IAC-AH-PC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36469/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 November 2014	**On 26 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

OLARN CHIARAVANONT
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Bazzini of Counsel instructed by E2W (UK) Ltd
For the Respondent: Mr T Melvin of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Thailand born on 2 January 1986. He first entered the United Kingdom on 1 September 2000. Since then he has been educated at secondary and tertiary levels in the United Kingdom. In recent years he has begun to establish himself as a promising young artist. On 28 January 2013, before expiry of his previous leave, he submitted an application for indefinite leave on

the basis of long residency under paragraph 276ADE of the Immigration Rules (the IRs).

2. On 8 August 2013 the Respondent refused his application and decided he should be removed by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. By a letter of the same date the Respondent gave reasons for the decision. The Appellant had been out of the country for longer than the maximum periods permitted if an applicant was to qualify for indefinite leave based on ten years' continuous lawful residence.

3. The Respondent went on to consider whether the Appellant had a claim that removal would place the United Kingdom in breach of its obligations to respect his private and family life in the United Kingdom protected by Article 8 of the European Convention by way of reference to the IRs and Appendix FM. There was no9 evidence of family life and he did not meet the requirements of paragraph 276ADE relating to private life. The Respondent considered there were no sufficiently compelling or compassionate circumstances to warrant granting him any further leave exceptionally and outside the IRs.

The First-tier Tribunal Determination

4. On 3 September 2013 the Appellant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended. The grounds relied on Article 8 outside the IRs but also made non-specific references to applicants similar to the Appellant who had been educated in the United Kingdom and whose absences were because of their youth and for school holidays.

5. By a determination promulgated on 27 August 2014 following a hearing on 23 July 2014 Judge of the First-tier Tribunal Verity dismissed the appeal based on long residency grounds under paragraph 276ADE of the IRs because the Appellant had spent more time outside the United Kingdom than permitted by the IRs.

6. She made findings of fact about the Appellant relating to the length of time he had been in the United Kingdom, his education in the United Kingdom and on the evidence that he was seen to be an artist of exceptional talent and showed great promise. Having made these findings of fact she concluded in the context of the IRs that the Appellant fell within the exceptional circumstances category. She noted a considerable amount of evidence had been put before her which had not previously been seen by the Respondent and remitted consideration of the Appellant's claim under Article 8 outside the IRs to the Respondent.

7. Each party sought permission to appeal and by a single permission of 14 October 2014 dealing with both applications Judge of the First-tier

Tribunal P J M Hollingworth granted permission in the following terms:-

> The judge should not have returned the matter to the Secretary of State. There is no indication as to whether the appeal was allowed or not … it is unclear whether the criteria in *Gulshan* were satisfied. At paragraph 21 the judge has referred to forming the opinion that the Appellant did fall within what might be termed the 'exceptional circumstances' category. In the light of this conclusion the purported return of the matter to the Secretary of State vitiates the determination. At paragraph 23 the judge states that the matter should be returned to the Secretary of State to consider all the facts and for detailed consideration to be given to whether the Appellant falls within the exceptional circumstances category … in the light of the conclusion reached … at paragraph 21 a further arguable error has arisen in relation to the purported delegation of a decision by the judge already reached.

The Upper Tribunal Hearing

8. The Appellant attended the hearing. Following a lengthy discussion, both parties agreed the determination dismissing the long residency appeal under the IRs at paragraph 19 should stand. However the consideration of the appeal on Article 8 grounds outside the IRs should be remitted to Judge Verity for further consideration on the basis that her starting point should be the findings of fact made at paragraph 21 of her determination. I did not consider I could re-make the decision at the same hearing because it was not clear from the determination whether the findings were selective or comprehensive and because the balancing exercise must take all circumstances into account.

Reasons for Finding of an Error of Law

9. At the start of paragraph 21 of her determination the Judge referred expressly to paragraph 276ADE of the IRs. She had "formed the opinion that the Appellant did fall within what might be termed the "exceptional circumstances" category.

10. *MF (Nigeria) v SSHD [2013]EWCA Civ.1192* is acknowledged to be a current leading judgment in the jurisprudence relating to Article 8 of the European Convention in English law. It focuses on the application of Article 8 both within the Immigration Rules and outwith the IRs in cases involving the deportation of foreign non-EEA national criminals. Paragraph 398 of the Rules which relates to deportation uses the phrase 'exceptional circumstances'. This is not a deportation case. At paragraphs 39 and 40 the Master of the Rolls said:-

> (Counsel) has made it clear on behalf of the Secretary of State that the new Rules do not herald a restoration of the

> exceptionality test. We agree. ...The Rules expressly contemplate a weighing of the public interest in deportation against 'other factors'. In our view, this must be a reference to all other factors which are relevant to proportionality and entails an implicit requirement that they are to be taken into account.
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> ...It is necessary to focus on the statement that it will only be 'in exceptional circumstances that the public interest in deportation will be outweighed by other factors'. ...Great weight should be given to the public interest in deporting foreign criminals.... It is only exceptionally that such foreign criminals will succeed in showing that their rights under Article 8(1) trump the public interest in their deportation.

At paragraph 41, the Master of the Rolls referred to the judgment in *R (Nagre v SSHD [2013] EWHC 720 (Admin).* He pointed out that the significance of the cases cited in *Nagre* was in the repeated use by the European Courts of Human Rights of the phrase 'exceptional circumstances'.

11. I take it he was referring to paragraph 40 of the judgment in *Nagre.* With one exception each of the ECtHR cases in the long list is from jurisdictions other than the United Kingdom where the domestic law within the margin of appreciation of contracting states may and in some cases does (for example Norway and Denmark) provide that the test for engaging rights protected by the European Convention is more stringent than the test of reasonableness established by *Huang v SSHD [2007] UKHL 11*. *MF (Nigeria)* makes the point that in assessing the proportionality of a deportation decision it will only be in exceptional circumstances that the public interest will be outweighed by other factors. But this is not a deportation case.

12. At paragraph 128 of *R (oao MM and Others) v SSHD [2014] EWCA Civ 985* in the leading judgment Aikens LJ in the course of a lengthy discussion of the relationship of the jurisprudence on Article 8 in the context of the Immigration Rules and Strasbourg case-law said:-

> .... 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. .....

and at paragraph 134:-

> ..... if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the *Huang* tests and UK and Strasbourg case law.

13. The test of exceptional circumstances is different from the approach referred to in the Section of Chapter 8 of the Immigration Directorate Instructions on family members dealing with Appendix FM. Section 1.0 Introduction provides:-

> This guidance reflects the two-stage approach to considering applications under the family and private life Rules in Appendix FM and paragraph 276ADE-DH. First, caseworkers must consider whether the applicant meets the requirements of the Rules, and if they do, leave under the rules should be granted. If the applicant does not meet the requirements of the Rules, the caseworker must move on to a second stage: whether, based on an overall consideration of the facts of the case, there are exceptional circumstances which mean refusal of the application would result in unjustifiably harsh consequences for the individual or their family such that refusal would not be proportionate under Article 8. If there are such exceptional circumstances, leave outside the Rules should be granted. If not, the application should be refused.
>
> This two-stage approach has been endorsed by the High Court in the Judicial Review in *Nagre*. In the judgment Sales J finds that our regime of Rules coupled with the Secretary of State's published policy on exceptional circumstances '…fully accommodates the requirements of Article 8' [paragraph 36] and '…there is full coverage of an individual's rights under Article 8 in all cases by a combination of the new Rules and (so far as may be necessary) under the Secretary of State's residual discretion to grant leave to remain outside the Rules' [paragraph 35]. ...

The test described in *MF (Nigeria)* is different from the Immigration Directorate Instructions which is not part of the Rules: see paragraphs 64 and 106 of the judgment in *R (Alvi) v SSHD [2012] UKSC 33*.

14. Further, at paragraph 54 of *Patel and others v SSHD [2013] UKSC 72* Lord Carnwath approved the approach to Article 8 described in *Huang* and that the Rules are no more than the starting point for the consideration of Article 8.

15. Indeed, the suggested logic that a test of exceptional circumstances or compassionate factors referred to in the Immigration Directorate Instructions has to be engaged before a less stringent test of "reasonableness" under Article 8 outside the IRs can be engaged is difficult to follow.

16. It follows that being found to be in the "exceptional circumstances" category is for the Respondent the trigger for her case worker to go on to consider the claim with regard to Article 8 outside the IRs. But there is no logic at law for the imposition of this initial hurdle.

17. The Judge commented on the amount of evidence which was before her and which had not been considered by the Respondent. This was not reason enough to remit the matter to the Secretary of State. The Judge was then in a position to conduct a proper assessment of the Appellant's case under Article 8 outside the IRs. Her treatment of the "exceptional circumstances" category and failure to make a full assessment of the Article 8 claim outside the IRs amounted to an error of law.

18. There was no challenge to those facts upon which the Judge made findings. As mentioned, it is not clear from the face of the determination whether such findings are comprehensive. In the circumstances I consider it appropriate to find that there is an error of law in the determination of the First-tier Tribunal and that the matter should be remitted to the same judge to complete the assessment and determination of the Appellant's claim under Article 8.

Anonymity

19. There was no request for an anonymity direction or order. Having read the papers in the Tribunal file and heard the parties on the error of law issue, I do not see that any such is required.

DECISION

The First-tier Tribunal's determination contained an error of law. The appeal is remitted for a resumed hearing in the First-tier Tribunal before Judge Verity on the basis outlined above.

No anonymity order is made.

Signed/Official Crest Date 26. xi. 2014

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal