



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/46107/2013

THE IMMIGRATION ACTS

Heard at : Field House
On : 15 July 2014

Determination Promulgated
On: 8 August 2014

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AYE AYE WIN

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer

For the Respondent: Ms J Heybroek, instructed by Lloyds PR Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (SSHD) against the decision of the First-tier Tribunal allowing Ms Win's appeal against the respondent's decision to remove her from the United Kingdom following the refusal of her application for leave to remain on grounds of long residence.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Ms Win as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Myanmar born on 5 June 1976. She first entered the United Kingdom on 12 October 2001 with leave to enter as a student until 20 November 2002 and was subsequently granted further periods of leave as a student, a participant of the International Graduates Scheme and a Tier 1 Post-Study Migrant until 2 July 2010. On 2 July 2010 she applied for further leave to remain as a Tier 1 General Migrant but her application was refused on 27 July 2010. Her appeal against the decision was dismissed on 23 December 2010, on 13 April 2011 permission to appeal to the Upper Tribunal was refused in the First-tier Tribunal and, following a further application to the Upper Tribunal for permission to appeal, permission was refused on 14 July 2011.

4. On 22 August 2013 the appellant applied for indefinite leave to remain on the basis of ten years' lawful residence. In her application it was stated that she did not receive the refusal of permission to appeal to the Upper Tribunal until 15 April 2013 as it was incorrectly served on her. She had spent nearly 12 years in the United Kingdom by the time she received the decision. The respondent was requested to disregard the short period of overstaying from 28 days following the receipt of the Upper Tribunal's decision on 15 April 2013. It was submitted that the appellant had established a family and private life in the United Kingdom. She was in a relationship with a person with permanent residence in the United Kingdom and her employer was happy to reinstate her employment.

5. The respondent refused the appellant's application on 14 October 2013 and a decision was made the same day for her removal to Myanmar. In refusing her application the respondent considered that she was unable to meet the criteria in Appendix FM as her partner had only discretionary leave until 22 February 2015 and was currently in Myanmar and she did not have any children. The respondent considered that the appellant was unable to meet the requirements of paragraph 276ADE. She had not had valid leave since the expiry of her leave to remain as a Tier 1 Post-Study Migrant on 2 July 2010 and it was considered reasonable for her to continue her private life in Myanmar.

6. The appellant appealed against that decision and her appeal was heard by First-tier Tribunal Judge Colvin on 24 March 2014. It was conceded before the judge on behalf of the appellant that she could not meet the ten year long residency rule and that the appeal was pursued only on Article 8 grounds. It was accepted that she could not meet the requirements under Appendix FM or paragraph 276ADE. However it was submitted on behalf of the appellant that there was a level of exceptionality in her case. The judge noted that she had been in the United Kingdom for 12½ years, of which nine had been with valid leave, and that the delay in making the current application was partly due to the decision of the Upper Tribunal refusing permission to appeal against the First-tier Tribunal's decision in her Tier 1 application having been wrongly served. She concluded that there were compelling circumstances not sufficiently recognised under the new rules and on that basis she allowed the appeal on Article 8 human rights grounds.

7. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had failed to follow the approach in Nagre, R (on the application

of) v Secretary of State for the Home Department [2013] EWHC 720 and Gulshan (Article 8 - new Rules - correct approach) Pakistan [2013] UKUT 640 and had failed to provide adequate reasons why the appellant's circumstances were compelling or exceptional.

8. Permission to appeal was granted on 6 May 2014.

Appeal Hearing

9. The appeal came before me on 15 July 2014.

10. After hearing submissions from both parties I advised them that in my view the judge's decision contained material errors of law such that it could not stand. Although the judge was clearly aware of the body of recent jurisprudence relevant to Article 8 and the new immigration rules, referring in particular to Shahzad (Art 8: legitimate aim) Pakistan [2014] UKUT 85 and the endorsement in that case to the approach taken in Gulshan, she did not appear to follow that approach. I do not agree with Ms Heybroek's submission that the decision in MM (Lebanon) & Ors, R (on the application of) v Secretary of State for the Home Department & Anor [2014] EWCA Civ 985 dispensed with the requirement to follow that approach. The judge was clearly aware of the need for there to be arguably good grounds for granting leave outside the rules and for there to be compelling circumstances not sufficiently recognised under the rules. However the factors upon which she relied at paragraph 22 of her determination as amounting to compelling circumstances amounted to little more than the appellant's length of residence, which was already recognised by the rules, and the fact that she fell short of ten years' continuous residence by only a short period, which was a "near miss" consideration. It is clear that she felt sympathetic towards the appellant and that she let her sympathy cloud her judgment with respect to the correct approach to be taken to the evidence, reaching conclusions that were, as Mr Jarvis submitted, clearly at odds with the principles set out in Patel & Ors v Secretary of State for the Home Department [2013] UKSC 72 and Nasim and others (Article 8) Pakistan [2014] UKUT 25.

11. Accordingly I set aside the judge's decision and sought the views of the parties with respect to re-making the decision. On the basis of Ms Heybroek's confirmation that there was no further evidence to be produced in regard to the appellant's private life and that there was no change in circumstances since the First-tier Tribunal heard the appeal I considered there to be no reason why I could not re-make the decision myself with the benefit of further submissions from both parties.

12. Ms Heybroek submitted that the appellant had had a legitimate expectation of being able to stay in the United Kingdom when she was granted leave as a Tier 1 worker. She relied upon paragraph 33(ii) of the judgment of the Administrative Court in Nagre in submitting that there were good grounds justifying the grant of leave to the appellant outside the rules, given the strength of her ties to the United Kingdom and the roots she had put down here, which outweighed the ties she retained to Myanmar. She submitted that those ties consisted of her length of residence here, her social and community ties, her involvement with the Buddhist temple and the friendships she had formed here. She had

not lived in Myanmar since 2001 and had made only three short visits to that country since then. In response to my enquiry, Ms Heybroek confirmed that the appellant was no longer in a relationship.

13. Mr Jarvis submitted that the issue of legitimate expectation was dealt with in Nasim. He had nothing to add to the submissions previously made in regard to the error of law.

Consideration and Findings

14. It is accepted that the appellant cannot meet the immigration rules, either in terms of ten years' lawful residence or family and private life under Appendix FM and paragraph 276ADE. Accordingly, pursuant to the principles in Shahzad and Gulshan, unless there are arguably good grounds for granting leave outside the rules there is nothing further to consider in terms of Article 8.

15. I do not consider that such arguably good grounds exist in the appellant's case. The legitimate expectation argument in relation to a previous grant of Tier 1 leave was comprehensively rejected in Nasim. The Court of Appeal in Miah & Ors v Secretary of State for the Home Department [2012] EWCA Civ 261 rejected the notion of a "near-miss" and accordingly nothing material arises from the shortfall in the appellant's period of ten years' lawful residence. Her length of residence is addressed within the terms of the rules as is the question of ties to her country of origin. Whilst the appellant has been in the United Kingdom for over 12½ years, the past four years have been without any leave. She relies upon the three year delay caused by the Tribunal's error in notifying her of the decision to refuse to grant permission to appeal to the Upper Tribunal. However I find merit in Mr Jarvis' submission that she was aware that her application for further leave had been refused, that her appeal against that decision had been dismissed and that her application to the First-tier Tribunal for permission to appeal to the Upper Tribunal had been refused. No explanation is given as to why it took the appellant so long to chase up the subsequent application to the Upper Tribunal for permission to appeal and it is relevant to note from the decisions of 13 April 2011 and 14 July 2011 that there was no merit in any event in her grounds of appeal.

16. Ms Heybroek relied upon paragraph 33(ii) of the judgment in Nagre which provided for circumstances where the ties to the United Kingdom and the roots established here were so strong as to manifestly outweigh the ties to the country of origin even in cases of adults who had resided in the United Kingdom for less than 20 years and who had retained some ties to their country. However I do not find that that is the case with the appellant. She has no family ties to the United Kingdom. Her relationship with her partner has ended. Although she claims to have an offer of employment from her previous employer if she was granted leave to remain there is no evidence to that effect. She is not currently employed. The evidence of her ties to the United Kingdom is extremely thin and consists of no more than details of a meditation programme followed at a Buddhist temple and her own, unsupported, statement as to relationships with friends and colleagues. Her ties to Myanmar, however, consist of close family ties, namely her parents and two married sisters and their children, as well as cultural and linguistic ties. Although she

claims to have only visited Myanmar three times since leaving there in 2001, it is clear that she retains significant ties to that country. Accordingly it seems to me that there are no arguably good grounds for granting leave outside the rules and there is therefore nothing further to consider for the purposes of Article 8.

17. However, for the sake of completeness, going on to consider whether compelling circumstances exist outside the rules I find that there are none, for the same reasons as considered above. Whilst Judge Colvin referred to the appellant being well integrated into the United Kingdom there is, as I have said, very limited evidence to support such a view. The other factors relied upon by the appellant, and endorsed by the judge, such as the appellant's good character and residence without breaching the immigration rules, consist of no more than those considered in Nasim as not carrying weight in enhancing a person's human rights.

18. In all the circumstances I find that the appellant's removal from the United Kingdom would not be disproportionate to the legitimate aim of maintaining an effective immigration control and would not be in breach of Article 8 of the ECHR.

DECISION

19. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside. I re-make the decision by dismissing Ms Win's appeal on all grounds.

Signed



Upper Tribunal Judge Kebede