Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/47014/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25 July 2014	**On 6 August 2014**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS SWEETLINE MAY BENNETT
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow
For the Respondent: Miss U Uwaezuoke

DETERMINATION AND REASONS

1. For convenience the parties are hereafter referred to as they were before the First-tier Tribunal so that Ms Bennett is the appellant and the Secretary of State for the Home Department is the respondent.

2. The appellant was granted limited leave to remain in the United Kingdom from 12 October 2010 until 2 January 2013. Her solicitors applied on 27

December 2012 for further leave to remain but that application was refused. The appellant appealed that decision and the appeal was heard by First-tier Tribunal Judge Talbot. In a determination promulgated on 12 May 2014 the judge allowed the appeal under Article 8 ECHR.

3. The respondent sought permission to appeal that decision. Her grounds for doing so were that the judge concluded that as the appellant had been granted discretionary leave prior to 9 July 2012 the provisions of Appendix FM and Rule 276ADE did not apply. The respondent argued that the judge did not consider the case of **Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558** which supported the respondent's view that the judge had erred in law. It was further submitted that the guidance in the case of **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)** applied in the instant case.

4. As argued by Mr Tarlow at the hearing before me the First-tier judge had not shown compelling reasons why the appellant should have the benefit of Article 8 and no proportionality assessment had been carried out.

5. Permission to appeal was granted. No Rule 24 reply was filed by or on behalf of the appellant.

My Deliberations

6. At paragraph 15 of the determination the judge agreed with a point made by the appellant's representative that the provisions of paragraph 276ADE and Appendix FM of the Immigration Rules did not apply to the appellant because of the transitional provisions (IDI Chapter 8). The appellant had been granted discretionary leave prior to 9 July 2012.

7. The Immigration Directorate Instructions (IDIs) of April 2013 which makes reference to family members under Appendix FM of the Immigration Rules Chapter 8 state at 2.3:-

> "2.3 Individuals granted Discretionary Leave before 9 July 2012
>
> Applicants who were granted leave under the discretionary leave policy before 9 July 2012 will continue to be considered under the discretionary leave policy through to settlement provided they continue to qualify for leave and their circumstances have not changed (normally the individual can apply for settlement after accruing six years of discretionary leave, unless discretionary leave has been granted because the individual is excluded from a grant of asylum or humanitarian protection, in which case ten years leave is usually required).
>
> Consideration must be given to the general grounds for refusal when considering an application for further discretionary leave."

8. The Reasons for Refusal Letter leaves the reader in no doubt that the respondent considered the appellant's private life under Article 8 in accordance with paragraph 276ADE of the Rules. Having decided that the appellant could not meet the requirements of Rule 276ADE(iii) the respondent considered whether the particular circumstances set out in the appellant's application constituted exceptional circumstances that might warrant consideration by the respondent of a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules. The respondent decided that they do not because the appellant's son had not been granted any leave at the time of the appellant's application and therefore the appellant was unable to be granted in line with him.

9. As to the immigration status of the appellant's son, as recorded at paragraph 10 of the determination, he was granted refugee status in 2007 because of his homosexual orientation until 2 January 2013 but has now been granted further leave to remain. .

10. It was clear to the judge that the respondent failed to apply her own policy in such a situation. It would have been open to the judge to have made his findings and to have allowed the appeal on the basis that the respondent's decision was not in accordance with the law and remitted the appeal to the respondent for the making of a lawful decision. However, what the judge did was embark upon an examination of the Article 8 ECHR position. This aspect had been considered by the Respondent in the refusal letter and the refusal on that ground was challenged in the notice of appeal. Although the respondent takes issue with the judge's decision and reasons for coming to that decision the judge finds that there are compelling reasons to allow the appeal. He undertook the proportionality assessment and in paragraph 20 comes to the firm conclusion for reasons that were open to him that the compassionate circumstances outweigh the respondent's legitimate aims and that the appeal therefore succeeds under Article 8.

11. The only further point that I would make is that the decision in **Haleemudeen** followed shortly after the decision in **Edgehill and Bhoyroo [2014] EWCA Civ 402** which came to the opposite conclusion on the issue to that decided in **Haleemudeen**. However, it is not apparent from the later decision that the earlier case had been cited therein or distinguished. Furthermore the implementation provisions were not referred to in **Haleemudeen** and it appears unlikely that those provisions were drawn to the attention of the court. Those provisions make clear that the appellant is entitled to the benefit of them as set out in 2.3 of the IDIs referred to above.

Decision

12. The challenge to the judge's decision under Article 8 reveals no error of law on his part. It would have been open to the judge to allow the appeal to the limited extent that the decision had not been made in accordance with the law and for the matter to be put before the respondent again for

the making of a lawful decision. That was not done but there is no challenge to the fact that it was not.

13. The decision of First-tier Tribunal Judge Talbot therefore stands.

14. I do not make an anonymity direction. None has been made thus far, there was no application for such an order and the circumstances do not appear to warrant a direction being made.

Signed Date

Upper Tribunal Judge Pinkerton