Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36831/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 July 2014	**On 14th July 2014**
Prepared 2 July 2014	

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS HABARAKADA HENADEERAGE BUDDHIKA MAHESHINI

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr J Martin, of Counsel, instructed by Nag Law Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Powell who in a determination dated 10 March 2014 allowed the appeal of Ms Habarakada Henadeerage Buddhika Maheshini against a decision of the Secretary of State to refuse her leave to remain on human rights grounds.

2. Although the Secretary of State is the appellant before me I will for ease of reference refer to her as the respondent as she was the respondent in the First-tier Tribunal. Similarly I will refer to Ms Habarakada Henadeerage Buddhika Maheshini as the appellant as she was the appellant in the First-tier Tribunal.

3. The appellant, a citizen of Sri Lanka, who was born on 10 October 1986 entered Britain as a student on 4 October 2008. She attended Nottingham Trent University to undertake a BA honours degree in fashion and textile management. She hoped to study for four years and then undertake two years' post-study work. However after successfully completing the first two years of her course she took up a placement for one year which meant that her fourth year of study was completed in May 2012 by which time the post-study work visa had been abolished and she was therefore not able to undertake post-study work here.

4. The appellant then made an application to remain on human rights grounds on 1 October 2012 placing weight on the fact that she had missed the opportunity of applying for the post-study work visa "by a matter of weeks." That application was refused on 15 January 2013 on the basis that the requisite fee had not been paid. A further application was then submitted and was refused without a right of appeal. However after further submissions had been made a right of appeal was granted on 16 September 2013.

5. The basis of the refusal was that the appellant did not qualify for leave to remain under the provisions of paragraph 276ADE of the Immigration Rules and moreover that there were no exceptional circumstances which would make it appropriate that she should be granted leave to remain under the ECHR.

6. At the hearing of the appeal before Judge Powell the appellant gave evidence and the judge took into account the evidence of two further witnesses, although that evidence is not recorded in the determination.

7. It was accepted by the appellant's representative that she could not meet the requirements of the Immigration Rules. In paragraph 19 the judge stated that he was not satisfied the appellant had lost all ties with Sri Lanka although he recognised that "her preference is not to return there". In paragraphs 20 onwards he found the appellant was exercising family and private life here. He described her relationship with her sister who is resident in Britain as being "unusually close and it was stated that she was financially dependent on her sister with substantial assistance from their father who lives and works in Italy." He stated that the appellant and her sister were dependent on each other for support and friendship and that the appellant was treated as her sister's responsibility culturally because although the appellant is 27 years old, educated and independent, she was unmarried and looked to her family to continue to support her physically, financially and emotionally as if she was still a dependent child.

8. Having referred to the judgment of the Court of Appeal in **Kugathas [2002] EWCA Civ 31** the judge stated that he would consider the question of dependency objectively. He noted that the appellant had not lived with her sister between 2003 and 2008 as at that time the appellant had lived in Sri Lanka with other siblings while her sister was here. Moreover the appellant had not lived with her parents who had visited every three or four months from Italy. Between 2008 and 2012 the appellant had been at university in Britain. Although the appellant would visit her sister every fortnight in Swindon and received regular visits from her sister while she was in Nottingham they had not lived together. It was only, the judge concluded since 2012 that the appellant has lived with her sister. The relationship had deepened since that time. The judge concluded that family life genuinely existed between them.

9. The judge went on to state that the appellant was in a "full and subsisting relationship" with a Mr David Marsh which was a relationship built on the foundation of friendship over a number of years "that has only relatively recently become romantic."

10. He also found that the appellant had made strong contacts in her local community which was shown by the attendance of the Mayor of Swindon to speak on her behalf. She had friends and contacts arising out of her studies and work placements. The judge then turned to the fact that the appellant had told him that she had originally come to England with a six year plan which would involve four years of university, plus two years of work experience but that after completing two years of her studies she had opted for a sandwich course in her third year which meant that she had been too late to apply for the post-study work visa.

11. The judge stated it was a matter of record that changes had been made to the Immigration Rules which meant that only students who had completed their degrees before April 2012 were able to apply for post-study work visas. The appellant had therefore been unable to work after obtaining her degree.

12. The judge took into account the funds invested in the appellant's education and stated that:

> "Her legitimate expectation she would be able to follow her entirely respectable plan went unmet because of a change in the Immigration Rules that had, until that change, enabled her to follow her plan".

13. Having referred to the determination in **CDS (PBS "available" Article 8) Brazil [2010] UKUT 305** the judge stated that the appellant had shown that she had established both family and private life in the United Kingdom. Having considered that her removal would be an interference in that private life but that that was for a legitimate purpose and in accordance with the law, the judge went on to consider the proportionality of the refusal.

14. Although the judge referred to "the decision in **Gulshan"** and noted that the appellant could not meet the requirements of the Immigration Rules he stated that there was an arguable case for the grant of leave to remain outside the Rules as there were factors in the case which were not covered by the Rules. These were her "particularly unusually close relationship with her sister" and the circumstances in which her plans to study and then work in Britain had been overtaken by changes in Immigration Rules.

15. He stated that these factors were sufficiently compelling to warrant him going on to consider the appellant's case further to decide whether it was proportionate to remove her to Sri Lanka.

16. He reminded himself that a successful appeal under Article 8 did not bring with it indefinite leave to remain but said that he was placing particular weight on the disruption of the appellant's six year plan caused by a change in the Immigration Rules in the context of the appellant enjoying an unusually close relationship with her sister "that amounts to recent dependency." He also referred to her private life being coloured by her relationship with Mr Marsh which he said appeared to have a good prospect of durability and which might, given time, lead to the appellant seeking leave to remain as a fiancée.

17. He emphasised the appellant's good character, her good progress educationally and the high regard for her work by professionals and others in the textile industry and the fact she was well liked and supported by many people in her local community. He said that the appellant's sister had health difficulties and had described the care and support she received from the appellant which evidence he accepted. Although he considered that the appellant had not lost all ties with Sri Lanka and that she had qualifications that would not prevent her from taking up what the appellant had "fairly described as job opportunities in Sri Lanka in the textile industry" and the fact that her parents and sister would be willing to support her financially in Sri Lanka and her father contemplated retiring to Sri Lanka in due course, he went on to state in paragraph 55:-

> "In this case, the appellant knew that her time in the United Kingdom was limited. It was indeed her plan to study and then work for a short time before returning to Sri Lanka. She has built her family and private life in the knowledge that both were temporary, time limited and did not give rise to an expectation that she would be able to remain in this country unless she met the requirements to do so under the Immigration Rules."

18. He referred to the case as being finely balanced but said that the balance was tipped in favour of the appellant, concluding that the appellant's right to respect for her family and private life outweighed the public interest in favour of removal.
19. He went on to say that it was for the respondent to determine the length of any period of leave granted but that he had identified two matters as outweighing the public interest. The first relating to the appellant's six year plan and the second was her relationship with her sister. He described his conclusions on that relationship as

being "very much a snapshot of the current position" and that therefore his decision should not be regarded as requiring the grant of indefinite leave to remain.

20. The Secretary of State appealed. The grounds of appeal asserted that the judge had failed to identify any compelling circumstances which would justify granting the appellant leave outside the Immigration Rules. The appellant had failed to meet the requirements of the Rules and a close relationship with her sister and a desire to complete a six year plan did not amount to compelling circumstances. Reference was made to the decision of the Tribunal in **Gulshan [2013] UKUT 00640 (IAC)** which had emphasised that an Article 8 assessment should only be carried out where there are compelling circumstances not recognised by the Rules. It was stated that the judge had not identified such compelling circumstances.

21. Moreover the determination in **Gulshan** emphasised that an appeal should only be allowed where there are exceptional circumstances – the grounds referred to the judgment of Sales J in **Nagre [2013] EWHC 720 (Admin)**.

22. It was pointed out that the appellant had had no legitimate expectation to remain in Britain, she did not meet the requirements of the Rules and that any interference with her private and family life was proportionate in the context of maintaining effective immigration control. The grounds referred to the judgment of the House of Lords in **Patel [2013] UKSC 72** which stated that Article 8 should not be used as a means of subverting the criteria of the grant of leave to remain set out in the Rules. Even a near miss under the Rules could not provide substance to a human rights claim which was otherwise lacking in merit. Although the judge had referred to the determination of the Tribunal in **CDS Brazil [2010] UKUT 305 (IAC)** that had stated that Article 8 did not provide a general discretion to dispense with the requirements of the Rules merely because their impact might be unduly harsh.

23. It was asserted that it was difficult to imagine how the private life of someone with no prior nexus to the United Kingdom would require admission outside the Rules for the purposes of work. Moreover the appellant's relationship with the British citizen could continue from abroad.

24. At the hearing of the appeal Mr Melvin relied on the judgment in **Nagre** in which Sales J had stated that a residual discretion fully accommodated the requirements of Article 8 and he emphasised that in the judgment in **Haleemudeen [2014] EWCA Civ 558** it was made clear that the new Rules required stronger bonds with the United Kingdom before leave will be given under them. In **Nagre** Sales J had stated that it was necessary to find particular factors in individual cases which were especially compelling where the balance would fall in favour of a grant of leave to remain even though those facts were not fully reflected in the new Rules and that it was also necessary to consider whether there are compelling circumstances not sufficiently recognised under the new Rules to require the grant of such leave. Mr Melvin argued that the new Rules were not merely a starting point for the consideration of proportionality under Article 8.

25. Mr Melvin referred to the grounds of appeal emphasising the ratio of the judgment of the Supreme Court in **Patel** – those who had been admitted on a temporary basis did not have a legitimate expectation to be able to work here and the fact that there was a "near miss" was not a basis for concluding that the rights of an appellant under Article 8 were infringed by the decision.

26. He argued that there were no exceptional ties in this case and that the judge ignored the higher test which, after the changes in the Rules, now prevailed when considering Article 8 rights.

27. In reply Mr Martin stated that the Secretary of State's case was nothing more than a disagreement with conclusions which the judge had properly reached – there was nothing to justify a reasons challenge. It was clear that the judge had followed relevant authorities which he had cited in his determination. He was correct to find that family life existed between the appellant and her sister and having so found, then to have gone on to consider whether removal was proportionate. This he had done placing weight on the appellant's romantic relationship with Mr Marsh, her strong community links – the fact was that the mayor of Swindon had been so impressed by her community work that he had attended the hearing - and the fact that the appellant had expected to be able to undertake post-study work and had been prevented from doing so. She was an appellant who had been a diligent student and had made considerable investment in her studies and it was only fair that her academic studies should be put to practical use here, as that would have an impact on her further career. He stated the judge had taken into account all relevant factors and had not ignored the public interest in immigration control but had found that the balancing exercise weighed in favour of the grant of leave to remain albeit for a limited period. He asked me therefore to dismiss the Secretary of State's appeal.

Discussion

28. This is in many ways a well structured determination in which the judge found the appellant's right to the composite of family and private life would be infringed by her removal and then concluded that the removal of the appellant would be disproportionate. However, what I consider the judge did not do was place appropriate weight on the structured approach to the issue of rights under Article 8 as set out in the Rules. Although he referred to the decision of the Tribunal in **Gulshan** he did not appear to have placed weight on the fact that this appellant could not succeed under the Rules and therefore something exceptional or compelling needed to be shown to conclude that, notwithstanding the fact that the appellant did not meet the requirements of the Rules, she should still be given leave to remain.
29. The reality is that the judge referred to three or possibly four factors in concluding that the removal of the appellant would be disproportionate.

30. Although he had properly recorded the fact that the appellant and her sister had not lived together in Sri Lanka after 2002 and that even while the appellant was studying here she was not living with her sister he considered that the appellant was exercising family life with her sister. While it is easy to accept that the appellant's relationship with her sister is close there is nothing in the papers to indicate that the appellant's sister and the appellant are in a relationship which is in any way greater than normal family ties between adult siblings. The appellant is not the carer for her sister nor vice versa and while it is easy to accept that they are very close siblings, that simply does not overcome the relevant test set out in **Kugathas**.

31. Similarly the reality is that the fact that the appellant's "six year plan" was disrupted by changes in the Rules does not mean that the appellant should be granted permission to work here for two years. As is made clear in the judgment of the Supreme Court in **Patel [2013] UKSC 72** the fact that the appellant could not comply with the Rules by a very short period of time is not a reason to apply Article 8 as, in effect, a means of causing the Rules to have no effect. Effectively it is relevant that Article 8 is not a "general dispensing power." As Carnwath LJ stated in **Patel** at paragraph 57 "the opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under Article 8."

32. The third basis on which the judge appeared to consider that the interference with the appellant's rights under Article 8 was disproportionate was her relationship with Mr Marsh. The reality appears to be that Mr Marsh has known the appellant for many years as a friend and also it appears that the relationship is now a "romantic" one, there is nothing to suggest that the relationship is one of such depth that it has a long term future – there is nothing to indicate that the appellant and Mr Marsh will become engaged or set up home together. There can simply be no reason why a strong friendship such as that between the appellant and Mr Marsh could be sufficient to enable leave to remain under Article 8.

33. I consider that, having analysed the evidence there was no basis for the judge's conclusion that the appeal should be allowed under Article 8 of the ECHR. To do so involved, I consider, a material error of law, in that he did not place appropriate weight on the Rules and moreover placed undue weight on the various factors which I have identified above. While the weight to be placed on various factors which may make up an Article 8 consideration, is a matter for the judge who hears the appeal, the reality is that the weight must be shown to lead to compelling or exceptional circumstances and that has not been done in this case.

34. I therefore set aside the decision of the First-tier Tribunal.

35. I put to Mr Martin that should I find a material error of law in the determination I would consider going on to remake the decision. I asked him for any other factors which should be taken into consideration. He submitted that the appellant's relationship with her sister, her relationship with Mr Marsh and her work in the

community would all be factors which would mean that, over time the strength of her rights under Article 8 would increase.

36. I however do not consider that that is correct. Even the judge acknowledged in paragraph 58 that his view of the appellant's relationship with her sister was very much a snapshot of the current position and it might not be an enduring position over any particular period. He reached that conclusion stating inter alia that the appellant's relationship with Mr Marsh might develop. The reality is that not only was there no reason why the judge should have considered that the relationship between the appellant and her sister was compelling, but also that the judge took the view that her relationship with her sister might weaken over time. That would surely be correct given that the appellant is likely at some stage to develop her own life away from that of her sister – whether or not she takes work away from Swindon and, of course, she did not study there, or indeed forms a relationship with Mr Marsh or anyone else.

37. Secondly the reality is that the relationship with Mr Marsh has not developed to the extent that he and the appellant have decided that they would wish to live together or marry despite the fact that they have known each other for many years. Even if the relationship were to develop further it could, of course develop when the appellant left Britain – Mr Marsh has visited Sri Lanka and indeed the appellant and her family in Sri Lanka in the past.

38. The appellant does, as the judge acknowledged have ties with Sri Lanka and has a sister there although it appears they have fallen out. In the past her parents, who live in Italy have visited Sri Lanka regularly, there is no reason why they and indeed possibly the appellant's sister could not do so in the future. While I accept that the appellant is undertaking community work here she would, of course, be able to do so in Sri Lanka.

39. Finally with regard to the appellant's work she will, it appears to have been acknowledged by all, have to start work in Sri Lanka and, given her age and the fact that she left university two years ago it is surely appropriate that she starts that as soon as possible.

40. The judge did not consider that the appellant would be entitled to remain in Britain indefinitely. There is no present basis on which she could do so and I therefore consider that it is perhaps less than kind to give her the hope of doing so by granting her a further period of leave to remain.

41. For the above reasons, having set aside the determination of the First-tier Judge I remake the decision and dismiss this appeal on both immigration and human rights grounds.

Signed Date

Upper Tribunal Judge McGeachy