



Upper Tier Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/24677/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 2 June 2014

Determination Promulgated  
On 3 June 2014

Before

Deputy Upper Tribunal Judge Pickup  
Between

Secretary of State for the Home Department

and

Karen Ho Man Au  
[No anonymity direction made]

Appellant

Respondent

**Representation:**

For the claimant: Mr E Wilford, instructed by GR Law UK Immigration Services  
For the appellant: Mr L Tarlow, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The claimant, Karen Ho Man Au, date of birth 5.3.90, is a citizen of New Zealand.
2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Wilson, who allowed the claimant's appeal against the decision of the respondent, dated 30.5.13, to refuse her application made on 20.9.12 for leave to remain in the UK on the basis of 10 years long residence, pursuant to paragraph 276B of the Immigration Rules.

3. The Judge heard the appeal on 26.11.13.
4. First-tier Tribunal Judge Page granted permission to appeal on 16.4.14.
5. Thus the matter came before me on 2.6.14 as an appeal in the Upper Tribunal.

### **Error of Law**

6. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Wilson should be set aside.
7. The grounds of application for permission to appeal to the Upper Tribunal raise a number of issues in submitting that the First-tier Tribunal Judge erred in law in allowing the appeal under Article 8.
8. In particular, the errors highlighted in the grounds of application for permission to appeal are that the judge, (1) “allowed the appeal under the Immigration Rules (Article 8 – Appendix FM);” (2) had regard to an irrelevant consideration in the proportionality assessment, namely the established status of the Anglican Church in the UK; and (3) erred in his assessment of the public interest for the purpose of proportionality.
9. In granting permission to appeal, Judge Page found, “an arguable error of law in the balancing exercise that the judge made in allowing the appeal under Article 8 in giving much weight to the appellant’s faith and church activities in the UK. The judge’s reasoning at paragraphs 24-48 I have had difficulty following. I do not have to decide the merits of the respondent’s appeal at this stage. So fortunately I do not, at this, the permission stage, have to wrestle any further with the question as to whether the UK is “both secular and divine” – or if the “Anglican tradition reflects an integral part of the United Kingdom as a society” or whether the appellant’s activities as an organ scholar were a relevant consideration under Article 8. The respondent argues that the judge erred in law when weighing these issues in the appellant’s favour and allowing the appeal under Article 8. All the grounds of appeal can be argued.”
10. Like Judge Page, I found great difficulty in following the logical course of the determination.
11. It appears that after summarising the evidence the judge concluded at §19 that, because of her absences from the UK, the claimant could not meet the Immigration Rules under paragraph 276B in respect of the 10-year long residence provision. No issue is taken by either side with that finding.
12. Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) was not promulgated until 17 December 2013 and thus Judge Wilson cannot be criticised for failing to follow, with Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), the approach of the Upper Tribunal that the Immigration Rules are to be regarded as a

complete code and there is no need to consider article 8 private and family life rights outside the Rules unless there are compelling circumstances not adequately recognised within the Rules so that, exceptionally, the decision of the Secretary of State would be unjustifiably harsh. Prior to those cases, the approach was to first consider an appeal under the Immigration Rules before going on to consider article 8 ECHR as a second stage.

13. However, in the determination Judge Wilson seems to have confused family and private life. It is clear that there was no family life claim in this case. Thus references at §20 onwards to Appendix FM and GEN 1.1 are entirely irrelevant.
14. Before proceeding to consider the claimant's private life claim under article 8 ECHR, the judge should have first dealt with private life under the Immigration Rules, pursuant to paragraph 276ADE. The judge eventually did so, at §30 of the determination, addressing both length of residence and ties to New Zealand. It can be inferred that the judge did not accept that the appellant met the requirements of paragraph 276ADE.
15. At §21 of the determination the judge went on to find that the Secretary of State had failed to make any assessment of the claimant's individual characteristics before issuing removal directions under section 47. The judge suggested that this amounted to the decision being not in accordance with the law such that it could have been returned to the Secretary of State to re-make the decision, but that he was not asked to do so. I find that the judge misdirected himself as to the application of MF (Nigeria) in suggesting that the Secretary of State had to consider the claimant's articles, 8, 9 and 10 rights before making the removal decision. However, if the judge concluded that the decision was not in accordance with the law, it did not require the request of one of the parties before it could be returned to the Secretary of State. The correct decision in such circumstances would have been to allow the appeal to the limited extent that there was no valid decision and that it remained for the Secretary of State to make a decision which was in accordance with the law. In any event, I find the entire discussion in §21 confused and difficult to follow.
16. Given that this was a private life claim under article 8, I do not follow why the judge went on to consider articles 9, 10, and even 13. I bear in mind that at §24 the judge explained that it was because the attributes asserted by the claimant require consideration of all three as a reflection of the claimant's private and public religious belief exhibited through her performance of church music. However, I do not accept the judge's statement at §36 that because he considered the claimant's need to demonstrate her religious belief so well entrenched articles 9 and 10 had to be considered along with article 8.
17. I fail to see how the decision of the Secretary of State to refuse the application made under the long residence provisions, an application doomed to failure under the Immigration Rules, engaged the qualified rights under articles 9 and 10 in relation to freedom of thought, conscience and religion, or freedom of expression, if that is what the judge intended to convey. As a citizen of New Zealand, the claimant would be

free to exercise her article 9 and 10 rights without hindrance. Neither was it at all necessary to consider article 9 and 10 in order to take into account the particular features of the claimant's private life.

18. I find that in reaching the conclusions, at §34 in relation to article 9 and §35 in relation to article 10, that there was no justification for interference with the claimant's rights, the judge misled himself. The judge had failed to clearly identify to what inference he was referring. It may be that the judge concluded that the claimant's particular talents and attributes were so special and unusual that she could only exercise her article 9 and 10 rights by composing and playing traditional Anglican choral music in the UK. This may be what the judge intended when stating at §36 that, "I am satisfied to exclude the religious faith displayed and enhanced through sacred music would not be giving due recognition to the appellant's attributes. On that basis I am satisfied that no reasoned interference with the appellant's present position having regard to the limited provision of article 9(2) could be justified."
19. However, at §37 the judge appeared to reach the conclusion that the claimant had failed to establish that the decision interfered with her religious practice and set out reasons in the following paragraphs before reaching the conclusion at §40 that the articles 9 and 10 claims failed. As Lord Bingham made clear in Ullah and Do [2004] UKHL 26, when considering the qualification of the right under Article 9.2 (and other such qualified rights), the balance is heavily weighted in favour of the decision being proportionate and indicated that decisions in pursuance of immigration control will be proportionate in "all save a small minority of exceptional cases."
20. After considering §40, I do not understand why at §41 the judge returned to consideration of article 9 interference, finding that the Secretary of State did not make out that the claimant's presence in the UK was sufficiently detrimental for a justification for article 9(2) interference.
21. I do not understand why the judge thought it necessary to add the contents of §33 of the determination, where he suggests that as the established church of the UK he had to recognise its special and unique nature underpinning the historical and cultural traditions of the UK. At §46 the judge added, that the UK was both secular and divine and that the Church of England is an established church has to be give due recognition because the Anglican tradition reflects an integral part of the UK as a society. Those are views that may or may not be agreed with by others, but they are irrelevant to the consideration of the appellant's private life claim. As Mr Wilford accepted in his submissions, the claimant's membership and involvement with the Anglican church held no more or particularly special value in any article 8 proportionality assessment than would her membership and activity in any other religion or indeed organisation engaged in promoting the public good. I find that the judge was, or certainly gave the impression that he was, according much greater significance to the claimant's faith and the practice of it than he properly could. In saying that, the claimant's private life has to encompass the pursuit of her faith, as it is, obviously, part of her private life.

22. In relation to article 8, at §43 the judge found that given the claimant's long-standing connection with the UK and the nature of her private life, article 8 was engaged. At §44 and §45 the judge could not identify any underlying public interest in this case other than need to maintain a fair system of immigration control. However, whilst denying that this was a near miss case, the judge considered that there was no Immigration Rules that reflected the claimant's position with a very unusual set of circumstances.
23. In relation to article 8 proportionality at §46 of the determination the judge misdirected himself as to the weight to be attached to immigration control, suggesting that he could not ascertain what impact the claimant could have on immigration control given that her post is not an active economic position that would attract applicants other than those who wished to follow a religious path. The judge ignores the clear principle that the maintenance of a generally applicable immigration policy is, by indirectly protecting the economic well-being of the state, a legitimate aim for the purposes of article 8. It is not diminished as a legitimate aim because there are few people who may wish to follow the claimant's path, although there was no evidence on that issue. Even if there were no others who might take up the claimant's position and even if she had no personal impact on the overall or macro level of economic well-being, it remains a legitimate aim and consideration. It would be wrong and fundamental misunderstanding to assess that legitimate aim by the particular 'cost' to the state of any individual claimant. I am satisfied that §46 amounts to an error of law.
24. More troubling in §46 are the references, previously cited, to the role of the Anglican church as part of the composition of the UK and that as an established church it must be given due recognition. I am concerned that the judge was according greater weight to the claimant's faith because it was part of the Anglican tradition which the judge considered to be an integral part of UK society. There is no reason why the established church should have any greater recognition than the faith of any other claimant.
25. I have struggled to understand what the judge intended to convey in this paragraph of the determination. I am concerned that judge appears to state that the legitimate aim has to reflect the greater status of the Anglican Church in the UK. This seems to me to be equivalent to over-inflating the value to be taken into account of the claimant's involvement with the Anglican faith whilst at the same time minimising the significance of the legitimate aim in immigration control, for the same reason. I am not clear that this is a proportionality assessment at all, but rather a finding that the Secretary of State failed to demonstrate that the decision was a necessary interference with the claimant's private life. Whether it was or was not a proportionality assessment, I find that this paragraph, together with the other paragraphs referred to above, contain such confusion of article 8 principles as to amount to material errors of law.
26. Finally, in the summary, the judge purports to allow the appeal under the Immigration Rules but referencing "Article 8 - Appendix FM," and then to

additionally allow the appeal under article 8 ECHR. It is not clear what Immigration Rules the judge was referring to, as it appears that he dismissed the appeal under both paragraphs 276B and 276ADE of the Immigration Rules. If the appeal succeeded under the Immigration Rules, there was no purpose in going on to consider article 8 ECHR. Further, there was no claim to family life and thus the only claim article 8 could relate to is private life under paragraph 276ADE. Of course, Appendix FM has no application to this appeal at all.

27. In all the circumstances, and for the reasons stated, I find that the making of the decision of the First-tier Tribunal involved such error of law that it should be set aside and remade.
28. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the findings of fact and the conclusions drawn are unclear on crucial issues at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal decision vitiate all other findings and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
29. In all the circumstances, I consider the appropriate course is to relist this appeal for a fresh hearing in the First-tier Tribunal. I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the parties of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

**Conclusions:**

30. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be determined afresh in the First-tier Tribunal.



Signed:

Date: 2 June 2014

Deputy Upper Tribunal Judge Pickup

### **Consequential Directions**

31. The appeal is to be relisted on 7.11.14 in the First-tier Tribunal at Hatton Cross before any First-tier Tribunal Judge other than Judge Wilson.
32. No findings of fact are preserved and the appeal is to be determined afresh.

### **Anonymity**

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

### **Fee Award**

**Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be determined.



Signed:

Date: 2 June 2014

Deputy Upper Tribunal Judge Pickup