Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14265/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 April 2014	**On 14 April 2014**
	.....

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

SALVACION PINUELA PLANA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Not represented
For the Respondent: Ms A. Holmes, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of the Philippines born 22 September 1976. She first arrived in United Kingdom on 11 December 2010 in possession of entry clearance conferring leave to enter until 21 June 2012. On that date she made an application for leave to remain as a Tier 4 (General) Student Migrant. This application was refused by the respondent on 18 April 2013 and, on the same date, a decision was made to remove the appellant from the United Kingdom pursuant to section 47 of the Immigration Asylum and Nationality Act 2006.

2. The appellant appealed these decisions to the First-tier Tribunal. First-tier Tribunal Judge Lal dismissed the appellant's appeal on all grounds in a determination promulgated on 27 January 2014. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Rintoul in a decision of 13 March 2014. In doing so Judge Rintoul stated as follows:

> "It is not arguable that the judge misdirected himself in law. While the burden is on the respondent to show that the decision to remove is proportionate, it was sufficient for her to state that (as is accepted) the appellant did not meet the requirements of the immigration rules.
>
> It is, however, arguable that the judge erred in stating [11] that there was no evidence of any private life, as she had adduced a witness statement setting out the difficulties she faces. On that basis permission to appeal is granted."

3. When dismissing the appeal Judge Lal observed that the appellant, who did not appear before him having requested that the appeal be determined on the papers, had accepted in her witness statement that she had no valid CAS document. He, therefore, correctly dismissed the appeal brought in relation to the Immigration Rules. This decision has not been the subject of challenge.

4. As to the Article 8 ground, the crux of the First-tier Tribunal's reasoning is as follows:

> "[11] The tribunal is satisfied that any intention to remove the appellant will be an interference with her family life and private life in the UK only to the extent that she clearly does not want to leave the UK by choice. Question (2) above is also perhaps answered in the affirmative. The interference is clearly lawful in that it seeks to maintain effective immigration control, the appellant arrived on a visit visa and this would likewise provide an affirmative answer in respect of question (4) above. The real issue is one of proportionality. The appellant has provided absolutely no evidence as to why removal to the Philippines would be disproportionate to either her family or private life. At its highest she would be returned to her country of origin which she left three years ago. She has provided no evidence of any family life in the UK and has given no evidence as to any private life enjoyed in the UK in any event, other than to say she has her friends here. All the evidence suggests that the appellant is an intelligent and healthy young woman who has spent the majority of her life in the Philippines and who has no doubt improved her situation by coming to the UK for 3 years.
>
> [12] The appellant is 37 years old and has lived in the UK since 2010. She has clearly spent the vast majority of her adult life in the Philippines and the Tribunal has been provided with no information that would establish that removal would be disproportionate. In fact the Tribunal would go as far as to say that the statement that returns the Philippines "would be like going to a strange country" to be wholly misleading. The Tribunal finds that this is a claim wholly without merit."

5. The pleaded grounds, drawn on the appellant's behalf by experienced counsel, submit that the First-tier Tribunal erred in placing the burden on the appellant to prove why her removal from the United Kingdom would be

disproportionate, rather than on the Secretary of State to demonstrate why it would be proportionate. It is further asserted that the First-tier Tribunal erred in failing to take into account the contents of the appellant's witness statement when coming to its conclusions. Neither ground has any merit.

6. As to the former ground, the tribunal correctly directed itself in paragraph 9 of the determination that once the appellant had established that article 8 is engaged the 'burden then shifts to the Respondent to establish that any such interference is not only legitimate but is also necessary and proportionate." In my conclusion there is nothing in the determination thereafter to suggest that the tribunal did not correctly apply such self direction to its considerations. The reference in paragraph 11 of the determination to the appellant having produced no evidence as to why her removal to the Philippines would be 'disproportionate' is not indicative of the tribunal reversing the burden of proof but rather a reflection of the fact that the respondent was entitled to rely on the appellant's failure to meet the requirements of the Immigration Rules as justification for removing her, and that such reliance would be sufficient, absent the appellant providing evidence as to why her removal would be disproportionate in all the circumstances.

7. Turning to the second ground, it is plain that the First-tier Tribunal had in mind the contents of the appellant's witness statement. It identified in paragraph 4 of its determination that it had such evidence before it, and it makes reference to the contents of this statement in paragraphs 6, 11 and 12 of the determination.

8. I have considered the terms of this statement for myself. It runs to 12 paragraphs and provides limited evidence as to the appellant's circumstances in the United Kingdom. In paragraphs 9 and 10 of the statement it is asserted that the appellant regards the United Kingdom as her main home, that she (i) has integrated into United Kingdom society, (ii) has all of her social and economic ties here, (iii) has many friends here, and (iv) could contribute to the United Kingdom's. As to her return to the Philippines, in paragraph 11 of her statement the appellant asserts that this would be like returning to a country she has never been before. The First-tier Tribunal considered and rejected this evidence when coming to its conclusions.

9. It is to be recalled that the appellant requested the appeal be determined on the papers. When viewed through the prism of the limited evidence that was before it, in my conclusion the reasons given by the First-tier Tribunal for dismissing the appeal against the decision of the Secretary of State refusing to vary the appellant's leave are clear and cogent, and its conclusion was not only open to it but was inevitable.

10. Having considered the determination as a whole I find no error in to the appeal brought against the decision refusing to vary the appellant's leave.

11. As identified above, the Secretary of State also made a removal decision in relation to the appellant pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006. In Ahmadi (s.47 decision: validity: Sapkota) [2012] UKUT 00147 the Upper Tribunal held that a removal decision under section 47 could not be made in respect of a person until written notice of the decision to refuse to vary that person's leave to remain had been given to that person, and that the Secretary of State's practice of incorporating both decisions in a single notice was incompatible with the legislation. The Secretary of State's appeal against the Upper Tribunal's decision was dismissed by the Court of Appeal in Secretary of State for the Home Department v Javad Ahmadi [2013] EWCA Civ 512, a decision by which we are, of course, bound. Given that the section 47 removal decision was made prior to 8 May 2013 I conclude that this decision was unlawful. The First-tier Tribunal did not consider this aspect of the appeal and to that extent its determination is flawed by legal error and must be set aside. I re-make the decision on this aspect of the appeal, allowing it.

12. The appeal brought in relation to the decision refusing to vary the appellant's leave is dismissed for the reasons given by the First-tier Tribunal.

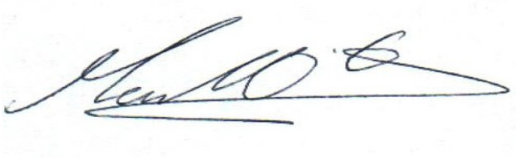
Decision

The determination of the First-tier Tribunal is set aside.

The appellant's appeal against the decision of the Secretary of State refusing to vary her leave is dismissed on all grounds.

The appellant's appeal against the Secretary of State's decision to remove her pursuant to section 47 of the Immigration and Asylum 2006 is allowed for the reasons given in paragraph 10 above.

Signed:



Upper Tribunal Judge O'Connor
Date: 14 April 2014