



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/02730/2014

**THE IMMIGRATION ACTS**

**Heard at Columbus House, Newport**

**Determination  
Promulgated**

**On 28<sup>th</sup> January 2015**

**On 9<sup>th</sup> February 2015**

**Before**

**UPPER TRIBUNAL JUDGE POOLE**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**MRS NHOMEMANY XAYPANYA**

Respondent

**Representation:**

For the Appellant: Mr Irwin Richards, Home Office Presenting Officer

For the Respondent: No Appearance

**REMITTAL & REASONS**

1. In this decision notice I will refer to the parties in the style in which they appeared before the First-Tier Tribunal.
2. The appellant is a female citizen of Laos, born 15 April 1983. The appellant is married to a UK citizen, Mr Richard Thomas.
3. The appellant first entered the United Kingdom as a visitor in December 2008 and re-entered as such on at least one further occasion. Subsequently she entered as a visitor for marriage with leave valid until 1 December 2010. The appellant subsequently applied to the respondent for leave to remain as the spouse of a UK citizen, but on 5 November 2013 the respondent made a decision refusing the application on the

basis that the appellant did not meet the requirements of the Immigration Rules and in particular Appendix FM and paragraph 276ADE.

4. The appellant appealed against that decision before Judge of the First-Tier Tribunal Archer on 15 September 2014. There was an oral hearing and the appellant was represented by her husband, the sponsor.
5. In a determination dated 26 September 2014, Judge Archer accepted that the appellant's marriage was genuine and subsisting, but found there was no evidence that the financial or language requirements of Appendix FM had been met and that therefore the appeal could not succeed under the rules. Paragraph 22 of the determination concluded with the sentence "there is no evidence that the requirements of the rules will be met in the near future".
6. Having found against the appellant "under the rules" Judge Archer went onto consider "the 1950 Convention".
7. Judge Archer reminded himself of the Court of Appeal decision in **MF (Nigeria) v SSHD [2013] EWCA Civ 1192** and then went onto conduct a balancing exercise as referred to in paragraph 26 of his determination. He concluded at paragraph 30 that removal of the appellant would not be proportionate to the legitimate objective of enforcing immigration control and allowed the appeal under the "1950 Convention".
8. The respondent sought leave to appeal that decision, arguing that Judge Archer had failed to give reasons or adequate reasons for making his findings, and that he had erred in his approach to the Article 8 assessment of the case.
9. In particular the respondent argued that Judge Archer had failed to properly apply **MF (Nigeria)** in acknowledging that the Immigration Rules were a complete code and that the judge had failed to take into account **Gulshan [2013] UKUT 00640 (IAC)**, and **Nagre [2013] EWHC 720 Admin.** Paragraph 6 of the grounds contended that the judge had failed to adequately give reasons why the appellant's circumstances were either exceptional or compelling.
10. In granting leave to appeal another judge of the First-Tier Tribunal noted that it was evident from the determination that the appellant could not meet the requirements of the rules, but that it was unclear from the determination why the appellant's case could be regarded as exceptional or compelling so as to deal with it outside the rules.
11. Thus that matter came before me sitting in the Upper Tribunal.
12. As indicated above Mr Richards appeared for the Secretary of State. There was no appearance either by the appellant or her husband (the sponsor). I note from the file that notice of the hearing was sent to appellant and the sponsor at their last known address, and I consider it appropriate therefore to proceed to deal with this appeal in the absence of the appellant.

13. Mr Richards relied upon the grounds alleging error. I indicated to him that I considered there was a material error or law contained within Judge Archer's determination and that it fell to be set aside. I indicated that there was insufficient fact finding which prevented me from proceeding to deal with the appeal and that it would therefore be appropriate to remit the case back to the First-Tribunal. There had been no challenge to the judge's decision in respect of the appeal "under the rules", his findings and decision in respect of that aspect of the determination must be preserved and stand.
14. There is no challenge to the judge's determination up to and including paragraph 23. The judge could quite clearly have come to no other decision by reason of the earnings of the sponsor and the lack of any English Language Certificate as required by the Immigration Rules.
15. The respondent has alleged that the judge failed to give reasons or adequate reasons for finding that he could allow the appeal outside the Immigration Rules by reference to Article 8. I have to agree. Whilst the judge quite properly sets out some of the factors that he should take into account in the consideration of such an appeal, he has fallen into error in adequately explaining why he could look at the appeal outside the Immigration Rules. He acknowledges the proportionality test, but fails to give explanation as to why he could reach a stage whereby proportionality was in issue.
16. The respondent refers to **Gulshan** and the need to consider such matters as "exceptional and compelling". Whilst the law has moved on from **Gulshan** it is still incumbent upon the judge to explain why the circumstances of this case meant that he could move onto a "stand alone" Article 8 consideration. It may well be the case that such consideration should be given to the case, but there is no adequate explanation as to why circumstances of this couple required it. In failing to do this the judge has erred in law, I consider that error to be material.
17. For these reasons the determination must be set aside. I consider that the case falls within the criteria set out in the Senior Presidents direction and I accordingly remit the case back to First-Tier Tribunal to be heard by a judge other than Judge Archer.
18. As indicated above there was no challenge to the judge's findings and decision under the Immigration Rules, and those findings and decision must stand. I do not consider it appropriate to preserve any of Judge Archer's findings from paragraph 24 onwards and it will be for the next judge to only consider the Article 8 aspects of the appellant's case.

### **Decision**

19. The Secretary of State's appeal is allowed and the case is remitted back to the First-Tier Tribunal.

Signed

Date

## Upper Tribunal Judge Poole