



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/03868/2013

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent
On 2nd May 2014

Determination Promulgated
On 3rd June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE COATES

Between

RENIER DORIA PEREZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Allan Briddock instructed by Castle Park Solicitors
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of the Philippines born on 16th March 1969. His application for entry clearance as a partner under Appendix FM of the Immigration Rules was refused by the Respondent on 11th December 2012. An appeal against that refusal was dismissed under the Immigration Rules but allowed on human rights grounds (Article 8) by Judge of the First-tier Tribunal Jessica Pacey on 2nd January 2014.

2. Permission to appeal was granted in the First-tier Tribunal on 21st January 2014 to the Respondent. In this determination, and in the hope of avoiding confusion, I propose to continue to refer to Mr Perez as the Appellant and the Entry Clearance Officer as the Respondent. Thus the matter came before me in the Upper Tribunal on 2nd May 2014.
3. The Appellant's Sponsor is Ms Dawn Friar. Ms Friar was present at the hearing and representation was as mentioned above.
4. In submissions, Mr McVeety relied upon the grounds submitted on behalf of the Respondent in support of an application for permission to appeal. The grounds state that the First-tier Tribunal allowed the appeal under Article 8, it having been conceded on behalf of the Appellant before the First-tier Tribunal that the requirements of the Immigration Rules were not satisfied. The grounds submit that in so doing the Tribunal erred in law.
5. The first error, it is argued, was the making of a material misdirection in law. The Appellant's case failed to meet the requirements of the Rules, however the appeal was then allowed under the ECHR. The grounds submit that it was made clear in Gulshan [2013] UKUT 00640 (IAC) that the Article 8 assessment shall only be carried out when there are compelling circumstances not recognised by the Rules. In this case the Tribunal did not identify such compelling circumstances and it is submitted that its findings are therefore unsustainable. Gulshan also makes clear that at this stage an appeal should only be allowed where there are exceptional circumstances. Nagre [2013] EWHC 720 (Admin) endorsed the respondent's guidance on the meaning of exceptional circumstances, namely ones where refusal would lead to an unjustifiably harsh outcome. In this case the ECO applied the law as it stood and therefore treated this case in the same way as any other case would be treated. This involved no prejudice to the Appellant.
6. The second ground referred to the First-tier Tribunal's regard to the relevance of MM [2013] EWHC 1900 (Admin). The judgment does not dispute the respondent's entitlement to set a minimum income threshold with the aim of ensuring that those who choose to establish their family life in the UK should have the financial ability to support themselves such that the migrant partner does not become a burden on the tax payer and is better able to integrate. The grounds submit that in MM the judge usurped the role of the democratically accountable decision-maker in the formulation of policy and had insufficient regard to the width of discretion afforded to the Respondent in formulating policy. In summary, the grounds submit that MM was wrongly decided and that the Tribunal erred in relying upon an unsafe authority.
7. A Rule 24 response, drafted by Mr Briddock, was filed on behalf of the Appellant. That was adopted and amplified by Mr Briddock in his oral submission.
8. The response begins by submitting that the Respondent's grounds, as set out in paragraph 1 are misleading. The grounds state "It was made clear in Gulshan that the Article 8 assessment shall only be carried out when there are compelling reasons not recognised by the Rules." The response points out that this is incorrect. Paragraph B of the head note in Gulshan is then quoted. The response contends that it is incorrect therefore, and highly misleading, for the ECO to suggest that Gulshan "made clear" that an Article 8 assessment should only be carried when there

are compelling circumstances. The Tribunal found, in fact, as per Nagre, that an Article 8 assessment should only be carried out where there are arguably good grounds for granting leave outside the Rules. This is a significantly different test to that suggested by the ECO.

9. Bearing in mind the Tribunal's decision in MM, the response argues that it cannot be said that there was not a good arguable case that leave should be granted outside the Rules. Therefore, the ECO was wrong in law to suggest that the judge erred in law by looking outside the Immigration Rules.
10. It is further argued that it is clear from the grounds that the ECO is applying an "exceptionality test". In MF (Nigeria) the Court of Appeal found that there is no exceptionality test. It is submitted that MM has not been overturned and remains good law. The First-tier Judge therefore cannot be criticised for relying on it.
11. In oral submissions, Mr Briddock reminded me that the date of the hearing is the relevant date for consideration of human rights issues under Article 8. By that date the Sponsor was earning £20,399 which is significantly more than the minimum amount stipulated under the Immigration Rules. Evidence to that effect was before the First-tier Judge and does not appear to be in dispute.
12. The hearing before the First-tier Tribunal took place on 20th December 2013 in Birmingham. The Upper Tribunal's decision in Gulshan had been promulgated only three days earlier, on 17th December 2013. It is very likely that within that short timescale the decision in Gulshan would not have come to the attention of the First-tier Judge, and she should not be criticised in that respect. The decisions in Nagre and Izuazu had been properly referred to at paragraphs 23 and 24 of the determination.
13. In conclusion, Mr Briddock submitted that the First-tier Tribunal's determination disclosed a careful analysis of the law and the facts. The First-tier Judge reached conclusions which she was entitled to make and there was no error of law.
14. As I indicated having listened to submissions, I am satisfied that the arguments advanced by Mr Briddock on behalf of the Appellant are well-founded. I am satisfied that the making of the decision by the First-tier Tribunal did not involve the making of a material error of law and I therefore uphold the determination and dismiss the Respondent's appeal.

No anonymity direction is made.

Signed

Date 28th May 2014

Deputy Upper Tribunal Judge Coates