



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

Appeal Number: IA/26048/2013

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)

On 19th June 2014

Determination

Promulgated

On 3rd July 2014

Before

UPPER TRIBUNAL JUDGE POOLE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

**DIANNA MAE TURINGAN YUMANG
(Anonymity direction not made)**

Appellant

Respondent

Representation:

For the Respondent: Mr S Jeshani, Counsel

For the Appellant: Mr David Mills, Home Office Presenting Officer

DETERMINATION AND REASONS

1. In this determination I will refer to the parties in the same way that they were referred to before the First-Tier Tribunal.
2. The appellant is a female citizen of the Philippines born 10 April 1987. She entered the United Kingdom as a visitor in August 2009 and was subsequently granted further leave to remain as a Tier 4 (General) Student until January 2013. In November 2012 the appellant applied for

variation of her leave to remain and on 19 June 2013 a decision was made to refuse the appellant's application and to remove her by way of directions under Section 47 of Immigration Asylum & Nationality Act 2006. The appellant appealed that decision.

3. The appellant's appeal came before Judge of the First-Tier Tribunal James on 27 November 2013. The appellant was represented by Mr Jeshani. The Home Office was also represented. Paragraph 12 of the judge's determination records that Mr Jeshani, on behalf of the appellant, confirmed that she could not meet the requirements of the Immigration Rules in terms of family or private life and that consequently the appeal before Judge James related only to Article 8 ECHR. For reasons set out in the determination the judge dismissed the appeal under the Immigration Rules but allowed the appeal "on human rights grounds".
4. Paragraph 40 of the judge's determination records "I regard a proportionate implementation of the decision would be for the respondent to vary the appellants leave by a period of 3 years to enable her to remain in the United Kingdom on a discretionary basis outside the Immigration Rules".
5. The respondent then sought leave to appeal. There is one allegation, namely "making a material misdirection of law". This allegation is explained by way of four paragraphs. It is suggested that allowing an Article 8 appeal should only happen where an appellants circumstances are found to be "exceptional or very compelling". It is suggested that this appellants circumstances do not amount to exceptional or very compelling. The appellant has family in the Philippines and could rely upon financial assistance from her parents (presently in the UK) and that any right of the appellant must be weighed against the public interest.
6. In granting leave to appeal another Judge of the First-Tier Tribunal gave the following as reasons:
 - "1. The respondent seeks permission to appeal, in time, against a decision of the First-Tier Tribunal Judge James who, in a determination promulgated on 29 November 2013 allowed the appellant's appeal against the respondent's decision to refuse to vary leave. The appeal under the Immigration Rules was dismissed but the appeal was allowed under Article 8 ECHR.
 2. The grounds argue that the judge erred in his assessment of the evidence in support of the Article 8 appeal and in his analysis of the law.
 3. Given the Tribunal's decision in **Gulshan (Article 8 - New Rules - Correct Approach) [2013] UKUT 00640** it is arguable that the judge misdirected himself as to the correct approach to Article 8.
7. On behalf of the appellant Mr Jeshani drafted a response under Rule 24 of the Upper Tribunal Procedure Rules. That response contains 14

paragraphs wherein he argues that the judge was correct in her approach and that her decision should stand. In particular Mr Jeshani relies upon the case of **Patel & Others v Secretary of State for the Home Department [2013] UKSC 72** and the principles set out in **Huang v Secretary of State for the Home Department [2007] UKHL 11**. Mr Jeshani (at paragraph 7) refers to **MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192**.

8. At paragraph 8 of the response Mr Jeshani noted the new Immigration Rules with effect from 9 July 2012 but highlighted the primary legislation contained in the Human Rights Act 1998 and the Nationality Immigration & Asylum Act 2002.
9. At paragraph 11 Mr Jeshani noted that the judge had not referred to **Gulshan (Article 8 - New Rules - Correct Approach) [2013] UKUT 00640** he argues that the judge would have reached the same conclusion and that as a result she did not make any material errors of law in the determination.
10. At the commencement of the hearing before me Mr Jeshani confirmed that his client was present and that she understood the nature of the proceedings. An Interpreter was not required. I enquired as to the existence of a Rule 24 response. No such document was on the court file. Mr Jeshani supplied me with a copy the contents of which had been referred to above.
11. Each representative then made a submission. A note of those submissions is contained within the record of proceedings but I will summarise them as follows.
12. Mr Mills emphasised that there was a difference with regard to the application of Article 8 under a case decided under the "New Rules". In this case the rules could not be met and the respondent now contends that the approach set out in paragraph 13 was not the correct approach. There was no longer a "free wheeling" approach. The new rules encompassed most situations/cases. It was conceded that there will be cases falling outside the rules but one can only go outside the rules when compelling or exceptional circumstances exist.
13. Mr Mills suggested that this was a prime case of a judge allowing an appeal under Article 8 in a situation not open to her. The appellant was 26 years of age and wishes to remain with her parents. There has been financial dependency upon them but there is simply a normal relationship that exists. There is nothing compelling. Mr Mills referred to the Rule 24 response and the case quoted of **Patel**. He pointed out that that was not a case involving the "New Rules". There was nothing more than normal ties between the appellant and her parents and Mr Mills referred to the Court of Appeal case of **Kugathas**. He referred me to paragraph 38 of the determination which he said contained an astonishing statement.

The judge had said that it was hard to conclude that the decision in this case was necessary in a democratic society nor could it be justified. The judge had put too much weight on the appellants skills. The appellant's occupation was not on the "shortage list". Mr Mills submitted that I should come to the conclusion that the judge was wrong and set the decision aside.

14. Mr Jeshani referred to the Rule 24 response. He pointed out that at the time of the hearing before Judge James the case of **Gulshan** had not been promulgated so how could she follow it? He accepted the case of **Patel** did not look at a case under the "New Rules" but whether it was old rules or new rules they were only rules. No statutes had been repealed in particular Section 84, no test had been put forward for "exceptional circumstances". Mr Jeshani did not accept that **Gulshan** was just stating the law. In this case Judge James had taken great care. There were emotional ties and the judge found the witnesses credible. He referred to paragraph 11 of the response and also referred to the Scottish case of **MMM** and in particular paragraph 35 where Lady Scott found that a failure to comply with the rules remained the starting point where any Article 8 enquiry. The test should be whether or not there was a realistic prospect of success and in this case the decision of Judge James should stand as there was no material error of law.
15. In response Mr Mills conceded that Section 84 still remained but it should be rare case that succeeds under Article 8. This was a far from compelling case and the judge had not engaged with a proper examination.
16. Mr Jeshani concluded by saying that the judge had properly adopted the Five Stage Razgar Test.
17. At this stage I announced my decision that I found a material error of law contained within the judge's determination and that as a result the decision must be set aside and remade.
18. I would emphasise at this stage that Judge James cannot be criticised in any way for failing to take into account the case of **Gulshan**. That case had not been promulgated at the time of Judge James decision. However **Gulshan** cannot be ignored in this case. **Gulshan** did not change the law but it did explain the law in the way that cases such as this must be dealt with where a claim is made in respect of Article 8 ECHR and the Immigration Rules.
19. The judge was required to consider the merits of the human rights claim in accordance with the approach set out by the Court of Appeal in **MF (Nigeria) [2013] EWCA Civ 1192**, the High Court in **Nagre [2013] EWHC 720 (Admin)** and subsequently by the Upper Tribunal in **Gulshan**, as confirmed by **Shahzad (Article 8: Legitimate Claim) [2014] UKUT 00085 (IAC)**. These judgments have made it clear that

the question of proportionality must be looked at in the context of the Immigration Rules with no need to go onto a specific assessment under Article 8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring that course to be taken. This approach has now been further confirmed by the Court of Appeal in the more recent case of **Haleemundeen v Secretary of State for the Home Department [2014] EWCA Civ 558**.

20. Again it is the case that Judge James did not have the benefit of these cases at the time of the hearing before her. She did correctly direct herself so far as **MF (Nigeria)** was concerned and she adopted the five step approach as set out in **Razgar** and noted the question of ties as set out in **Kugathas**. However the judge was conscious that this was a case under the new rules and I consider that she erred in failing to properly take into account what has been described as the Article 8 consideration contained within the rules themselves. In doing so she has not explained what she considered to be the exceptional elements so as to take the case into the area for specific assessment under Art 8. I also conclude that the judge fell into error in her assessment of the public interest element Mr Mills was correct in identifying the comments contained in paragraph 38 of the determination.
21. For these reasons I conclude that the judge fell into error in the way she dealt with this case and that such errors were material to the eventual outcome. The decision therefore falls to be set aside.
22. In remaking the decision I took into account the submissions made by the representatives following the announcement of my decision to set aside the judge's determination. A note of those submissions is contained in the record of proceedings but in summary the following submissions were made.
23. Mr Mills said there was no challenge to the strong connections the appellant had with her parents but it was disputed that that would engage Article 8. It is not disputed that the appellant has family in the United Kingdom but she also has other family in the Philippines. It was acknowledged that the appellant could get employment in the United Kingdom but it is disputed that she could not get employment in the Philippines. There is no reason to suppose that the parents could not provide financial support in the future. There was nothing compelling within the appellant's case to find Article 8 is engaged outside the rules.
24. Mr Jeshani adopted his skeleton argument before Judge James. I note that document runs to some 29 paragraphs. It sets out the issues and the law and emphasises the family life enjoyed by the appellant together with private life (paragraph 24) and at paragraphs 17 and 25 Mr Jeshani sets out his submissions on proportionality.

25. Before me Mr Jeshani argued there were compelling reasons to go outside the rules as in this case it would result in unduly harsh consequences for the appellant. The findings of the First-Tier Judge could be preserved and he referred me to witness statements contained in the original bundle. He submitted there were far more than normal emotional ties. The appellant had no siblings nor grandparents in the Philippines and there was no one there that she could depend upon. It would not be reasonable to expect her to return. The appellant could have expected to continue in the United Kingdom with her career but the rules had changed and there was no longer an urgent need for people in her profession.
26. At this stage I indicated that I would reserve my determination.
27. In remaking this decision I have noted the date of the original respondent's decision. The application fell to be considered under the "New" Immigration Rules in force since July 2012. I also note that it is not an issue that the appellant could not meet the requirements of those rules especially in terms of family or private life. This was accepted in the appeal before Judge James and recorded at paragraph 12 of her determination.
28. The required consideration that I must give to the appellant's case is summarised in paragraph 19 above.
29. In short I have to consider whether there are particular compelling or exceptional circumstances in the appellant's case before I can go to a specific assessment under Article 8 ECHR. Whilst I note the comments made with regard to the Supreme Court case of **Patel** I am conscious that that was decided without reference to the new rules and for that reason I restrict myself with the requirement set out paragraph 19 above.
30. I have considered the statements and other documents that were set out in the appellant's original bundle.
31. The appellant is 26 years of age and spent 22 years of that time in the Philippines. She entered the United Kingdom as a visitor and then went on to become a student. She claims to be dependent upon her parents who are British citizens. That dependency involves the simple and normal emotional ties between an adult child and her parents. There is no evidence before me that those emotional ties exceed the normal. It is correct that the appellant has been financially dependent upon her parents but again I find that normal bearing in mind that they have assisted her financially during her time as a student and in work training. That would be normal for any parent in such a situation assuming that they have the financial means to do so. In short those ties do not exceed the normal.

32. Nothing has been placed before me that suggests that the appellant is under any form of disability or that she needs any form of special assistance.
33. The appellant has spent the majority of her life in the Philippines. She did have grandparents but sadly that is no longer the case but there is reference to other relatives in that country.
34. The appellant is in possession of a university degree. It is argued by her that she would not find it easy to gain employment in her chosen field in the Philippines. I do not necessarily accept that contention. The appellant is clearly educated and has some experience in healthcare and that must put her in a better position than others when comes to seeking employment.
35. The appellant's parents have assisted her financially and there is no reason why that could not continue if it were necessary even if the appellant is living in the Philippines. It is indeed arguable that any financial contribution made by the parents would be worth more in real terms in the Philippines than it would be in the United Kingdom.
36. I acknowledge that I must also, to an extent, consider the position of the appellant's parents but there is nothing to stop them visiting the appellant in the Philippines or continuing to communicate by modern means.
37. The all important question before me is whether there any particular compelling or exceptional circumstances requiring a specific assessment under Article 8. In this case the answer is no.
38. The appellant's appeal is therefore dismissed.
39. By reasons of this decision I reverse the fee award made by the First-Tier Tribunal Judge.

Signed

Date 1/7/14

Upper Tribunal Judge Poole