, whether or not he had specifically referred to it and set out the Appellant's circumstances and, in particular, his immigration history noting that he had entered in 2009 and was granted an extension of stay as a student until 14th April 2013. The current application being made on 14th April (but being dated 27th March 2013). He noted that he had been working in his current care home since 2010 in a part-time capacity and achieved various qualifications during his time. It was further noted that his wife had entered the United Kingdom in October 2013 when it was known that his application for leave to remain had been refused. The judge at [13] took into account the Appellant's plan and expectation that he would wish to switch to a Tier 2 category but that was not possible due to the Rule changes in 2011 and in 2012. The judge also recorded at [14] "it is accepted that the Appellant does not meet the requirements of the Immigration Rules for private or family life." The judge took into account at [15] that there were many testimonials before him from residents and colleagues at the care home which the judge found "speak of the Appellant in extremely positive and complementary fashion."
12. The judge then applied the law and cited the decision of the Upper Tribunal in **Gulshan** where it was decided that after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them it is necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them. The judge went on to cite the case of **Nasim and Others (Article 8) [2014] UKUT 0025 (IAC)** and noted that the judgment of the Supreme Court in **Patel and Others [2013] UKSC 72** served to re-focus attention on the nature and purpose of Article 8 and, in particular, to recognise that Article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity. The case also considered the issue of "legitimate expectation" and quoted paragraph 29 stating

"What the present submissions amount to is a contention that Article 8 entitles an immigrant to compel the Respondent to continue to apply to that person the Immigration Rules that were in force when the immigrant was granted leave to enter the United Kingdom, or when he or she was

subsequently granted leave to remain. This submission is misconceived. It finds no sanction in any case law to which our attention has been drawn.”

The judge went on also to consider **CDS Brazil [2010] UKUT 305** as referred to in **Nasim** at paragraph 41 as follows:-

“The Tribunal did, however, expressly acknowledge that it was unlikely a person would be able to show an Article 8 right by coming to the United Kingdom for temporary purposes. The chances of such a right carrying the day have, we consider, further diminished, in the light of the judgments in **Patel and Others**. It would, however, be wrong to say that the point has been reached where an adverse immigration decision in the case of a person who is here for study or other temporary purposes can never be found to be disproportionate. But what is clear is that, on the state of the present law, there is no justification for extending the obiter findings in **CDS**, so as to equate a person whose course of study has yet not ended with a person who, having finished their course, is precluded by the Immigration Rules from staying on to do something else.”

13. The judge concluded at [18] as follows

“In the light of all the matters set out above I find that the Appellant has not shown on the balance of probabilities, that there may be arguably good grounds for granting leave to remain outside the Rules and a private or family life and I do not go on to consider whether there are compelling circumstances not sufficiently recognised under them.”

14. Thus he dismissed the appeal.

The appeal before the Upper Tribunal:

15. The Appellant sought permission to appeal that decision and permission was granted by First-tier Tribunal Judge Cox on 19th May 2014. The reasons were as follows:-

“I have carefully considered the determination in relation to the grounds. Having done so, it is arguable that the judge gave inadequate consideration to the family life ground raised before her and to that extent materially erred. The grounds also raise interesting questions as to the status of **Gulshan** in relation to higher authorities such as **MF (Nigeria)** and **Patel and Others v SSHD [2013] UKSC 72.**”

16. Thus the appeal came before the Upper Tribunal. Mr Jeshani, who appeared on behalf of the Appellant in the court below appeared on behalf of the Appellant. Mr Tarlow appeared on behalf of the Respondent. At the outset of the hearing I provided to the parties an extract from the Record of Proceedings relevant to the first ground relied upon by the Appellant at 5(1) in which it was asserted that Counsel at the hearing did not concede that the Appellant’s claim under Article 8 was only under private life; it being advanced on behalf of the Appellant that Counsel (Mr Jeshani) had made it clear at the hearing that both private life and family life was being argued and that this was a material error of law for failing to consider the

family life of the Appellant with his wife and the impact of separation upon family life and the family unit of the couple if he had to return back to the Philippines. The extract from the Record of Proceedings was therefore provided. I asked Mr Tarlow if he had any note from the Record of Proceedings but it appeared that there was no relevant note.

17. In respect of the grounds, and the first ground which I have just referred to, Mr Jeshani explained that at the hearing he had referred to private life only in his skeleton argument but on the day of hearing it transpired his wife was in the United Kingdom and that was a factor to be taken into account in relation to proportionality. It was only on the day of the hearing that he had become aware of the Appellant's wife, she had not provided a statement and she did not give evidence before the First-tier Tribunal. However, Mr Jeshani said that he did raise the issue of family life and that the passport showed that she had leave until February 14th 2016 as a Tier 4 Student.
18. Thus he adopted the grounds as his submissions. He submitted that the judge erred in law by only considering the appeal on the basis of the Rules and that even after the Rules were introduced in July 2012 the decision of the Supreme Court in **Patel and Others [2013] UKSC 72**, an authority which is binding on all courts and takes precedence over **Gulshan** affirmed that the most authoritative guidance to the approach of Article 8 was that set out in **Huang v SSHD [2007] UKHL 11** and that the failure of an Appellant to qualify under the Immigration Rules is the starting point at which to begin, not the end. Furthermore he submitted that **MF (Nigeria) v SSHD** was also binding on the Tribunal and that took precedence over **Gulshan** which confirmed that it is always necessary to carry out a two-stage process and that the test of exceptional circumstances or insurmountable obstacles had been declared as the wrong test in approaching Article 8 outside of the Rules. The grounds also submitted that from 9th July 2012 the new Immigration Rules only reflect certain aspects and factors and not all are adequately reflected under Article 8.
19. In his oral submissions he submitted that there was a constitutional point raised in his grounds that the Immigration Judge was under a positive duty in law after considering Section 84(1)(a) of the 2002 Act that the decision was not in accordance with the Immigration Rules, to go on to consider all the other Grounds of Appeal and in this case the relevant ones being Section 84(1)(c) and (g) that the decision was unlawful under Section 6 of the Human Rights Act as being incompatible with the Appellant's Convention rights. He submitted in this respect the judge had looked at the Rules and said as the Appellant could not meet it and therefore did not look at Article 8. He should therefore have looked at Article 8 and if the government had introduced the Rules in that way then the government should have repealed Section 84(1)(c) and (g) if only the Rules were relevant. He referred the Tribunal to a decision of the outer house, Court of Session reported at **MMM (AP) v SSHD [2013] CSOH 43** at [35] where it was said that where a claim did not meet the requirements of the

Rules it would be necessary for an Immigration Judge to go on to make an assessment of Article 8 applying the criterion established by law. A failure to comply with the Rules thus remains the starting point of the Article 8 enquiry and not its conclusion. In such an assessment failure to meet the Rules is only a factor in the proportionality equation. At [36] it is recorded "in any event the exercise of assessing whether there is a good arguable case will often involve in practice consideration of the same issues involved in actually carrying out an Article 8 assessment." Mr Jeshani submitted that that case demonstrated that it was necessary to look outside of the Rules.

20. He further submitted that even if the Tribunal had looked at it under **Gulshan** and whether it was an arguable case the same factors of proportionality applied and that on the grounds of this particular application the evidence show that there were arguably good grounds for granting leave to remain outside of the Immigration Rules relying upon the following
- (i) His wife was in the United Kingdom studying until 2006,
 - (ii) the strong ties he developed over the years,
 - (iii) the public interest in his removal being reduced significantly due to his positive contribution to British society by caring for the elderly and vulnerable in care homes.

Those were compelling circumstances not sufficiently recognised under the Rules and therefore it was a positive duty to consider Article 8 outside of the Rules and apply the five stage test in **Razgar**.

21. I asked Mr Jeshani that if an error of law was found what were his submissions on re-making the decision? Mr Jeshani said that they were as outlined in the grounds namely that in respect of family life he was in a genuine marriage and his wife had permission to stay until February 2006 and it would be unjustifiably harsh to separate them. In relation to private life, he had developed strong ties over the four years in the United Kingdom, the public interest in his removal was significantly reduced due to his contribution and caring for the elderly in care homes, that he would not be able to obtain a job or had minimal job prospects in the Philippines and that his skills in the UK are care related which would be of minimal use in the Philippines and he had no home to return to. He further submitted that in terms of proportionality the Tribunal should take into account the Rules had changed and he would not have been able to switch to Tier 2 but that was a matter to look at in proportionality. Thus he invited the Tribunal to re-make the decision allowing the appeal on behalf of the Appellant under Article 8 outside of the Rules.
22. Mr Tarlow on behalf of the Secretary of State relied upon the Rule 24 response in which it was submitted that the grounds advanced no material arguable error of law capable of having a material impact upon the

outcome of the appeal as it was submitted that no properly directed Tribunal would have found that the Appellant's appeal could succeed under Article 8 and thus the grounds were just a mere disagreement with the negative outcome of the appeal.

23. In this context he submitted that the determination, taken together with the Record of Proceedings indicated that the Appellant's case was only put on the issue of private life only. Whilst it was not in dispute that his wife was as a student, she could not have had any expectation to be allowed to remain beyond February 2016. In any event there would only be a short separation between them.
24. He submitted the judge properly looked at the decision in **Gulshan** referring to "compelling circumstances." He submitted that even if an error was found and the Tribunal was to re-make the decision, there would be nothing to bring the case into circumstances which were compelling and that all the Article 8 aspects were considered under the Rules. The Appellant works in a care home and whilst that was employment beneficial to the community and he would like to stay here, the Secretary of State has a responsibility in maintaining immigration control and he came on a temporary basis with no expectation that he could remain. In short he submitted that there was nothing compelling to put in the category and in summary, he submitted that there was no evidence of law and even if there were it would not be material because the Appellant could not properly succeed on the particular facts. In the alternative in re-making the decision it should be dismissed the balance in favour of the Respondent. The Appellant could not meet the Rules and there was nothing compelling to bring his case under Article 8 outside of the Rules.
25. As to any constitutional point, Counsel has not produced any cases relevant to this and therefore he made no submissions.
26. Mr Jeshani by way of reply submitted that there was an error of law and it was material. If the Appellant could not meet the Rules then it was necessary to look at proportionality and the test was "is it reasonable to expect the Appellant to return to the Philippines?" Looking at all the factors of the balancing exercise. He had built up a private life over four years and was working in the care industry. The public interest was weakened because he was caring for vulnerable people and his skills and qualifications do not exist in the Philippines and it was not reasonable to expect him to return. He could not work full-time if he returned. The compelling circumstances relate to his private life and also his family life as he would be separated for eighteen months from his partner. For those reasons, the decision would be disproportionate to remove the Appellant.
27. At the conclusion of the submissions I reserved my decision.

Discussion: _____

28. I have had the opportunity of hearing the submissions of both advocates and considering them in the light of the determination of the First-tier Tribunal (Judge Morris). I remind myself that I can only interfere with a decision of the First-tier Tribunal if it is shown that the judge made an error of law in the determination when dealing with the relevant issues.
29. There is an analysis of the relevant case law in the grounds and developed in the oral submissions of Mr Jeshani, Counsel on behalf of the Appellant, however it is not necessary to consider in detail those submissions as the legal principles are now settled. The decision of **R (Nagre) v SSHD [2013] EWHC 720 (Admin)** considered the new Immigration Rules. They were amended in 2012 to address more explicitly the factors according to domestic and Strasbourg case law weighing in favour of or against a claim by a foreign national based on Article 8 of the ECHR to remain in the United Kingdom. It is said that the amendments were introduced with the intention to align the Immigration Rules more closely with the approach to be taken under Article 8 and to unify consideration under the Rules of Article 8 and also Section 55 of the 2009 Act (dealing with the welfare of children), where there were any to be taken into account. Instructions were issued by the Secretary of State regarding the approach to be applied by officials in deciding to grant leave to remain outside the Rules. Those instructions were that if the Rules are not met it will be appropriate normally to refuse the application but leave can be granted where exceptional circumstances in the sense of “unjustifiably harsh consequences” on the individual would result. As Mr Justice Sales stated, there is a dual discretion which “fully accommodated the requirements of Article 8.” In accordance with the guidance set out in **MF (Nigeria) v SSHD [2013] EWCA Civ 1192**, the High Court in **Nagre [2013] EWHC 720** and **Gulshan** as confirmed in **Shahzad (Article 8: Legitimate Aim) [2014] UKUT 0085 (IAC)**, a judge is required to consider the question of proportionality in the context of the Immigration Rules first with no need to go on to a specific assessment of Article 8 if it is clear from the facts that there are no compelling or exceptional circumstances that require that course to be taken. That approach is consistent with the Court of Appeal’s decision in **MF (Nigeria)** and **Huang**. In the decision of **Shahzad** (as cited) it was found that where an area of the Rules does not have an express mechanism such as found in a deportation appeal, the approach set out in **Nagre** (at paragraphs 29 to 31) and **Gulshan** should be followed, that is, after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside the Rules is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.
30. As Sales J said in **Nagre** at paragraph 30:-
- “The only slight modification I would make, for the purposes of clarity, is to say that if, after the process of applying the Rules and finding that the claim for leave to remain under them fails, the relevant official or Tribunal Judge considers that it is clear that the consideration under the Rules has fully

addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there was no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached the decision on application of the Rules.”

31. Thus the starting point for the judge was to look at the Rules and see if the Appellant could meet the requirements. If the Appellant could not, the next question should have been whether the decision would lead to a breach of Article 8 but in the context of whether there are factors not covered by the Rules which give rise to the need to consider Article 8 further. Or to put it another way, are there any “compelling circumstances” that would justify a detailed examination taken outside of the Rules?
32. It is plain from reading the determination and in the light of the factual background of the Appellant, he could not meet the Rules relating to private life or family life under Appendix FM and paragraph 276ADE. The decision letter gave express consideration to the Appellant’s private life under 276ADE of the Rules. In this context it was noted that the Appellant entered the United Kingdom on 27th December 2009 and had not lived continuously in the UK for at least twenty years and therefore he could not meet the requirements of paragraph 276ADE(iii). At the time of his application he was 37 years of age and therefore not under the age of 18 or aged 18 years and above and under 25 at the time of the application and had also spent 33 years in his home country before coming to the UK and therefore the Secretary of State was not satisfied that he could meet the requirements of 276ADE(iv) and (v). In the context of ties, the Respondent noted that he had spent 33 years in his home country and in the absence of any evidence to the contrary, it was not accepted that in the period of time that he had been in the UK that he had lost ties to his home country [see Rule 276ADE(vi)].
33. Looking at the findings made by the First-tier Tribunal Judge, it is plain that he could not meet the criteria for private life as his length of residence was that of only four years. The judge placed that in context with his life in his home country of the Philippines noting that he had spent 33 years in the Philippines prior to coming to the UK and that he had graduated in the Philippines in 1999 and had worked for ten years before he came to the United Kingdom in 2009 during which time he was able to raise money for financial support. During that time in his home country he had studied and had also met his girlfriend, now his wife. Whilst it was claimed on behalf of the Appellant that he could not live with his family if returned to the Philippines because they had a rift (C7) it was clear from the evidence that prior to coming to the United Kingdom he had supported himself and did not rely upon his family, having lived with his girlfriend. Given the length of time that he had been in the United Kingdom, namely four years, when balanced against the length of time that he had been in

the Philippines, taken with a holistic view of the meaning of ties as set out in the decision of **Ogundimu**, it could not be said that the Appellant had no social or cultural ties to the Philippines given his length of prior residence. Thus he could not meet the requirements for private life.

34. The decision of the Respondent did not consider any claim under Appendix FM relating to family members. That is not surprising because at the date of the decision, it was not said that he had any family member in the United Kingdom. It is common ground that his wife arrived in the United Kingdom in or about October 2013 which was post the decision. Nonetheless even applying the new Rules to the circumstances of the Appellant, it could not be said that he met any of the Rules designed to deal with family life under Appendix FM. He would not be able to qualify under the partner route as his wife was not a British citizen nor was she settled in the United Kingdom. He had not made an application to remain as her dependant but had instead chosen to seek to remain on the basis of private life. The fact that she had leave in the United Kingdom, which was temporary until February 2016, does not by itself demonstrate any insurmountable obstacle to returning to the Philippines her country of nationality if she so wished to and continue with family life with her husband, the Appellant.
35. Reviewing the determination in the round, I am satisfied that the determination was carried out in compliance with those legal principles that I have set out above. The judge found that the Appellant could not meet the Immigration Rules for those reasons set out above accepted on behalf of the Appellant at [14]. The judge was then required to consider if there were any compelling circumstances that would justify a detailed examination to be taken outside of the Rules. The judge here did exactly what the grounds say the judge should have done and the judge looked to see if there were any compelling circumstances to justify a more detailed analysis outside of the Rules by way of a second stage approach. In this context she gave consideration and weight to what she described as “the many testimonials before me from residents and colleagues at the care home which speak of the Appellant in an extremely positive and complimentary fashion,” she took into account the qualifications and training that he had undertaken and that he had been working in a part-time capacity for twenty hours per week at the care home. The judge also correctly directed herself at [16] to consider whether there were any compelling circumstances not sufficiently recognised under the Rules. In this context at [17] the judge had regard to the decision of **Nasim and Others (Article 8) [2014] UKUT 00025** and also **Patel and Others [2013] UKSC 72** noting that both decisions re-focused attention on the nature and purpose of Article 8, and in particular, to recognise what she described as “the Article’s limited utility in private life cases that are far removed from the protection of an individual’s moral and physical integrity.” In this context also she considered the argument put before her at [13] that there was some “legitimate expectation” that should be taken into account that he would have wished to switch to a Tier 2 category as a senior carer on completion of his course but was not able to

do so because the Rules changed in April 2011 and a further Rule change in June 2012 which then required an NQF level 6 but all care related positions were only skilled to NQF level 4. Thus he could not qualify in terms of employment under the Rules either. The judge in this context cited paragraph 29 that there was no legitimate expectation against that background that could have been taken into account. The judge also had regard to the decision of **CDS (Brazil) [2010] UKUT 305** and what was said about that case in **Nasim and Others (Article 8) [2014] UKUT 0025 (IAC)** citing paragraph 41. In this context that it was unlikely that a person would be able to show an Article 8 right by coming to the United Kingdom for temporary purposes. In this case, on application of paragraph 41 it could not be said on behalf of the Appellant that he was still studying in the United Kingdom. He had completed his studies; his leave having been extended for that purpose until April 2013. He had not sought to study further or to make an application in this regard but had wished to remain on Article 8 grounds to continue to secure employment that he had had on a part-time basis during the temporary nature of his studies. This, the judge found was not a matter that could properly be said as a “good ground for granting leave to remain outside the Rules.” Consequently, the judge found on the assessment of the facts before her that there were no compelling circumstances to justify a more detailed analysis outside the Rules and that was a finding entirely open to the judge and entirely consistent with the legal principles applicable.

36. The grounds at paragraph 4 (and relied upon in oral argument before the Tribunal) in which it is said that there were arguably good grounds, praying-in-aid the strong tie that he had developed over four years, and that the public interest in his removal being “significantly reduced” because he had contributed to society by caring for the elderly as a care home employee, that they were sufficiently good grounds to go outside of the Rules. That is a disagreement with the finding of the judge. In my judgment those matters had been considered sufficiently under the Rules and that they did not constitute either arguably good grounds or compelling circumstances to carry out or to justify a more detailed analysis outside of the Rules. Thus it cannot be said on the grounds submitted that any other result that could reasonably be reached by the Immigration Judge and that the only outcome could have been to allow the appeal.
37. A further point raised in the grounds relates to a concession recorded by the judge which it is said Counsel did not make. The grounds at paragraph 5(i) refer to paragraph 10 of the determination in which the judge set out what appears to be a concession made by Mr Jeshani as follows:-

“He accepted that the Appellant’s Article 8 claim is in respect of private life only because the evidence of family life is with his wife who is in the United Kingdom temporarily.”

38. The grounds submit that Counsel at the hearing

“Did not at any point whatsoever concede that the Appellant’s claim under Article 8 was only under private life. Counsel made it clear at the hearing that both private and family life was being argued and therefore the Immigration Judge has materially erred in law by failing to consider the family life of the Appellant with his wife who is studying and would be in the United Kingdom until 2006 and the impact of separation upon the family life and the family unit of the couple if he has to return back to the Philippines. Further, family life has also been considered/mentioned by the Respondent in the refusal letter and ought to have been adequately considered by the Immigration Judge.”

39. There are two matters arising out of that. Firstly, the Respondent in the refusal letter did not make any reference to family life. As I have set out earlier that decision which was reached on 3rd June 2013 did not take into account any family life of the Appellant because that was not the basis upon which the application for leave to remain had been made. As the reasons for refusal letter clearly states, the application for leave to remain was made on the basis of his private life. That is further evidenced by the letter sent in support of the application by his solicitors. There is no reference or mention of any family life. Secondly, the Record of Proceedings does state “Article 8 private life case only. Evidence of family life is with wife who here temporary.” Mr Jeshani informed the Tribunal that there was no reference to family life either in his skeleton argument dated 1st April 2014 (the day of the hearing) because it was only on the day of the hearing that it transpired that his wife was in the United Kingdom and therefore became an issue. However there was no witness statement from her, no evidence placed before the judge and indeed she did not give oral evidence before the First-tier Tribunal. That being said, it seems to me that there is evidence that Counsel on behalf of the Appellant did raise sufficient reference to the Appellant’s wife in his submissions recorded at [10] in which it is said the Appellant’s marriage engaged Article 8 and thus I am satisfied that Counsel did seek to introduce that into the factual matrix. At [6] the evidence was his wife was a Tier 4 Student who had a visa until 2016 and submissions were given at [12] reflect the conclusions of the judge that his wife had entered the United Kingdom in October 2013 when it was known that his application for leave to remain had been refused. However in the absence of any proper evidence advanced on behalf of the Appellant in relation to family life, there being no statement from the Appellant’s wife nor any oral evidence being heard from her, the judge was entitled not to pursue this any further or expand any more on the issue than the judge did at [12] where it was noted that she entered the UK in October 2013 at a time when she knew his application for leave had been refused and that she was in the UK on a temporary basis as a student. The fact that she had permission or leave to stay in the UK on a temporary basis does not necessarily mean that she has no choice as to whether she accompanied her husband back to the Philippines. There was no evidence or any assertion either before the First-tier Tribunal or indeed before the Upper Tribunal that she could not pursue or continue her studies in the Philippines and therefore any interference with family life does not result from the decision to refuse to

vary leave to remain but her own decision to remain in the United Kingdom.

40. Therefore the complaint made that the judge did not deal with family life does not in my judgment take the case any further. It is not asserted either before the First-tier Tribunal or before this Tribunal that she could not complete or continue her studies in the Philippines and any interference would not be as a result of the Respondent's decision to refuse to vary leave to remain but her choice to continue to study in the UK rather than to complete them in the Philippines and resume family life with her husband. Even if it could be said that this was an error on the judge's part not to fully explore the family life issues more fully, it was not material in the light of the lack of evidence that was provided before the judge and it is unarguable that the Appellant would have succeeded under a proportionality assessment in the light of the particular facts of this case.

Decision:

41. In those circumstances, the Appellant has not demonstrated that the judge made any material error of law that would require the setting aside of this determination. Thus the decision stands.

Signed

Date

Upper Tribunal Judge Reeds