Upper Tribunal
(Immigration and Asylum Chamber)
IA/37877/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On June 20, 2014	**On June 23, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS MICHAELINE MARIE NATIVIDAD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Saunders (Home Office Presenting Officer)
For the Respondent: Mr Jeshani, Counsel, instructed by Aston Brook Solicitors

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 Miss Michaeline Marie Natividad as the appellant.

2. The appellant, born October 10, 1970, is a citizen of the Philippines. She entered the United Kingdom as a student with a visa valid from October 22, 2007 until December 31, 2009. She extended that leave as a Tier 4 (General) student from August 4, 2011 but her leave was curtailed until August 23, 2013. The appellant applied for leave to remain based on her family and private life on August 8, 2013.

3. The respondent refused her application on September 6, 2013.

4. On September 16, 2013 the appellant appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002 claiming the respondent should have exercised her discretion differently and that the decision was incompatible with the appellant's rights as set out in the ECHR.

5. The matter was listed before Judge of the First-tier Tribunal Trevaskis (hereinafter referred to as "the FtTJ") on March 19, 2014 and in a determination promulgated on March 31, 2014 he allowed the appeal under paragraph 276ADE of the Immigration Rules.

6. The respondent appealed that decision on April 10, 2014. Permission to appeal was granted by Judge of the First-tier Tribunal Froom on May 13, 2014 who found it was arguable that the FtTJ had erred by misdirecting himself as to the meaning of "no ties" as set out in Ogundimu [2013] UKUT 60 (IAC).

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

SUBMISSIONS

8. Mr Saunders submitted the FtTJ had erred in his approach because he failed to properly take into account the fact the appellant had lived in the Philippines for 38 years and had lived on her own between 2005 and 2008. The FtTJ also failed to attach any weight to the fact the appellant would be perfectly familiar with the way of life there. The FtTJ failed to properly consider these factors when considering whether the appellant had any ties to the Philippines and by only considering the factors he did the FtTJ had materially erred.

9. Mr Jeshani relied on paragraphs [6] to [8] of his Rule 24 response. He submitted the FtTJ did take account of all

the relevant matters and his approach could not be faulted. Even if the FtTJ had not demonstrated he had considered all matters he submitted that the error was not material as the FtTJ recognised that the appellant's ties had shifted and had had full regard to the current situation in the Philippines.

ERROR OF LAW ASSESSMENT

10. Whilst the FtTJ stated in paragraph [5] of his determination that he had taken into account all of the evidence sadly his assessment of the evidence and findings does not support this statement.

11. His findings are contained between paragraphs [26] and [32] in his determination. He noted at paragraph [26] the appellant was 38 years old when she came to the United Kingdom and he commented that since being here she has been educated and been assimilated into her mother's sister's family. At paragraph [27] he accepted her claims about the conditions in the Philippines and he noted the appellant's parents went to live in America in 2005 leaving the appellant alone in the family home until she came to the United Kingdom in 2008. At paragraph [28] the FtTJ accepted she had no family, no home or any job opportunities in he Philippines. At paragraph [31] he concluded that as she had no family ties or a house she would find it difficult to make an independent life there.

12. Tne FtTJ erred because:

    a. He failed to take into account in paragraph [31] that the appellant had spent over 85% of her life in the Philippines and had actually lived alone for up to four years before coming to the United Kingdom.

    b. He failed to take into account she only came here when she was 38 years old and would have developed many social ties in the Philippines prior to her arrival in the United Kingdom.

13. The Tribunal in Ogundimu between paragraphs [120] and [125] set out the correct approach. Whilst the FtTJ reminded himself of the decision I am satisfied he did not apply the correct test.

14. I therefore set aside the FtTJ's decision and I advised the representatives I intended to remake the decision on the evidence currently before me.

15. I invited the representatives to make final submissions firstly on both paragraph 276ADE and Appendix FM (if appropriate) and secondly on the approach I should take to considering this application outside of the Immigration Rules.

SUBMISSIONS

16. Mr Saunders submitted the appellant could not demonstrate she had no ties in the Philippines because "no ties" did not just mean no family ties but no friends or cultural ties as well. He further submitted that the appellant could not meet Appendix FM. He stated that there was no arguable case for considering this case outside of the Immigration Rules. In respect of private life he submitted the same arguments being relied on for article 8 were properly covered by paragraph 276ADE. With regard to family life the appellant was a grown woman and whilst she was currently financially dependent on her aunt and uncle that was because of her immigration status. She may provide some support but her financial and emotional ties did not mean she had family life. He submitted there was no reason to consider this appeal outside of the Rules.

17. Mr Jeshani adopted his skeleton argument along with his earlier submissions on why there had been no error. He submitted the appellant's appeal should be allowed under paragraph 276ADE HC 395 because of the life, or lack of a life, facing the appellant in the Philippines compared to what she had here. Alternatively, he argued that the appellant had a "good arguable case" in respect of both her family and private life. She had a dependency that went beyond the normal emotional ties and her closest family was now her aunt and uncle because she could not go and live with her parents and sister in America. She had no one to return to in the Philippines. She was continuing to study here and there were various letters of support. She was contributing both financially and emotionally to the United Kingdom and he submitted refusing her application would be disproportionate as there was no real public interest in removing someone, like the appellant, who contributed so much.

ASSESSMENT AND FINDINGS

18. The appellant has applied to remain in the United Kingdom under either paragraph 276ADE or Appendix FM of the Immigration Rules.

19. There appeared to be no dispute that the appellant could not meet any of the requirements of Appendix FM as she had no partner and/or child living in the United Kingdom. Mr Jeshani did not seek to argue anything to the contrary.

20. The respondent considered her application with reference to paragraph 276ADE HC 395. The appellant's case was considered under subsection (vi) of paragraph 276ADE namely "she is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."

21. Both parties agreed that the decision of Ogundimu should be applied as the Tribunal had provided guidance on the correct approach to be taken. The Tribunal found-

> "120. In approaching our consideration of the meaning of this rule we remind ourselves of the guidance given by Lord Hoffmann in Odelola v Secretary of State for the Home Department [2009] 1 WLR 1230:
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> > "[4] Like any other question of construction, this [whether a rule change applies to all undetermined applications or only to subsequent applications] depends upon the language of the rule, construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy."
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> 121. In Mahad v ECO [2009] UKSC 16, Lord Brown, when considering the question of construction of the Immigration Rules, said as follows:
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> > "[10] The rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy. The respondent's counsel readily accepted that what she meant in her

> written case by the proposition "the question of interpretation is…what the Secretary of State intended his policy to be" was that the court's task is to discover from words used in the Rules what the Secretary of State must be taken to have intended…that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State's intention to be discovered from the Immigration Directorates Instructions"

122. We take note of the fact that the use of the phrase "no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK" is not exclusive to paragraph 399A of the Rules; it is also used in paragraph 276 ADE, in the context of the requirements to met by an applicant for leave to remain based on private life in the United Kingdom when such person has lived in the United Kingdom for less than 20 years.

123. The natural and ordinary meaning of the word 'ties' imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation or removal. It involves there being a continued connection to life in that country; something that ties a claimant to his or her country of origin. If this were not the case then it would appear that a person's nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the rule. This would render the application of the rule, given the context within which it operates, entirely meaningless.

124. We recognise that the text under the rules is an exacting one. Consideration of whether a person has 'no ties' to such country must involve a rounded assessment of all the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances. Nevertheless, we are satisfied that the appellant has no ties with Nigeria. He is a stranger to the country, the people, and the way of life. His father may have ties but they are not ties of the appellant or any ties that could result in support to the appellant in the event of his return there. Unsurprisingly, given the length of the appellant's residence here, all of his ties are with the United Kingdom. Consequently the appellant has so little connection with Nigeria so as to mean that the consequences for him in establishing private life there at the age of 28,

> after 22 years residence in the United Kingdom, would be 'unjustifiably harsh'.
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> 125. Whilst each case turns on its own facts, circumstances relevant to the assessment of whether a person has ties to the country to which they would have to go if they were required to leave the United Kingdom must include, but are not limited to: the length of time a person has spent in the country to which he would have to go if he were required to leave the United Kingdom, the age that the person left that country, the exposure that person has had to the cultural norms of that country, whether that person speaks the language of the country, the extent of the family and friends that person has in the country to which he is being deported or removed and the quality of the relationships that person has with those friends and family members."

22. Paragraphs [123] to [125] of Ogundimu are of particular importance as these highlight the matters that a Tribunal should have regard to.

23. Applying that guidance to this appeal I have to consider whether the appellant's circumstances bring her within subsection (vi).

24. I find the following points important:-

    a. The appellant lived with her parents in the Philippines for thirty-five years until they went to live in the United States of America in 2005 with her sister.

    b. The appellant continued to live in the Philippines until she came to the United Kingdom in 2008.

    c. The appellant would have developed a large network of friends in the Philippines based on the fact she lived there for 38 years.

    d. The appellant cannot join her parents in America because of her age and American immigration laws.

    e. Due to the typhoon and subsequent devastation the appellant has no home and her family no longer live there.

    f. Since being in the United Kingdom the appellant attended college until her leave was curtailed. She chose not to appeal that curtailment but instead

lodged an application to remain based on private life.

g. Her aunt and uncle have sponsored her studies and consider her to be their own child. She lives with them and the appellant wishes to remain here to care for them as they are growing older. The appellant feels a sense of responsibility towards her aunt and uncle. Her aunt now suffers from osteoarthritis and she relies on the appellant to run errands and do odd jobs for her. There is medical evidence to support the aunt's condition.

h. The appellant works as a care worker and provides a service to the community.

i. The appellant has a large network of friends in the United Kingdom.

j. There are few jobs in the Philippines because of the devastation. She believes that many criminals have escaped and the country is unsafe.

25. Having spent 38 years in her country of birth and 6 years in the United Kingdom I cannot accept the appellant has no connection to Philippine life. I accept that as she has been here for the last six years she has established some ties to this country but that does not mean she has lost connection to the Philippines.

26. In Ogundimu the applicant had been in the United Kingdom since the age of six and had spent 22 years living here. That is in stark contrast to this appellant who has spent only six years of her life here and 38 years in the Philippines. It cannot be said she has lost touch with the Philippines, which contrasts with the applicant in Ogundimu. Ultimately the assessment has to have regard to -

a. The length of time a person has spent in the country to which he would have to go if he were required to leave the United Kingdom. In the case of this appellant that is 38 years.

b. The age that the person left that country. In this case she left when she was 38.

c. The exposure that person has had to the cultural norms of that country. 38 years in a country suggests she has had a large exposure to the cultural norms of the country.

d. Whether that person speaks the language of the country. There is no suggestion the appellant has any language difficulties in the Philippines.

e. The extent of the family and friends that person has in the country to which she is being removed. This is the appellant's strongest point when assessing her ties because she has no known family living there. However, having lived there for 38 years I am satisfied she would have developed a large network of friends.

f. The quality of the relationships that person has with those friends and family members. It has been difficult to assess this because the appellant has claimed she has no ties to the Philippines.

27. If qualifying under subsection (vi) were based on whether a person had family in the country of return then this appeal would succeed. Unfortunately for the appellant the test is considerably wider and applying the tests set out above I am not satisfied the appellant has met the requirement of the Rule.

28. I therefore find that the appellant cannot satisfy either Appendix FM or Paragraph 276ADE HC 395.

29. However, I must also consider whether the appellant's case should be considered outside of the Immigration Rules.

30. In R (on the application of Onkarsingh Nagre) 2013 EWHC 720 Sales J at paragraphs [42] and [43] said

> "The approach explained in the Strasbourg case-law indicates that ... consideration of whether there are insurmountable obstacles to the claimant's resident spouse or partner relocating to the claimant's country of origin to continue their family life there will be a highly material consideration. This is not to say that the question whether there are insurmountable obstacles to relocation will always be decisive.... Therefore, it cannot be said that in every case consideration of the test in Section EX.1 of whether there are insurmountable obstacles to relocation will necessarily exhaust consideration of proportionality, even in the type of

> precarious family life case with which these proceedings are concerned.
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> I agree with the statement by the Upper Tribunal in Izuazu in the latter part of paragraph [56], that the Strasbourg case-law does not treat the test of insurmountable obstacles to relocation as a minimum requirement to be established in a precarious family life case before it can be concluded that removal of the claimant is disproportionate; the case-law only treats it as a material factor to be taken into account.
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> Nonetheless, I consider that the Strasbourg guidance does indicate that in a precarious family life case, where it is only in "exceptional" or "the most exceptional" circumstances that removal of the non-national family member will constitute a violation of Article 8, the absence of insurmountable obstacles to relocation of other family members to that member's own country of origin to continue their family life there is likely to indicate that the removal will be proportionate for the purposes of Article 8".

31. Mr Jeshani has also brought to my attention a recent decision of MMM (AP) v The Secretary of State for the Home Department [2013] COSH 43. This decision does no more than re-affirm that approach the court took in Nagre namely the appellant has to show there is a good arguable case tin order to have his case considered outside of the Rules.

32. I am satisfied that in respect of the appellant's private life claim that consideration of the claim under paragraph 276ADE does take into account all of the issues that I am being asked to consider under article 8. The appellant came as a mature student with no expectation to be allowed to stay. Her Tier 4 leave was curtailed and instead of challenging that decision she chose to apply under the private life route. All of the matters that would be considered fell to be considered under the Ogundimu test. I do not therefore find there is a good arguable case on private life grounds to consider the case outside of the Rules.

33. With regard to family life the appellant could not raise a claim under Appendix FM because she was neither

married nor with a partner and she did not have a child. Her age also excluded her from any possible claim under Appendix FM.

34. The appellant has argued family life with her aunt and uncle and has ought to argue both an emotional and financial dependency. However, in order for me to consider the case outside of the Rules there must be a good arguable with a realistic prospect of success.

35. I have to have regard to the fact she is neither a minor nor her aunt's child but is an adult living in her aunt's house.

36. In Kugathas v SSHD (2003) INLR 170 the Court of Appeal said that, in order to establish family life, it is necessary to show that there is a real committed or effective support or relationship between the family members and the normal emotional ties between a mother and an adult son would not, without more, be enough. In Etti-Adegbola v SSHD (2009) EWCA Civ 1319 the Court of Appeal concentrated on the last part of that test and confirmed that the Tribunal had applied the right test in finding that a family's behaviour was "no way exceptional or beyond the norm". In JB (India) and Others v ECO, Bombay (2009) EWCA Civ 234 the Court of Appeal reiterated that the approach in Kugathas must be applied to the question of whether family life for the purposes of Article 8 subsists between parents and adult children. In ZB (Pakistan) v SSHD 2009 EWCA Civ 834 the Court of Appeal said that when considering whether, for Article 8 purposes, family life existed between a parent and adult children, account must be taken of the parent's need for the children and the totality of the family relationships must be considered. The question of whether there was a family life was not answered properly by considering each one to one relationship in turn and in isolation.

37. It is against this background that I must consider the appellant's current situation. When she came to the United Kingdom she did not come to look after her aunt or uncle but she came to study. Her aunt sponsored her but it was her choice to come and study here and it was her aunt's choice to sponsor her. It was not out of necessity she came to the United Kingdom. Her situation has now changed because her aunt needs some support and it is this support that the appellant argues takes her case outside of Kugathas and the other cases.

38. The evidence presented does not suggest the appellant's uncle is unable to look after his wife. It is understandable that both the aunt and uncle want her to stay because according to the aunt they have become so attached to her. Paragraph [9] of the aunt's statement perhaps paints the real picture in this case because the aunt states "It would be a real shame if this would not continue. Instead my husband and I would end up sad and lonely."

39. The appellant is not a person who has just become an adult. She is in her forties and her dependency is only because she has no permanent immigration status.

40. Although I accept her situation could be considered outside of Appendix FM I am not satisfied there is family life, as defined by article ECHR, after considering the evidence and the authorities surrounding an adult family matrix.

41. I therefore find that as there is no family life as required by Razgar then her appeal under ECHR would fail and there is no basis for me to consider the case outside of the Rules.

42. In summary, I find there is no good arguable case to consider the appellant's private life claim outside of the Rules and whilst there is an argument to consider family life outside of Appendix FM I am not persuaded there is a realistic prospect of success (See test in paragraph [37] of MMM).

DECISION

43. There is a material error of law.

44. I set aside the original decision and I substitute the following decision:-

    a. I dismiss the appeal under the Immigration Rules.

45. 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 reverse the fee award made by the First-tier Tribunal.

Signed: Dated:

Deputy Upper Tribunal Judge Alis