



IAC-AH--V1

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

Appeal Number: IA /28860/2013

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 14th October 2014

On 7th November 2014

**Before
Ms GA BLACK
DEPUTY JUDGE OF THE UPPER TRIBUNAL**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**Ms SOOK FUN CHOONG
(ANONYMITY DIRECTION NOT MADE)**

Claimant

Representation:

For the Appellant: Mr C Avery (Senior Home Office Presenting Officer)
For the Claimant: Mr A Jafar (Counsel instructed by Southbridge solicitors)

DECISION AND REASONS

1. This is a resumed hearing following a decision made by the Upper Tribunal on 27th June 2014 that there was a material error of law in the determination of the First tier- Tribunal. I refer to that decision for the background to this appeal and to the directions made by the Upper Tribunal as follows;

“The main findings of fact are unchallenged and are preserved. The decision stands to be remade. I direct both representatives to produce and serve written submissions on the Gulshan guidance and Article 8 ECHR within 10 days of the date of issue of this decision.”

2. The claimant is a citizen of Malaysia and her date of birth is 23.4.1967.
3. It would appear that owing to administrative error the Upper Tribunal decision 27.6.2014 was only promulgated on 3rd September 2014. The claimant submitted written submissions dated 9th September 2014 inviting the Upper Tribunal to relist the matter for a hearing afresh on Article 8. No written submissions were received from the Secretary of State. This matter was listed for oral hearing despite directions made for written submissions. Mr Jafar produced a skeleton argument.
4. Notwithstanding that the directions were not complied with by the Secretary of State and taking note of the request for an oral hearing and having regard to the overriding objective (Rule 2 Tribunal Procedure Rules 2008), I proceeded to hear oral submissions from both parties on Article 8 ECHR.
5. Mr Jafar relied on the facts as set out in the determination of the First tier Tribunal. He argued that this was a rare case in which the claimant lived in the UK lawfully from 2002 and save for a period of 5 months until her reapplication in April 2012. As a work permit holder (granted on 2 occasions) the claimant did have an expectation of settlement in the UK. It was accepted that the claimant was not responsible for failures in her immigration applications made by her employers. Mr Jafar acknowledged that there was no “near miss” argument but that the spirit of the rules remained to be applied. The Gulshan test would apply in this case and the facts justified allowing the appeal under Article 8.
6. Mr Avery submitted that the claimant did not meet the immigration rules under 276ADE. The basis of her exceptionality argument under Article 8 arose because of errors on the part of her employers. There was no fault on the part of the Secretary of State. Her private life could be replicated in Malaysia. The case did not get beyond the Gulshan gateway. Gulshan remained good law notwithstanding the obiter comments in **MM(Lebanon & others, R(on the application of) v SSHD [2014] EWCA Civ 985.**
7. Mr Jafar relied on **MM** and submitted that the Court of Appeal made it clear that there was no tertiary test for Article 8, following **Nagre**. The issue was proportionality.

Discussion and decision

Gulshan

8. The Upper Tribunal decision dated 27th June 2014 found that the First tier Tribunal erred by failing to give adequate reasons justifying consideration

out side of the Rules following **Gulshan**. The further submissions I have heard do not alter that conclusion as to the adequacy of the reasons. In any event, I am satisfied that the outcome would be no different whether or not the **Gulshan** test was or was not met. I have regard to the Court of Appeal in **MM** that the “arguable grounds” stage is no longer necessary.

Article 8 - proportionality

9. The main issue before this Tribunal is the Article 8 assessment of proportionality. Aside from the arguments pursued by the claimant before the First tier Tribunal relying on **Philipson(ILR - not PBS:evidence)India[201]UKUT 00039 (IAC)**, which I concluded was an erroneous approach, I have taken into account the further submissions made by Mr Jafar as to proportionality. There was no new evidence before me and no argument was put that oral evidence was necessary. The findings of fact from the First tier Tribunal are preserved. I accept the clarification that the claimant was granted leave from 2002 until 2012 and that it was only a matter of 5 months during which she had no lawful leave. Nevertheless I remain of the view that whilst the situation for the claimant is unfair because of errors on the part of her employers, there was no unfairness on the part of the Secretary of State. The claimant may well have believed that she would be granted indefinite leave to remain after being granted leave as a work permit, but that expectation is not a matter that can reasonably be resolved by the Secretary of State. The claimant for whatever reason went along with her employers who made mistakes in her immigration applications not only on one occasion but on two occasions. I find that she did not take any steps herself in 2007 to rectify that situation.
10. I fully accept that the claimant is hard working and has lived in the UK for a considerable period of time. She has made a contribution economically and established a career. However, there was no evidence before me to indicate that she would not be able to resume and replicate her private life in Malaysia. She has transferable skills and would be able to obtain employment as a pattern cutter. She has lived for the majority of her life in Malaysia. There was no evidence to indicate that she did not have any ties in Malaysia. There is nothing of major significance about her private life. In assessing proportionality the First tier Tribunal found that there was no legitimate aim beyond immigration control. However, there was no consideration by the Tribunal of the reasonableness of the claimant returning to Malaysia and any private life that she may establish there. I have now heard submissions on these issues. Whilst she may face considerable disruption on return to Malaysia after such a long absence but there is no evidence to show that she would not be able to work, and make new friends and contacts, thus replicating her private life in the UK. It remains open to her to make a fresh application for entry clearance.
11. The claimant has not met the Rules designed to reflect the Secretary of State position on private life and public interest. There is no evidence of any exceptional and/or compelling circumstances. The claimant seeks to

rely on Article 8 in order to rectify mistakes made by others. This fails to engage the real purpose behind Article 8 as in **Nasim & others (Article 8)[2014] UKUT 00025(IAC)** where the headnote states:

“The judgments of the Supreme Court in **Patel and Others v Secretary of State for the Home Department [2013] UKSC 72** serve to re-focus attention on the nature and purpose of Article 8 of the ECHR 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.

A person’s human rights are not enhanced by not committing criminal offences or not relying on public funds. The only significance of such matters in cases concerning proposed or hypothetical removal from the United Kingdom is to preclude the Secretary of State from pointing to any public interest justifying removal, over and above the basic importance of maintaining a firm and coherent system of immigration control.”

Decision

I remake the decision by substituting a decision that the appeal is dismissed on immigration and on human rights grounds.

No anonymity direction is made.

Signed

Date 29.10.2014

Judge GA Black

Deputy Judge of the Upper Tribunal

TO THE RESPONDENT FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 29.10.2014

Judge GA Black

Deputy Judge of the Upper Tribunal