Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/44516/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16th June 2014	**On 29th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

GLORIA REYES PADUA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Maka (Counsel)
For the Respondent: Ms J Isherwood (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant's appeal against a decision to remove her from the United Kingdom was dismissed by First-tier Tribunal Judge K S H Miller ("the judge") in a determination promulgated on 26th February 2014.

2. The appellant arrived in the United Kingdom in February 2002, with leave valid until April that year. On 4th April 2012, she applied for leave to remain outside the Immigration Rules ("the rules"). Over a year later, that application was refused and, in due course, a removal decision was made in October 2013. The appellant's case was advanced in reliance upon Article 8 of the Human Rights Convention. The judge took into account Gulshan [2013] UKUT 00640. He accepted that the appellant has played a supportive role in the household of two British citizens and took into account letters of support written by some twelve people. On the other side of the coin, as the judge put it, the appellant's leave expired in April 2002 but she remained in the United Kingdom thereafter. In addition, the appellant took employment without permission in the ten years or so before she applied to regularise her position. In the final, substantive paragraph of the determination, the judge concluded that there were no exceptional circumstances in the case and found that it would not be unjustifiably harsh to expect the appellant to return to the Philippines.

3. In an application for permission to appeal, it was contended that the judge erred in failing to consider whether the removal decision breached the appellant's Article 8 rights, particularly in the private life context. The judge did not consider whether an assessment was required and so did not come to a decision on the proportionality of the adverse decision. Permission to appeal was granted on 15th April 2014, the judge granting permission noting that the appellant's application was made on 4th April 2012, before substantial changes to the rules came into effect on 9th July 2012.

4. In a brief Rule 24 response, the Secretary of State opposed the appeal. The judge properly found that the appellant's removal would not amount to a disproportionate interference with her rights. There was no material error.

Submissions on Error of Law

5. Mr Maka handed up a skeleton argument. In refusing the appellant's application, the Secretary of State noted that her application was made before 9th July 2012 and so regard was expressly had to the rules in place before that date. This was the correct approach in the light of the judgment of the Court of Appeal in Edgehill and Another [2014] EWCA Civ 402. The appellant was entitled to the benefit of transitional provisions in the rules and, as the Court of Appeal held, it is not lawful to reject an Article 8 application made before 9th July 2012 in consequence of a failure to meet the requirements of the rules in force with effect from that date.

6. In oral submissions, Mr Maka said that the judge erred in the Article 8 assessment. The appellant's application was made in April 2012. The new rules did not apply. The Secretary of State, in refusing the application, appeared to accept this but then went on to make an assessment under the new rules. The judge's Article 8 assessment was flawed because, as

was clear from his direction in relation to Gulshan, the new rules had a substantial, if not determinative impact on his reasoning. As a matter of law, the Article 8 assessment in the appellant's case required no consideration of compelling circumstances.

7. Secondly, the judge erred in finding, at paragraph 40 of the determination, that if the appellant were to succeed as a person who had worked here unlawfully for some years, this might set a precedent. The law required an Article 8 assessment to be fact specific and to be an overall one which took into account, where relevant, the impact of removal on other persons. The assessment made by the judge did not comply with these principles. In particular, there was no consideration of the impact on the Pars family, for whom the appellant performed valuable service during the loss of Mr and Mrs Pars' son in May 2012 and following the death of Mrs Pars' mother in October 2013. As at the date of the hearing, the appellant provided care and support to the couple, Mr Pars now requiring a kidney transplant. These facts were required to be taken into account in the Article 8 assessment. If the judge had realised that there was no need to search for circumstances not recognised under the rules, he might have carried out an Article 8 assessment in the light of domestic and Strasbourg authority, as required.

8. Ms Isherwood said that paragraph A277C of the rules fell to be applied. Edgehill concerned applications and decisions before 9th July 2012. In this case, the Secretary of State's adverse decision was only made in the autumn of 2012. The judge had before him the Secretary of State's decision letter, containing an assessment under the old rules, the new rules and in relation to Article 8. He properly gave weight to the appellant's evasion of immigration control. He did not accept the account of her circumstances in the Philippines. He did not overlook the support given to the Pars family and was entitled to give weight to the appellant's conduct, including her unlawful employment. Whether the case was considered under the old or the new rules would have made no material difference. There would have been no difference in relation to the Article 8 assessment. Relevant in this context was the decision of the Court of Appeal in Haleemudeen [2014] EWCA Civ 558, at paragraph 43 and paragraph 47 in particular. The appellant's immigration status was precarious.

9. In a brief reply, Mr Maka said that the error was apparent in the determination. The starting point for the judge was a requirement for exceptional or compelling circumstances.

Conclusion on Error of Law

10. I am grateful to Ms Isherwood and Mr Maka for their submissions. I conclude that the judge did materially err, as is shown by paragraphs 34, 35 and 41 of the determination in particular. In the light of the appellant's inability to meet the requirements of the rules, in issue was the need for

an Article 8 assessment. The judge dismissed the appeal in the absence of compelling or exceptional circumstances, or unjustifiably harsh consequences, although none were required in the particular circumstances of the case. In the light of the guidance given by the Court of Appeal in Edgehill, what was required was a straightforward Article 8 assessment, applying domestic and Strasbourg authority where appropriate. The guidance given in Gulshan, which suggests that an Article 8 assessment outside the rules is only required if there are arguably good grounds for granting leave outside the rules, so that a judge would then be required to consider whether there were compelling circumstances not sufficiently recognised under the rules, does not apply to applications made before 9th July 2014 which were undecided by that date. The appellant was entitled to rely on the transitional provisions contained in HC 194.

11. With great respect to the very experienced judge who wrote the determination, his conclusion that there were no exceptional circumstances or unjustifiably harsh consequences reveals the application of a threshold that was not required.

12. I conclude that the decision of the First-tier Tribunal contains a material error of law and must be remade.

13. In a discussion with the representatives regarding the appropriate venue, it became apparent that substantial fact-finding would be needed and it was likely that Mr Pars would wish to give evidence. Both representatives agreed that in these circumstances the appropriate course, taking into account the Presidential Practice Statement and section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007, would be to remit the appeal to the First-tier Tribunal at Taylor House, to be remade there before a judge other than First-tier Tribunal Judge K S H Miller. The findings of fact made by the judge are not preserved and all issues are at large.

Signed Date

Deputy Upper Tribunal Judge R C Campbell