



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

Appeal Number: IA/45095/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 5<sup>th</sup> September 2014**

**Determination  
Promulgated**

**On 26<sup>th</sup> September 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS**

**Between**

**MRS UMME SHABNAZ ADAM  
(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr R Subramanian, Legal Representative  
For the Respondent: Ms A Everett, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The Appellant is a citizen of Mauritius born on 30<sup>th</sup> January 1988. Her immigration history is set out in considerable detail in the Home Office letter of 8<sup>th</sup> October 2013. By a Notice of Refusal dated 8<sup>th</sup> October 2013 the client's reconsidered application under Article 8 of the European Convention of Human Rights outside the Immigration Rules and under the Immigration Rules put in place on 9<sup>th</sup> July 2012 was refused. The Appellant lodged Grounds of Appeal to the First-tier Tribunal and the appeal came before First-tier Tribunal Judge Oakley sitting at Hatton Cross on 23<sup>rd</sup> June

2014. In a determination promulgated on 27<sup>th</sup> June 2014 the Appellant's appeal was dismissed under the Immigration Rules but was allowed pursuant to Article 8 of the 1950 Convention.

2. The Secretary of State lodged Grounds of Appeal to the Upper Tribunal on 4<sup>th</sup> July 2014. Those grounds contended:
  - (i) that the judge had failed to place any, or adequate, weight upon the Appellant's precarious immigration status during her relationship to her husband; and
  - (ii) that the judge had erred in law by failing to accord any, or any adequate, weight to the Appellant's significant period of overstay in the UK as a factor relating to the public interest in immigration control.
3. On 16<sup>th</sup> July 2014 Judge of the First-tier Tribunal Reid granted permission to appeal. In granting permission Judge Reid considered that it was arguable that the judge's assessment lacked reasoning on proportionality and public interest with reference to the length of time which the Appellant had already overstayed when she met her husband and the Appellant's immigration status during the entirety of the family life built with her husband.
4. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Secretary of State appears by her Home Office Presenting Officer Ms Everett. The Appellant appears by her instructed legal representative Mr Subramanian. The appeal is by the Secretary of State and for the purpose of continuity within legal proceedings the Secretary of State continues to be referred to herein as the Respondent and Mrs Adam as the Appellant.

### **Submissions/Discussions**

5. Ms Everett indicates that she relies on the Grounds of Appeal. She acknowledges that Judge Oakley has at paragraph 33 of his determination considered the fact that the Appellant is an overstayer but submits that he has placed undue weight on the failure of the Secretary of State to remove the Appellant. She accepts that there is no misapprehension created of the Appellant's immigration status but submits that it is not clear how much weight the judge has given to this and the judge should have given more weight to the fact that the Appellant did not have leave.
6. In response to the Appellant's solicitor's skeleton argument it is submitted that the Appellant could not in any event have relied upon the old Rules as she could not switch to an in-country appeal from an out-of-country appeal and that nothing further is particularly advanced by the skeleton. She asked me to find that there is a material error of law in Judge Oakley's

determination, to set it aside and to remake the decision dismissing the appeal.

7. Mr Subramanian relies on the skeleton argument and submits that Judge Oakley has considered all the circumstances and the effect of removal and has found that the Appellant's spouse was born here and has no connection with Mauritius. He reminds me of the dicta in *Chikwamba [2008] UKHL 40* whereby the likelihood of a return by entry clearance should not be ordinarily treated as a factor rendering removal proportionate; "if anything, the reverse is the case". He points out that the delay from the Secretary of State was back in 2011 and that it is only now that the case has been litigated. He submits that it would be unduly harsh to require the Appellant to return and that the Appellant's spouse has no contact nor connection with Mauritius and he relies on the authority of *Beoku-Betts v the Secretary of State for the Home Department [2008] UKHL 39*.

## **The Law**

8. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
9. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

## **Findings**

10. I start by reminding myself that I am required to determine whether there is a material error of law in the decision of the First-tier Tribunal. I address it that way because some of the submissions of Mr Subramanian particularly with regard to his analysis under *Chikwamba* and *Beoku-Betts* are effectively asking me to re-adjudicate matters. The contention of the

Secretary of State is that the judge has erred in the amount of weight given to the Appellant's immigration status during the relationship with her husband and her period of overstaying as a factor relating to the public interest in immigration control. The fact remains that the judge has given weight to these factors. In his determination he has drawn conclusions at paragraph 27 that the Appellant's family life has been established in the full knowledge of her unsettled immigration status. He has taken due note of the position regarding the Appellant's family at paragraph 28 and of her husband's status as a British citizen with no knowledge of Mauritius at paragraph 29. He has given due consideration to the authority of *Nagre v SSHD [2013] EWHC 720* and has applied the law as set out at paragraphs 31 and 32. Thereafter he has drawn conclusions which he is entitled to. He has decided that this is one of those rare cases where the Appellant meets the criteria for succeeding outside the Immigration Rules. He has given weight to the factor that no steps have been taken to remove the Appellant by the Respondent from the United Kingdom and the submissions made on behalf of the Secretary of State herein on that factor amount to little more than disagreement. Whether another judge would have given as much weight is a matter of conjecture. It is not however the role of this Tribunal when weight has been given and the decision is not perverse to overturn it.

11. The Tribunal in *Gulshan* made clear and has repeated subsequently in *Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)* at paragraph (31):

*"Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."*

12. The Court of Appeal in *MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985* at paragraph 128 went on to state:

*"Nagre does not add anything to the debate save for the statement that if a particular person is outside the Rule then he has to demonstrate, as a preliminary to a consideration outside the Rule that he has an arguable case that there may be good grounds for granting leave to remain outside the Rules. I cannot see much utility in imposing this further intermediary test. If the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision maker."*

13. In this instant case the relevant decision maker namely the First-tier Tribunal Judge found that the Appellant could demonstrate that there was an arguable case outside the Rules and went on to properly consider it. He provided full and detailed reasons therein at paragraphs 33 to 37 of his determination. They were findings that the judge was entitled to make and the determination consequently discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

### **Decision**

14. The decision of the First-tier Tribunal discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is upheld.
15. The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris