Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/36559/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 August 2014	**On 4 August 2014**

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Ms CHRISTELLE DEBRA LAMBRECHTS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mrs L Kenny, Home Office Presenting Officer
For the Respondent: Miss C H Bexson, Counsel
(instructed by Platt Associates Limited)

DETERMINATION AND REASONS

Introduction

1. The Appellant (the Secretary of State) appealed with permission granted by Designated First-tier Tribunal Judge McClure on 19 May 2014 against the determination of First-tier Tribunal Judge Flynn who had dismissed the Respondent's appeal against the

Appellant's decision dated 20 August 2013 to refuse to grant the Respondent leave to remain under Appendix FM of the Immigration Rules (as a spouse), but had allowed her appeal under Article 8 ECHR in a determination promulgated on 8 April 2014.

2. The Respondent is a national of South Africa, born on 31 March 1964. Her application for a variation of leave to remain on the basis of her private and family life under Article 8 ECHR had been refused because the requirements of Appendix FM had not been met. The Respondent had not shown that her sponsor was a British Citizen and so had not complied with paragraph R-LRTP.1.1(d) or E-LTRP.1.2. Nor did the Respondent meet paragraph 276ADE in respect of her private life.

3. Permission to appeal to the Upper Tribunal as sought by the Appellant was granted because Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 00640 (IAC) and related authorities such as Nagre [2013] EWHC 720 (Admin) cast doubt on whether Judge Flynn's approach to Article 8 ECHR was sustainable. It was arguable that the judge had erred in finding that there were compelling circumstances.

4. Directions were made by the Upper Tribunal in standard form.

Submissions – error of law

5. Mrs Kenny for the Appellant relied on the grounds and the grant of permission to appeal. The decision was inadequately reasoned. No exceptional circumstances had been identified by the judge which would have caused refusal of the variation of leave application to result in an unjustifiably harsh outcome, i.e., a disproportionate breach of Article 8 ECHR. Gulshan (above) and Nagre (above) had not been followed. Nothing in the judge's findings of fact showed exceptional circumstances or an unjustifiably harsh outcome as a consequence of the refusal decision. The Respondent had simply to return home to make an entry clearance application in the usual way.

6. Counsel for the Respondent sought to argue that the Appellant's grounds amounted to no more than a disagreement with a thorough and carefully reasoned decision, which took account of the relevant authorities and which had been open to the judge. It

was a factor in the proportionality assessment that the Respondent would have to make a fresh entry clearance application, incur further expenses and suffer delay. The application had been made before 5 July 2012 and that should have been taken into account, i.e., the previous approach to Article 8 ECHR should have been taken by the Secretary of State. The judge had identified compelling circumstances, such as the difficulties which the Respondent would face in returning to South Africa. She also had a rôle in caring for her sponsor's elderly parents. The determination should stand.

7. It was not necessary to call upon Ms Kenny in reply.

The error of law finding

8. The tribunal gave its decision at the hearing that the Secretary of State's appeal would be allowed and reserved its reasons which now follow. The determination was a full and careful one but, the tribunal must find that the judge had inadvertently fallen into material error of law, as the grant of permission to appeal indicated. There was, of course, no dispute that the appeal was bound to fail under the Immigration Rules and was correctly dismissed.

9. The failure to comply with the Immigration Rules was, as the judge correctly observed, largely technical. Some might consider that the Secretary of State might have relented or reconsidered once it had been shown that the Respondent's sponsor was a British Citizen, settled and easily able to meet the stringent financial requirements of Appendix FM. But there is, of course, no "near miss" principle (see Miah and ors v SSHD [2012] EWCA Civ 261), nor did the judge suggest otherwise.

10. The difficulty with the judge's conscientious decision under Article 8 ECHR was, as Mrs Kenny submitted, the fact that there was no evidence before the judge anywhere near sufficient to justify her conclusion that there were compelling circumstances applicable to either the Respondent or her sponsor. The guidance from Gulshan (above) and related authorities may be summarised as being that only if there are arguably good grounds for granting leave outside of the Immigration Rules (i.e., in the discretion of the Secretary of State) is it necessary for the First-tier Tribunal to go on to consider

whether there are compelling circumstances not sufficiently recognised under them.

11. The judge found (see [67] and [68]) that it would be possible, indeed by inference from her determination, a relatively straightforward matter, for the Respondent and her sponsor to provide the specified evidence in a future entry clearance application and thus meet the Immigration Rules. The Respondent and her sponsor were not in the position of needing leave outside the Immigration Rules to respect their family life, as they were able to meet the requirements of the Immigration Rules. Thus, as the judge recognised at [63], the crux of the matter was whether it was reasonable to expect the Respondent to return to South Africa to seek entry clearance. The alternative, i.e., the Respondent and her sponsor moving to South Africa, was not a realistic proposition for all of the reasons the judge identified. Indeed, it was so obviously unrealistic and contrary to the relevant parties' wishes that it warranted no serious consideration.

12. No evidence was identified by the judge to show that there would be any undue delay in the processing of an entry clearance application from South Africa. No evidence was identified by the judge to show that the sponsor could not travel there with her for at least part of the time needed. [85] to [87] show that the sponsor's brother is able to assist in the care of the sponsor's elderly parents. The judge's conclusions at [78] and [79] amount to no more than a finding that it might be inconvenient for the Respondent to return to South Africa for the purpose of making an entry clearance application. The judge stated that the Respondent did not know whether the friends with whom she stayed in 2012 would offer accommodation again and would ask them only reluctantly. There was no evidence of any change of circumstance affecting the friends. The obvious inference is that the friends would again assist, not least because the Respondent would naturally reciprocate in due course once she was settled in the United Kingdom. There was no suggestion that the sponsor would be unable to assist with the expense of the journey if required. The burden of proof of showing insurmountable obstacles, i.e., an unreasonable degree of difficulty, was on the Respondent and she had failed to discharge it.

13. The judge was also mistaken at [88] to state that "there is nothing to suggest that allowing the [Respondent] to remain with her partner

and his family in the United Kingdom will interfere with the [Appellant's] overall control of immigration." Control of immigration, with respect to the judge, is determined by the Immigration Rules and is a matter for the executive arm of government.

14. In the tribunal's view, the question of whether the variation of leave application should have been considered under the pre 9 July 2012 regime in relation to Article 8 ECHR makes no practical difference. The judge was addressed on the basis that the post 9 July 2012 regime applied to Article 8 ECHR. There was no claim that the Respondent had shown by the evidence presented with her variation of leave application that she was able to meet paragraph 284 of the Immigration Rules. Edgehill [2014] EWCA Civ 402, decided after the judge's determination and not cited to her, indicates that the previous rules apply, i.e., that the Secretary of State was not entitled to base her refusal on the new rules, but that can make no difference to the present appeal which has always turned on Article 8 ECHR and proportionality. The proportionality outcome on the facts properly understood of the present appeal is the same when public and private interests are weighed in the balancing exercise.

15. For all of these reasons, the tribunal finds that the determination contains material errors of law, such that it must be set aside and remade. The Secretary of State's appeal to the Upper Tribunal is allowed.

Discussion and fresh decision

16. The submissions by both parties made in relation to the errors of law embraced all relevant arguments and no further submissions were needed to dispose of the appeal.

17. The issue in this human rights appeal is proportionality. The legitimate aim included in Article 8.2 ECHR which is usually summarised as immigration control embraces many important matters, most if not all of which are ultimately policy decisions for government: for further recent discussion of such issues see Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC).

18. Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 00640 (IAC) indicates that the tribunal has no power to avoid, waive or circumvent the Immigration Rules by in effect resorting to Article 8 ECHR save in exceptional circumstances, i.e., where the consequences of such refusal would be so unduly harsh that they would amount to a disproportionate failure by the state to respect private or family life of a relevant person affected by such refusal. This amounts to no more than a restatement of the essential principles of proportionality, and directly recalls [20] of Razgar [2004] UKHL 27.

19. As appears from the discussion above, there was no such evidence. The Respondent and her partner's private interests, temporary inconvenience and possibly a modest period of separation, are substantially outweighed by the public interest in maintaining effective and fairly applied immigration control. The First-tier Tribunal's decision can only be remade in one way, that is, that the appeal against the Secretary of State's decision must be dismissed.

DECISION

The making of the previous decision involve the making of an error on a point of law. The appeal to the Upper Tribunal is allowed. The decision of First-tier Tribunal Judge Flynn is set aside and remade as follows:

The appeal under the Immigration Rules is DISMISSED

The appeal under Article 8 ECHR is DISMISSED

Signed **Dated**

Deputy Upper Tribunal Judge Manuell

TO THE RESPONDENT
FEE AWARD

The appeal was dismissed and so there can be no fee award

Signed **Dated**

Deputy Upper Tribunal Judge Manuell