



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

Appeal Number: IA/37357/2013

THE IMMIGRATION ACTS

**Heard at Glasgow
on 23 April 2014**

**Determination issued
On 24th April 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VALERIE ANNA ISABEL FERNANDEZ DUNCAN

Respondent

For the Appellant: Mr D Duheric, Solicitor

For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

No anonymity order requested or made.

DETERMINATION AND REASONS

- 1) This determination refers to parties as they were in the First-tier Tribunal.
- 2) The appellant is a citizen of Mexico, born on 13 August 1987. She came to the UK in 2011 (apparently on a visit visa) with her sister and her mother. Her mother is British by descent. After 6 months, the appellant and her sister returned to Mexico. Her sister and her father applied to enter the UK on settlement visas. The appellant returned to the UK on 15 February 2012

on a Tier 4 General visa. The applications by her sister and father were granted in September 2012, and they joined the appellant and her mother in the UK.

- 3) By application dated 29 January 2013 the appellant sought to remain with her family under paragraph 276ADE of the Rules, based upon her private life (page 9 of her application) but relying also upon her family circumstances (page 18).
- 4) The respondent refused the application for reasons explained in a letter dated 28 August 2013. She could not meet the requirements of Rule 276ADE (iii), (iv), (v) and (vi). In terms of sub-paragraph (vi), she had spent 24 years in her home country and had not lost her ties there. The respondent did not find exceptional circumstances in relation to Article 8. While it was acknowledged that family life existed among the appellant, her parents and younger sister, the respondent was “not satisfied that the relationship between parents and adult children and between adult siblings is strong enough to engage Article 8.”
- 5) I observe that the reference to a relationship between adult siblings is incorrect. The appellant’s sister will not attain majority until 20 May 2015.
- 6) The appellant’s first ground of appeal to the First-tier Tribunal was that she had no ties with her home country, but (no doubt wisely) that does not appear to have been pursued. In an additional ground, the appellant said that the interference with her family and private life in the UK would be disproportionate.
- 7) First-tier Tribunal Judge Agnew allowed the appeal by determination promulgated on 21 January 2014. At paragraph 10 the judge said that there were “extremely compelling circumstances” in relation to Article 8. She referred to *Razgar* [2004] UKHL 27 and to *Huang* [2007] UKHL 11, and went on:
 12. The appellant is extremely close to her [younger] sister ... as well as her parents. The family decided to leave Mexico because of the dangers they felt to exist there, particularly for the sisters. They also wanted to join the extensive family network they have in Scotland. The appellant’s sister is at school studying for her highers. I accept her evidence that it would have a devastating effect on her if she were separated from her sister, but more so at this critical stage in her life. There are various family members in Scotland and some of these have written letters of support ... The family do not have family members in Mexico with whom they have any contact. The appellant would therefore be returning on her own without family support. She is 26 years old and probably could manage an existence in Mexico where she has spent most of her life. However, I accept the evidence of her parents that they will not return to Mexico and therefore a serious family rupture would take place if the appellant were forced to return ... I must bear in mind not only the serious detrimental effect this forced separation would have on the appellant, but also on all the family members.
 13. Whilst bearing in mind it is the respondent’s duty to maintain a firm and fair immigration system ... I find the consequences of the respondent’s decision, given the history and circumstances of this particular appellant’s case and her

family, wholly disproportionate and a breach of the appellant's rights under Article 8 of the ECHR.

8) These are the SSHD's grounds of appeal to the Upper Tribunal:

Failing to give reasons or adequate reasons for findings on material matters

- 1 ... the Tribunal has erred in law in its approach to the Article 8 assessment in this case.
- 2 *MF Nigeria* [2013] EWCA Civ 1192 confirms that the Immigration Rules are a complete code that forms the starting point for the decision-maker. Any Article 8 assessment should only be made after consideration under these Rules. That was not done in this case ... the Tribunal erred in law by not having regard to the Rules and ... the subsequent proportionality assessment is unsustainable because of this omission.
- 3 Furthermore, it was made clear in *Gulshan* [2013] UKUT 00640 (IAC) that the Article 8 assessment shall only be carried out when there are compelling circumstances not recognised by these Rules. In this case the Tribunal did not identify such compelling circumstances and its findings are therefore unsustainable.
- 4 *Gulshan* also makes clear that at this stage an appeal should only be allowed where there are exceptional circumstances. *Nagre* [2013] EWHC 720 Admin endorsed the Secretary of State's guidance on the meaning of exceptional circumstances, namely ones where refusal would lead to an unjustifiably harsh outcome. In this case the Tribunal has not followed this approach and thereby has erred.
- 5 ... the Tribunal has failed to provide adequate reasons for their findings at paragraph 12 that the appellant's circumstances are extremely compelling to make her removal disproportionate ... the appellant is not dependent upon her family here beyond normal emotional ties and she would be able to remain in contact with them via modern methods of communication and via visits ... the appellant is fully capable of living an independent life in Mexico where she has spent the majority of her life.
- 6 ... had the Tribunal taken these issues into consideration they would have found that the decision to remove is proportionate.

9) Mr Mullen submitted that the only reason given was that the appellant was very close to her sister, and that did not amount to a compelling case outside the Rules. The appellant is aged 26 and in good health. The judge accepted that she could manage in Mexico, where she has spent 24 of her 26 years. There was no evidence that her absence would be significantly to the detriment of her younger sister, for example by affecting her academic performance. The judge did not deal with the point in the refusal decision that there were here no more than normal emotional ties, a reference to the test in *Kugathas* [2003] EWCA Civ which the judge should have applied. No doubt the family members would all be upset by the separation which would come about, but absent some extraordinary feature the separation of a 26 year old adult from a family unit including a minor sibling did not merit consideration outside the rules. The determination should be reversed.

- 10) Mr Duheric said that the respondent had not been represented in the First-tier Tribunal, and so the arguments now put had not been developed. This was an attempt to re-open the first hearing, rather than to show error of law. The point about “no more than normal emotional ties” was made in the refusal letter but not reflected in the grant of permission to appeal to the Upper Tribunal. The SSHD’s grounds submitted that the appellant was “fully capable of living an independent life in Mexico” but that did not reflect the terms of the judge’s finding, which was that she “probably could manage an existence”. Those were two very different levels. The judge had taken an appropriate route to her conclusion. She said at paragraph 10 that she reached her conclusion on all the evidence, which meant that she had considered all of the 64 pages of the appellant’s bundle. Her conclusion at paragraph 13 was reached “given the history and circumstances”. She did not have to specifically mention all the favourable features of the appellant’s case, which included her having a grandfather who chose to fight for the United Kingdom in the Second World War. The reasons given, directly and indirectly, entitled the judge to allow the appeal under Article 8. The determination should stand.
- 11) Mr Mullen said in reply that the absence of a Presenting Officer in the First-tier Tribunal was of no relevance, and that the judge had taken the wrong starting point. She had not started from the undoubted position that the appellant’s case fell well short of what the Rules require. All she pointed to as a matter of fact was a separation of an adult from parents and a minor sibling, which was not in any way an unusual effect of the Rules. She used the expressions “devastating” and “extremely compelling circumstances” but that was no substitute for reasons.
- 12) I permitted Mr Duheric a further reply. He said that the circumstances were clearly compassionate, and while one judge might differ from another on how strong they were, it was within the judge’s scope to find as she did, and the respondent’s case now amounted only to disagreement.
- 13) I reserved my determination.
- 14) *Nagre* was a judicial review. The report indicates that only if there may be arguably good grounds for granting leave to remain outside the Rules is it necessary to go on to consider whether there are compelling circumstances not sufficiently recognised under them.
- 15) As well as the cases referred to by the respondent, I have considered *MS* [2013] CSIH 52 (also a judicial review, not an appeal). The Court agreed with *Nagre*, saying at paragraph 26:

It seems to us that the new Rules are likely to deal adequately with the great majority of cases where the Article 8 right to private or family life is put in issue. In that event, there is no need to go on to consider Article 8 separately, using the type of analysis set out in *Razgar*.

- 16) The Court did not approve the test of exceptionality for cases which might need to be considered outwith the Rules. Expressing its conclusions at paragraph 30, the Court said:

Before it is necessary to embark on that second stage exercise, however, the application for leave to enter or remain must demonstrate a good arguable case that leave should be granted outside the Rules: that a distinct assessment of proportionality should be made to determine whether removal would infringe the applicant's Article 8 rights. If that is not demonstrated, it can be assumed that the applicant's Article 8 rights will be adequately dealt with by applying the new Rules. Finally, the test of exceptionality should not be used any longer; instead, decision makers should focus on the question of whether the applicant has shown a good arguable case that his or her application should be dealt with outside the Rules.

- 17) In *Gulshan* the Upper Tribunal digested the position derived from case law to date to the following effect. A judge should firstly address the Article 8 aspects of a case through the Rules, and only if there were arguably good grounds for granting leave to remain outside the Rules was it necessary for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.

- 18) The absence of a Presenting Officer in the First-tier Tribunal has no bearing on whether the determination errs in law.

- 19) I think the judge did err by failing to consider whether there were more than normal emotional ties, so as to constitute family life, and that the point is clearly raised by the grounds on which permission to appeal to the Upper Tribunal was granted. However, I do not think it is necessarily one which rebounds in favour of the SSHD. It seems implicit in the determination that the judge thought that the state of relations amounted to family rather than private life. Although the appellant is 8 years into adulthood, she is single and childless and has essentially remained with her family of birth. Whether to judge this state of affairs to amount to her family rather than her private life is in the end a question of fact. In my opinion, a judge might well find this to be family life. The choice of expression makes little if any difference if the case reaches a final balancing exercise, because the facts remain the same.

- 20) On the question whether the judge gave adequate reasons for finding arguably good reasons to go outside the rules, and for finding compelling circumstances not sufficiently recognised under the rules, I prefer the submissions for the respondent. The judge has used the expressions derived from the case law for going outside the rules, but she has not explained why they apply to the facts. The separation of a single adult from her closest relatives may be unfortunate for them all, but such an outcome is routinely inherent in the scheme established by the Rules. There is no overriding right under Article 8 for adults not otherwise entitled to be in the UK to live with their closest relatives. The appellant's sister will be upset, but the expression "a devastating effect" is not justified by the evidence

and is overstated. It is commonplace to have an adult sibling living outside the family home, even in another continent.

- 21) In my opinion, there is nothing in the determination (or in the evidence) to justify a finding that there was a good arguable case to consider outside the Rules; and even if the case were to pass that stage, there is nothing to justify a finding of compelling circumstances not recognised under the Rules.
- 22) The determination of the First-tier Tribunal is **set aside**. The appellant's appeal, as brought to the First-tier Tribunal, is **dismissed**.

A handwritten signature in black ink, reading "Hugh Maclemon". The signature is written in a cursive style with a large, stylized initial 'H'.

24 April 2014
Judge of the Upper Tribunal