Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36965/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4 September 2014	**On 9 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MEIFENG LIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble of the Specialist Appeals Team
For the Respondent: Mr C Lam of Counsel instructed by Egmont Solicitors LLP

DETERMINATION AND REASONS

The Respondent

1. The Respondent, Meifeng Lin to whom I shall refer as the Applicant, is a citizen of the People's Republic of China born on 27 May 1989. On 1 September 2010 she arrived with leave to enter as a Tier 4 (General) Student migrant. That leave was extended until 30 September 2012.

2. On 5 April 2012 she married Wenshan Cai born 21 September 1985. He is also a Chinese citizen and at the time had Leave to Remain as a work permit holder. On 17 August 2012 she applied to the SSHD for further leave to remain as his wife. Their first child, a son, was born in the United Kingdom in January 2013.

The Decision and Original Appeal

3. On 21 August 2013 the SSHD refused the Applicant's application on the basis that her husband was in the United Kingdom as a work permit holder and she could only succeed as his partner if he was present and settled in the United Kingdom.

4. She could not succeed as the parent of her child because her child was not a British citizen and had not lived in the United Kingdom for seven years. Further, the Respondent refused the application under paragraph 276ADE (private life) because the Appellant had not been resident in the United Kingdom for sufficiently long. The SSHD considered there were no circumstances warranting consideration of the United Kingdom's obligations under Article 8 of the European Convention.

5. On 9 September 2013 the Applicant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended. The grounds set out her family circumstances and that her husband had leave as a work permit holder until 14 May 2014. The grounds assert that if the Applicant had made application under paragraph 194 of the Immigration Rules and her son's position had been considered under paragraphs 305-308, the applications would have been allowed. The other grounds relate to the Applicant's claim based on Article 8 of the European Convention outside the Immigration Rules.

The First-tier Tribunal Determination

6. By a determination promulgated on 27 May 2014 Judge of the First-tier Tribunal Archer, following an oral hearing at which both parties were both represented, the Applicant by Mr Lam, dismissed the Appellant's appeal under the Immigration Rules and allowed it by way of reference to Article 8 of the European Convention.

7. The SSHD sought permission to appeal on the basis that the Judge had not considered the jurisprudence in *Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)*. On 13 June 2014 Judge of the First-tier Tribunal Fisher granted permission on the ground that the Judge had failed to identify the compelling circumstances which warranted consideration of the Applicant's Article 8 claim outside the Immigration Rules.

The Upper Tribunal Hearing

8. At the start of the hearing Mr Lam produced a birth certificate of the second son of the Applicant and her husband born in July 2014. Mr Bramble confirmed that on 28 April 2014 the Applicant's husband had been granted indefinite leave to remain. He noted that subsequent to the First-tier Tribunal's determination the Court of Appeal had handed down judgment in *R (oao MM (Lebanon) and Others) v SSHD*

[2014] EWCA Civ 985. He submitted that the SSHD would simply rely on the grounds for appeal.

9. Following a discussion with the parties in chambers, I decided that the First-tier Tribunal's determination did not contain an error of law of such materiality that the determination should be set aside.

10. I came to this conclusion because the Judge made findings of fact favourable to the Applicant. He noted the Applicant's pregnancy, the delay of over a year between the date of the Applicant's application and the decision under appeal and took account of the immigration status of the Applicant's husband and their first child. All these matters in the context of the jurisprudence to which I refer below amounted to sustainable reasons for the Judge's conclusion that if further limited leave was not granted to the Applicant the State would be in breach of its obligations to respect her private and family life protected by Article 8 of the European Convention.

Article 8 Claim outside the Immigration Rules

11. *MF (Nigeria) v SSHD [2013]* 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 Rules 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'. 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'.

12. 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.

13. 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.

14. 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.
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> 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*.

15. 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.

16. 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 Rules can be engaged is difficult to follow.

17. The Judge found there were arguably good grounds for considering the Applicant's position under Article 8 outside the Immigration Rules for the reasons already mentioned at paragraph 10 above. For the reasons just adumbrated there was no need for him to look for any exceptional circumstances. The determination did not contain an error of law such that it should be set aside.

18. The appeal was allowed on human rights grounds with a suggestion that leave should be at least until the birth of the Applicant's second child. The child has been born and in reviewing the position the SSHD may now wish to have regard to the subsequent grant of indefinite leave to the Applicant's husband.

Anonymity

19. There was no request for any direction or order for anonymity and having considered the appeal I find there is no need for one.

DECISION

The determination of the First-tier Tribunal did not contain an error of law such that it should be set aside. Accordingly, it shall stand.

The appeal of the SSHD is dismissed with the effect that the appeal of the Applicant is allowed.

Signed/Official Crest Date 08. ix. 2014

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal