Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48147/2013

THE IMMIGRATION ACTS

Heard at Field House
On 15 September 2014

Determination Promulgated
On 29 September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS WILHELMINA NOYNAY
(NO ANONYMITY ORDER MADE)

Respondent/Claimant

Representation:

For the Appellant/Secretary of State: Mr T Melvin, Specialist Appeals Team
For the Respondent/Claimant: Mr G Davison, Counsel instructed by Greater London Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing on Article 8 grounds the claimant's appeal against the decision

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by the Secretary of State to refuse to grant her leave to remain as a domestic worker, and against the Secretary of State's concomitant decision to make directions for her removal from the UK pursuant to Section 47 of the 2006 Act. The First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is warranted for these proceedings in the Upper Tribunal.

2. The claimant is a national of the Philippines, whose date of birth 15 August 1983. She entered the United Kingdom on 18 August 2012 with entry clearance as a domestic worker (visitor) that was valid until 23 January 2013. Her previous employer in Dubai had sponsored this application. The appellant says she was ill-treated by this employer in the UK, and she eventually ran away from her employer in order to seek employment elsewhere. A friend of hers helped her to obtain a position with a new employer, Mrs Baldwin, as a housekeeper and childminder, in October 2012.

3. The claimant is recorded as having applied for leave to remain outside the Immigration Rules on 14 November 2012. The covering letter in support of the application from the claimant's solicitors is dated 20 December 2012. Her application was for leave to remain to be granted outside the Immigration Rules to work in a private household as a housekeeper for a period of twelve months. There were genuine and compassionate grounds that ought to be considered by the Secretary of State in accordance with the Home Office policy on discretionary leave to remain in the UK outside the Rules. The solicitors referred to the following passage in **Pankina [2010] EWCA Civ 719** at paragraph 45:

> There appears to me, in this situation, to be no escape from the proposition that in exercising her powers, whether within or outside the Rules of practice for the time being in force, the Home Secretary must have regard and give effect to the applicants' Convention rights. This will mean in most cases evaluating the extent and quality of their family and private life in the United Kingdom and the implications, both for them and for the United Kingdom, of truncating their careers here.

4. On 29 October 2013 the Secretary of State gave her reasons for refusing to vary the claimant's leave to enter the United Kingdom, and to remove her by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The Secretary of State's policy was to consider granting leave outside the Rules where particularly compelling circumstances existed. Grants of such leave were rare, and were given only for genuine and compassionate reasons. After carefully considering her application for leave to remain to continue employment as a domestic worker, a category for which she did not meet the requirements of the Rules, the Secretary of State was not satisfied that her circumstances were such that discretion should be exercised outside the Rules. The application was refused under paragraph 322(1) due to the fact that a variation of leave to remain was being sought for a purpose not covered by the Rules. It had been considered whether EX.1 applied to her application. She had spent 29 years in her home country, and in the absence of any evidence to the contrary, it was not accepted that in the period of time that she had been in the UK she had lost all ties to the Philippines. Therefore she did not meet the requirements of Rule 276ADE(vi).

The Hearing Before, and the Decision of, the First-tier Tribunal

5. The claimant's appeal came before Judge Canavan sitting at Taylor House in the First-tier Tribunal on 13 May 2014. The judge received oral evidence from the claimant and from her employer, Mrs Holly Baldwin. The claimant said she sent around £1,000 to £1,200 to her family in the Philippines every month. The remittances that she sent home had become even important since Typhoon Hayan devastated many parts of the Philippines in November 2013. Her mother and two children were wholly reliant on her support, as well as her three sisters and their families. A total of at least four adults and eight children were reliant on the earnings that she was able to send them at the current time.

6. In her subsequent determination, Judge Canavan found there was no breach of the claimant's right to private or family life under Article 8 "within the meaning given in the Immigration Rules". She went on to conduct a statutory human rights assessment. At paragraphs 14 and 15 she held that Article 8(1) was engaged. Her reasoning was that in **Niemitz v Germany [1992] 16 EHRR 97** the European Court found that private life included the right to establish and develop relationships with other human beings and there was no reason why it could not include activities of a business or professional nature.

7. The claimant's length of residence, taken alone, would be insufficient to engage her right to private life. However, she worked in the UK and the income that she derived from that employment was crucial to the survival of a large number of family members in the Philippines. As the European Court had confirmed that relationships of business or professional nature might give rise to a private life that could engage the operation of the Convention, she found the appellant had established a private life in the UK.

8. From paragraph 16 onwards she addressed the question of proportionality. She reminded herself at paragraph 17 that the Tribunal in **Gulshan v SSHD [2013] UKUT** referred to the exceptional circumstances test set out in the Secretary of State's policy guidance relating to consideration of Article 8 cases outside the Rules, but concluded that a breach was only likely to be found where a case discloses "compelling circumstances" not sufficiently recognised under the Rules. The Tribunal went on to criticise the First-tier Tribunal Judge for having conducted a freewheeling Article 8 analysis, unencumbered by the Rules.

9. At paragraph 18, Judge Canavan observed that it is difficult to see how that test could be consistent with the principles set out in higher authorities such as **Huang**, **Patel** and **MS Nigeria v SSHD [2013] EWCA Civ 1192**, which are binding. In **Patel and Others v SSHD [2013] UKSC 72** the Supreme Court had restated the principle set out in **Huang v SSHD [2007] UKHL 11** that the Immigration Rules were not determinative but a starting point for the consideration of Article 8. However, Article 8 was not a general dispensing power and was to be distinguished from the Secretary of State's discretion to allow leave to remain outside the Rules, which may be unrelated to any protected human rights. Mrs Huang's case did not turn on how

closely she had come to compliance with the Immigration Rules but on the application of the family values why underlay the rules relating to elderly dependent relatives, which also lay at the heart of Article 8.

10. At paragraph 19 the judge held that what became clear from the higher court authorities was that, in assessing whether refusal to grant leave to enter or remain outside the Immigration Rules was proportionate under Article 8, the approach should still be a balancing exercise conducted in accordance with Strasbourg principles.

11. At paragraph 20, the judge observed that it was unfortunate for the claimant that the Immigration Rules were not changed shortly before her arrival in the UK so by the time of the application there was no provision for her to extend her leave to enter as a domestic worker with a new employer.

12. At paragraph 21, the judge attached limited weight to the evidence given by Mrs Baldwin as to the reasons why she would like the claimant to remain in her employ, because any other employer in a similar situation would also want to retain a trusted employee if they lived in their home.

13. At paragraph 22 she said that while the claimant had provided a reasonable explanation for the course of events, (including her reason for leaving her previous employer, and taking up employment with Mrs Baldwin outside the Rules), removal would otherwise nonetheless be proportionate because it became clear only a couple of months after she began working for Mrs Baldwin that she would not be able to extend her visa under the Immigration Rules.

14. At paragraph 23 the judge held the most compelling factor in the case occurred after the claimant was refused further leave to remain. This was the massive cyclone that hit the Philippines in November 2013, causing widespread devastation to many areas of the country. The claimant's family was amongst those who were hardest hit. She took into account the fact that even before the cyclone, many Philippine nationals sought to work abroad in order to support their family at home. The conditions of the Philippines at the moment were likely to be particularly harsh. As a result the income that the claimant was currently earning and remitting to her family was of more than usual importance. She was supporting at least four adults and eight children who, even with her support, were living in a very precarious situation.

15. At paragraph 24, the judge found that aside from the fact the claimant did not meet the requirements of the Rules, there were no other strong public interest issues raised in this case that might compel her removal e.g. abuse of the immigration system at the more serious end of the scale such as deception or use of false documents. At the hearing it was said the appellant was not asking for further leave to remain on a long-term basis but only seeking a limited period of leave in order to allow her time to remain in employment while her family recovered their position in the Philippines. A limited period of leave would also allow her time to consider what other options might be open to her in terms of future employment.

16. At paragraph 25 she said she had taken into account the best interest of the children who were dependent upon her support and the vulnerability of a large number of other dependent family members who were reliant on her income in a period when the Philippines was recovering from the devastation caused by the cyclone. She was satisfied that this factor was sufficiently unusual, compelling and compassionate to show that the claimant's removal at the current time would be disproportionate in all the circumstances of the case. She went on at paragraph 26 to say the nature of her findings indicated that a limited period of leave to remain of at least twelve months was likely to be appropriate in order to allow the claimant time to consider what other options might be open to her in terms of lawful routes to employment either in the UK or elsewhere.

The Application for Permission to Appeal

17. A member of the Specialist Appeals Team settled an application for permission to appeal to the Upper Tribunal on behalf of the Secretary of State. She raised four grounds, but only ground 3 and 4 are pertinent for present purposes.

18. Ground 3 was that the judge erred in finding that the claimant's short period of work, coupled with her remittances to her family in the Philippines, was sufficient to engage Article 8. Reference was made to paragraph 57 of **Patel [2013] UKSC 72**, where Lord Carnwath held Article 8 was to be distinguished from the Secretary of State's discretion to allow leave to remain outside the Rules, "which may be unrelated to any protected human rights". The merits of a decision not to depart from the Rules are not reviewable on appeal: Section 86(6). One may sympathise with Sedley LJ's call in **Pankina** for common sense in the application of the Rules to graduates who have been studying in the UK for some years. However, such considerations do not by themselves provide grounds of appeal under Article 8, which are concerned with private or family life, not education as such. 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.

19. This ratio was applicable to a person's opportunity to work in the UK. In **Nasim and Others [2014] UKUT 25 (IAC)** at paragraph 12 the UT held that Lord Carnwath's ratio in **Patel** served to "refocus attention upon the core purposes of Article 8". Whilst the claimant's family would suffer detriment, in losing their remittance income at least temporarily, the core social relationships would be preserved. The claimant would be able to work in the Philippines, or in a third country, or in the UK if she qualified under the points-based system.

20. In **Januzi [2006] UKHL 5** at paragraph 19 Lord Bingham, considering internal relocation of refugee cases, said this:

> Suppose a person is subject to persecution for Convention reasons in the country of his nationality. It is a poor country. Standards of social provision are low. There is a high level of deprivation and want. Respect for human rights is scant. He escapes to a rich country where, if recognised as a refugee, he would enjoy all the rights guaranteed to refugees in that country. He could, with no fear of persecution, live elsewhere in his

> country of nationality, but would there suffer all the drawbacks of living in a poor and backward country. It would be strange if the accident of persecution were to entitle him to escape, not only from that persecution, but from the deprivation to which his home country is subject.

21. The reasoning in **Januzi** at paragraph 19 was applicable to the ECHR. Applying Lord Bingham's analysis, it would be strange if the operation of the ECHR were to mandate that the claimant's family in the Philippines should escape the deprivation common to those in their locality. The ECHR was not concerned with providing an opportunity for an applicant to guarantee to their family members resident outside the territory of the contracting state a standard of living higher than that which would be enjoyed by similarly situated inhabitants of their non-contracting territory. Accordingly, the loss of opportunity for the claimant to work as a domestic servant occasioned by the removal decision did not have consequences of such gravity as to engage any Convention right to a private life.

22. Ground 4 was that the Tribunal erred in failing to accord sufficient weight to the public interest when assessing proportionality. The claimant's failure to meet the requirements of the Rules was a weighty factor against the claimant in a proportionality evaluation. Such Rules are calculated with particular regard to the UK's economy, and the need – or lack thereof – for certain classes of labour demand to be met by way of economic migration. In **FK** and **OK** **Botswana [2013] EWCA Civ 238**, Stanley Burton LJ held that:

> The second reason is that the maintenance of immigration control is not an aim that is implied for the purposes of Article 8.2. Its maintenance is necessary in order to preserve or to foster the economic wellbeing of the country, in order to protect the health and morals, and for the protection of the rights and freedoms of others. If there were no immigration control, enormous numbers of persons would be enter this country, would be entitled to claim social security benefits, the benefits of the National Health Service, to be housed (or to compete for housing with those in this country) and to compete for employment with all those already here. Their children would be entitled to be educated at the tax payer's expense … All such matters (we do not suggest they are the only matters) go to the economic wellbeing of the country.

The Grant of Permission to Appeal

23. On 27 July 2014 First-tier Tribunal Judge Lambert granted the Secretary of State permission to appeal on ground 3 and 4:

> Taken with the judge's express concerns in paragraph 18 is the degree of authority represented by **Gulshan** there is arguably a lack of the refocus of attention upon the core purposes of Article 8 presented by the UT in **Nasim and Others** **[2014] UKUT 25** and lack of weight attached to the claimant's failure to meet the requirements of the Immigration Rules.

The Hearing in the Upper Tribunal

24. At the hearing before me, Mr Melvin developed the arguments raised in ground 3 and 4 of the grounds of appeal. Mr Davison mounted a robust defence of the

determination, submitting that the judge had directed herself appropriately, and that the grounds amounted to no more than expression of disagreement with a conclusion that was reasonably open to the judge under domestic and Strasbourg jurisprudence. In a skeleton argument, he referred to **Mukarkar [2006] EWCA Civ 1045** where the Court of Appeal said at paragraph 40:

> The mere fact that one Tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean it made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new. Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach in a similar case in the future.

Reasons for Finding an Error of Law

25. Judge Canavan's rehearsal of the applicable law is entirely sound, save arguably for her casting doubt on the **Nagre** threshold test approved by the Upper Tribunal in **Gulshan**. The **Nagre/Gulshan** line of authority has been approved at Court of Appeal level, inter alia by the Court of Appeal in **Haleemudeen [2013] EWCA Civ 558**, relevant passages from which are cited in ground 1 of the grounds of appeal in this case.

26. To answer the rhetorical question posed by Judge Canavan in the course of her determination, the **Nagre/Gulshan** line of authorities can be reconciled with, among other things, Lord Carnwath's speech in **Patel** by the simple fact that different types of Rule are under discussion in the different lines of authority. The focus in **Patel**, and the earlier case of **Pankina**, is on what might be termed ordinary Immigration Rules, and in particular Rules covered by the points-based system; whereas the **Nagre/Gulshan** line of authorities are discussing the interrelationship between (a) the codified Rules on family and private life contained in Appendix FM and Rule 276ADE, and (b) what Aikens LJ in **MM (Lebanon)** characterised as a "further Article 8 claim" outside the Rules. As the new Rules set out with great specificity how the Secretary of State considers the balance should be struck in a private or family life claim, it is not the case that, where these Rules are potentially engaged, an applicant's failure to bring himself within them merely serves as a starting point for a consideration of an Article 8 claim outside the Rules. This is only appropriate where there exist compelling circumstances not sufficiently recognised under the Rules. This involves making a judgment on two questions, one of which is a question of fact, and the other of which is a question of law: namely, whether there are compelling circumstances (a question of fact) *and* whether these compelling circumstances have a human rights dimension which is not sufficiently recognised under the Rules relating to family and private life (a question of law).

27. Ground 1 was that the judge erred in law by failing to identify compelling circumstances not sufficiently recognised under the new Rules so as to require the grant of leave to remain. As the Secretary of State was not granted permission to appeal on this ground, I shall put it to one side at this stage of the discussion.

28. Focusing on the judge's freestanding human rights assessment outside the Rules, there was no error of law in the judge finding that Article 8(1) was engaged, applying **Niemitz**. But when the judge came to conduct the balancing exercise at stage 5 of the **Razgar** test, the focus on the Article 8(1) side of the equation needed to be on the claimant's private life in the UK, and the gravity of the interference with that private life consequential upon the refusal decision. The judge rightly attached little weight to factors relevant to that private life, such as the relationship of trust which the claimant had built up with her employer.

29. The judge's egregious error was to attribute decisive weight to a factor which, on analysis, had nothing to do with the claimant's private life in the UK at all. Instead, it had everything to do with protecting and enhancing the private lives of the claimant's dependants in the Philippines.

30. Article 8 does not confer on an applicant the right to work in the country of his or her choice. As Article 8 does not afford such a right in the first place, such a right cannot be created simply because the purpose for which the applicant wishes to continue to be allowed to work is in order to remit money to needy family members living in a third country where standards of social provision are low, and there is a high level of deprivation and want.

31. The position of the dependent children in the Philippines is no different from the position of dependent adults. They are not within the jurisdiction, and so there is no obligation on the part of the UK authorities to consider their welfare or best interest. Nor was this a case where the children, although abroad, were seeking entry clearance, such as to trigger an obligation on the part of the state to consider whether refusal of entry clearance was contrary to their best interest and hence disproportionate. The claimant's family in the Philippines fell wholly outside the scope of the UK's treaty obligations under Refugee Convention, the Human Rights Convention or the Convention on the rights of the child. So basing the favourable decision under Article 8 on the proposition that the claimant needed to be allowed to carry on working outside the Immigration Rules in order to protect their interests was a manifestly impermissible deviation from the core purposes of Article 8. It follows that the proportionality assessment was fatally flawed.

32. For the sake of completeness, it follows from what I have said above that the judge also erred in law by failing to identify compelling circumstances "not sufficiently recognised under the Rules" such as to require the grant of leave to remain outside the Rules. The Rules do not give an economic migrant the right to work in order to support family members in the country of origin, even where their economic circumstances in the country of origin are dire. The question then arises as to whether this is a right which is not sufficiently recognised under the Rules, so as to create an arguable case for a grant of leave outside the Rules. The answer to this is plainly no. This "right" is not recognised under the Rules for the very good reason that it is not a right which can reasonably be derived from either domestic or Strasbourg jurisprudence on the operation and scope of Article 8 ECHR.

33. In conclusion, the decision of the First-tier Tribunal was vitiated by an error of law, such that it should be set aside and remade.

The Remaking of the Decision

34. I am only asked to take into account one additional piece of evidence when remaking the decision. Mr Davison informed me that Mrs Baldwin, the claimant's employer, was due to give birth next month, and that therefore the claimant would be required to look after the other children. I do not have any details about these children, apart from the fact that they are said to be minors.

35. I do not consider that this additional evidence changes the landscape. I accept this is a factor which is pertinent to the balancing exercise, but I do not consider it adds much weight to the claimant's private life claim. The original application was only that the claimant be allowed to stay in the United Kingdom for another year, and the claimant completed one year of employment with Mrs Baldwin in the autumn of 2013. Both she and her employer have known for a long time that the claimant was not going to be a permanent presence in the household and that Mrs Baldwin was going to have to find another housekeeper and carer in the near future. The claimant has now had the benefit of earning a substantial salary for nearly two years, although she entered on a visa which only permitted her to work here for six months, and moreover only permitted her to work for the employer whom she was accompanying from Dubai. Under Section 117B of the 2002 Act, as amended by Section 14 of the Immigration Act 2014, little weight can be accorded to private life which has been built up in circumstances where the person's right to enter or remain is precarious. I find that the interference consequential upon the refusal decision is proportionate to the legitimate end sought to be achieved.

Decision

The decision of the First-tier Tribunal allowing the claimant's appeal on Article 8 grounds outside the Rules contained an error of law, and accordingly the following decision is substituted: the claimant's appeal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Monson