Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/33822/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On June 13, 2014	**On June 27, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JOSE JR MISOLA DORMIDO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Avery (Home Office Presenting Officer)
For the Respondent: Ms Iqbal, Counsel, instructed by Equalizers Limited

DETERMINATION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department I will refer below to the parties as they were identified at the First-tier Hearing namely the Secretary of State for the Home Department will from hereon be referred to as the respondent and Mr Jose Jr Misola Dormido as the appellant.

2. The appellant, born March 18, 1961, is a citizen of the Phillipines. On April 16, 2012 the appellant lodged form FLR(O) and applied to extend his leave to remain in order to give

himself more time to pass the "Life in the UK test " or to obtain a relevant ESOL with citizenship material qualification.

3. The respondent refused his application on July 24, 2013. The appellant had not applied to remain under any specific Immigration Rule and considered his application under Appendix FM and paragraph 276ADE HC 395. His application was refused under paragraph 322(1) HC 395 and the respondent further stated there was no basis to consider the application outside of the Immigration Rules for article 8 purposes. The same day a decision was taken to refuse to vary his leave to enter or remain and a decision was taken to remove him under Section 47 of the Immigration, Asylum and nationality Act 2006.

4. On August 15, 2013 the appellant appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002.

5. The matter was listed before Judge of the First-tier Tribunal Adio (hereinafter referred to as "the FtTJ") on February 18, 2014 and in a determination promulgated on March 10, 2014 he dismissed the appeal under the Immigration Rules but allowed the appeal under article 8 ECHR.

6. The respondent appealed that decision on March 18, 2014. Permission to appeal was granted by Judge of the First-tier Tribunal Nicholson on April 16, 2014 who found in particular that ground 3 of the respondent's grounds of appeal was arguable. Permission to appeal was given on all grounds.

7. The matter was listed before me on the above date and both the appellant and sponsor were in attendance.

PRELIMINARY ISSUE

8. The appellant had lodged on May 19, 2014 an appeal out of time against the refusal of the appellant's application under the Immigration Rules. I did not have that application in front of me as it seemed the paperwork was at the Hatton Cross Hearing centre.

9. Ms Iqbal indicated at the start of the proceedings that she intended to seek to withdraw that appeal. She accepted it was out of time and whilst there may be good reasons she did not intend to pursue that appeal further.

10. Rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 state:

(1) Subject to paragraph (2), a party may give notice of the withdrawal of its case, or any part of it—

(a) at any time before a hearing to consider the disposal of the proceedings (or, if the Upper Tribunal disposes of the proceedings without a hearing, before that disposal), by sending or delivering to the Upper Tribunal a written notice of withdrawal; or

(b) orally at a hearing.

(2) Notice of withdrawal will not take effect unless the Upper Tribunal consents to the withdrawal except in relation to an application for permission to appeal.

11. In the circumstances, I gave permission for the appellant's cross-appeal to be withdrawn.

12. I am therefore only left with the respondent's appeal.

SUBMISSIONS

13. Mr Avery submitted the FtTJ had totally misunderstood the application before him and his whole approach amounted to an error. The appellant had not applied under the Rules but had applied to extend his stay outside of the Rules. The FtTJ erred by finding the respondent was wrong to deal with the application under the new Immigration Rules because his application was not an application to extend his stay under the Rules but merely an application to allow him to remain to take a test. Consequently, the respondent was right to deal with the matter under appendix FM and paragraph 276ADE and the FtTJ erred by firstly considering the application under the Immigration Rules and secondly by not following the approach set out in Gulshan [2013] UKUT 00640. The FtTJ should not have considered the application under paragraph 284 HC 395 because the appellant's wife did not have settled status at the date of the application. The FtTJ having erred in his initial approach he then erred by considering the application under article 8 without following the Gulshan approach. Even if the FtTJ was entitled to consider the case under article 8 be that under his own approach or by finding it was a case that was arguable to be heard outside appendix FM and paragraph 276ADE the FtTJ failed to have regard to the fact the appellant had not passed his English language test. The Court of Appeal in Bibni and Anor [2013] EWCA Civ 322 confirms the FtTJ must give full consideration to the respondent's public interest policies. The FtTJ failed to have regard to these policies. The grant under article 8 should be set aside.

14. Ms Iqbal submitted that the FtTJ had correctly considered this was a case that fell under the old Rules. The respondent's own IDI's (Chapter 9 Section 3.2 and 9) reiterate that the fact the appellant may not meet the Rules does not mean the respondent should not apply the appropriate Rule and then consider it under article 8. She submitted this is exactly what the FtTJ did and there was nothing wrong with this approach. On the basis this was the correct approach the FtTJ then considered article 8 between paragraphs [14] and [17] of his determination and he had regard to all of the factors in the case. It was open to him to allow the appeal. Alternatively, if the FtTJ should have considered it as suggested by the respondent it is submitted that this was a case that should be considered outside the Rules and the findings made by the FtTJ are sustainable.

15. Both parties agreed that in the event of there being an error in law I would be able to conclude the case without taking any further oral evidence.

ERROR OF LAW ASSESSMENT

16. The appellant's immigration history reveals that he first arrived in the United Kingdom with his son (aged 8) on October 13, 2010 as a work permit dependant. His leave was valid until May 7, 2012. His wife had come to the United Kingdom as a work permit holder in August 2007. She had submitted an application for indefinite leave to remain on behalf of herself and her son.

17. The appellant's application was accompanied by a letter from his representatives dated April 13, 2012 that stated-

> "His wife … and their child … are currently applying for indefinite leave to remain in the United Kingdom and are still awaiting a decision from the UKBA. Mr Dormido is yet to pass the "Life in the UK Test" or obtain a relevant ESOL … qualification hence this application for extension to give him more time. "

Prior to April 6, 2012 such applications were governed by paragraphs 128-133 HC 395 but on April 6, 2012 these paragraphs were deleted by HC 1888 except insofar as relevant to paragraphs 134 to 135.

18. The problem the appellant faced was he had not passed the English test and unlike his son this was a mandatory requirement. So when the appellant applied to extend his time in the United Kingdom he had to meet the new Rules because his application was not submitted until April 13, 2012. In order to be granted indefinite leave to remain he would have needed

to demonstrate he had "sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with paragraph 33BA of these Rules."

19. The FtTJ formed an opinion that the respondent should have considered this application under paragraph 284 HC 395 but in order to succeed under this Rule the appellant's wife had to be both present and settled in the United Kingdom.

20. "Settled in the United Kingdom" is defined in the Immigration Rules as meaning-

> "(a) is free from any restriction on the period for which he may remain save that a person entitled to an exemption under Section 8 of the Immigration Act 1971 (otherwise than as a member of the home forces) is not to be regarded as settled in the United Kingdom except in so far as Section 8(5A) so provides; and
>
> (b) is either:
>
> (i) ordinarily resident in the United Kingdom without having entered or remained in breach of the immigration laws; or
>
> (ii) despite having entered or remained in breach of the immigration laws, has subsequently entered lawfully or has been granted leave to remain and is ordinarily resident."

21. When the appellant submitted his application the appellant's wife did have a restriction on the period she could remain because she had come to the United Kingdom as a work permit holder.

22. The reason for seeking an extension was not a matter covered by the Immigration Rules and he was refused under paragraph 322(1) HC 395. This states that leave is to be refused where the variation sought is not covered by the Rules.

23. The Court of Appeal in Edgehill and another v The Secretary of State for the Home Department [2014] EWCA Civ 407 considered how the Courts should approach applications made before July 9, 2012 but not considered until after that date. They concluded-

> "29. Aided by this guidance, I now return to the central issue in the two current appeals. Mr Bourne submits that applications made under article 8 before 9th July 2012 did not fall under any of the Immigration Rules, either old or new. The decision maker

simply had to apply article 8, taking into account the wealth of guidance provided by Strasbourg and the domestic courts.

30. The next stage in Mr Bourne's argument is that appellate tribunals make article 8 decisions by reference to the current state of affairs, not by reference to the state of affairs when the Secretary of State reached her decision. In both of the present cases the current state of affairs included new rule 276ADE, providing a requirement for 20 years' continuous residence.

31. I admire the dexterity of this argument. Nevertheless it produces the bizarre result that the new rules impact upon applications made before 9th July 2012, even though the transitional provisions expressly state that they do not do so.

32. The Immigration Rules need to be understood not only by specialist immigration counsel, but also by ordinary people who read the rules and try to abide by them. I do not think that Mr Bourne's interpretation of the transitional provisions accords with the interpretation, which any ordinary reader would place upon them. To adopt the language of Lord Brown in *Mahad*, "the natural and ordinary meaning of the words, recognising that they are statements of the Secretary of State's administrative policy," is that the Secretary of State will not place reliance on the new rules when dealing with applications made before 9th July 2012.

33. Accordingly, my answer to the question posed in this part of the judgment is no…."

24. Mr Avery has sought to argue that as this was not an application under the Immigration Rules the transitional procedures did not apply.

25. Ms Iqbal referred me to the respondent's own IDIs at Chapter 9, section 3.2 and 9. These state:

"3.2. Applications for leave outside the Rules

Applications for leave or variation of leave on an exceptional basis should be considered both under and outside the Rules. Where the applicant does not qualify under the Rules, and the exercise of discretion outside the Rules is inappropriate, refusal will be necessary.

It is important to note that where an application is made specifically for "exceptional" leave to remain, it is not appropriate to refuse solely for the reason that there is no provision within the Rules for leave to remain on that basis. Such applications are by definition a request to depart from the Rules and are made in recognition of the fact that the applicant fails to meet the requirements of the relevant Rule or Rules, for example:

- applications for leave to remain here exceptionally with family members who are dependent on the applicant (and not vice versa); or

- applications for exceptional leave to remain because of temporary disturbance in the home country.

The first application falls under the dependent relative Rules but calls for careful consideration outside the Rules. The second application may on occasions fall to be considered under the visitor Rules, depending on the facts of the case (see paragraph 9.1 below), but otherwise will fall to be refused under Paragraph 322(1) of the Rules. Consideration should nevertheless be given to departing from the Rules.

9. NO PROVISION IN THE RULES

The Tribunal have previously held that where no applicable Rule exists the appellate authorities have jurisdiction to review the merits of the decision (by virtue of Section 19(1)(a)(ii) of the 1971 Act). However Paragraphs 320(1) and 322(1) of HC 395 now provide for the mandatory refusal under the Rules of all applications when either entry or variation of leave is sought for a purpose not covered by the Immigration Rules. Consequently, any application not provided for elsewhere in the Rules will fall for mandatory refusal under one of these two rules and the jurisdiction of the appellate authorities will be restricted by virtue of section 19(2).

However, it is surprisingly rare that there really is no relevant provision in the Rules which apply to a case. Such "impossible" applications should not be confused with "inappropriate" ones (see paragraph 6 above). The fact that a person does not seemingly qualify under any Rule does not mean there is no Rule applicable. A dependent cousin falls to be considered under Paragraph 317 because that is the Rule, which applies to dependent relatives. He does not qualify because he is not related to the sponsor in any of the ways set out in Paragraph 317(i).

26. The appellant submitted an application to remain. There does not appear to be a Rule that covered his application so his application was properly refused under paragraph 322(1) HC 395. Taking into account these IDIs and the guidance given in Edgehill, along with the statement in HC 194 concerning how applications for leave to remain should be treated, I am satisfied that Ms Iqbal's submissions have merit and this is an appeal that was submitted prior to July 9, 2012 and was refused under the Immigration Rules and it is a an application that should be dealt with by the Rules in place prior to July 9, 2012.

27. I accept Ms Iqbal's submission that the FtTJ was entitled to consider the appeal under article 8 ECHR and there was no requirement to consider the appeal under the Gulshan principles.

28. The FtTJ's assessment of article 8 can be found between paragraphs [14] and [17] of his determination. The FtTJ followed the Razgar principles in paragraph [14] of his determination and identified that the issue was one of proportionality.

29. The FtTJ took into account the following matters:-

    a. The appellant came to the United Kingdom on a visa to join the sponsor. His son came with him and they had been living together for three years.
    b. The appellant did not satisfy the Immigration Rules.
    c. The appellant had not passed an appropriate English language test but he had entered the United Kingdom at a time when the English language test was not a requirement of the Rules.
    d. The appellant acknowledged he would have to take the life in the United Kingdom test.
    e. Removal would mean the appellant would be separated from his wife and son.
    f. His son was doing well at school.
    g. He placed emphasis on the fact that the appellant and his son were given permission to join the sponsor.

30. The FtTJ concluded that removal would be unjustifiably harsh and was likely to lead to a long break up of the family and it would not be reasonable and he therefore found removal disproportionate and amounted to a breach of his right to family life. Ms Iqbal has adopted these findings and submits there is no material error in the FtTJ's approach.

31. Mr Avery has argued that the FtTJ materially erred in his article 8 assessment by:-

    a. Failing to attach sufficient weight to the fact the appellant had not passed an appropriate English test.
    b. Overlooked the fact that the appellant came to the United Kingdom not as a spouse dependant but as a work permit dependant.

32. In paragraph [16] of his determination the FtTJ clearly considered his lack of an English test but also had regard to the fact there was no such a requirement when he arrived. If there is a criticism to be made it is the possible assumption of what visa the appellant was seeking to extend although in reality the

appellant was seeking to extend his stay with the sponsor who in turn had applied for indefinite leave to remain-something I am told she has since been granted.

33. The FtTJ clearly had regard to all the factors in his assessment of article 8 and his conclusions are contained in paragraphs [15] to [17].

34. This was a well reasoned determination that had regard to all of the factors and Mr Avery has not persuaded me that there has been an error in law.

DECISION

35. There is no material error of law. The original decision shall stand.

36. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I uphold the fee award made in the First-tier Tribunal.

Dated:

Signed:

Deputy Upper Tribunal Judge Alis