**UPPER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)** **APPEAL NUMBER: IA/11044/2014**

**THE IMMIGRATION ACTS**

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| **Heard at: Field House** | **Determination Promulgated** |
| **On: 27 May 2015** | **On: 9 June 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MAILER**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**And**

**MS ICHIKO WATANABE**
(NO ANONYMITY DIRECTION MADE)

**Respondent**

**Representation**
**For the Appellant:** **Mr P Nath, Senior Home Office Presenting Officer**
**For the Respondent:** **Mr S Khan, counsel (instructed by Aschfords Law)**

**DETERMINATION AND REASONS**

1. For the sake of convenience I shall refer to the appellant as the Secretary of State and the respondent as "the claimant."

2. The claimant is a national of Japan, born on 10 April 1976. She has been granted successive periods of leave to remain in the UK following her grant of leave to enter as a student in April 2003. She was granted leave to remain until 31 December 2012. However, on 1 May 2012 her leave to remain was curtailed so as to expire on 14 October 2012 and she was given 60 days to find another Tier 4 sponsor.

3. On 12 November 2012 she applied outside the rules for further time to obtain an English language test certificate at the appropriate level. That was refused on 14 June 2013. On 5 December 2013, she was served with "overstayer papers."

4. On 23 December 2013 she applied for leave to remain under Article 8 of the Human Rights Convention. That application was refused on 11 February 2014. It was on that date that the secretary of state made the decision to remove the claimant.

5. Her appeal against that decision was allowed on human rights grounds by First-tier Tribunal Judge Russell in a determination promulgated on 3 October 2014. The Judge did not accept that the claimant had no ties to Japan even though she had not visited there since 2010. Her family who supported her in her studies and with whom she maintained contact were still there.

6. The Tribunal had regard to her relationship to her British partner, which although not amounting to family life was nevertheless relevant to a finding about her private life. That relationship commenced in about May 2013 and became serious in December 2013. The Judge found that "in that sense the relationship is developing." This was nevertheless a nascent relationship and they cannot be considered to have formed a family life together, nor had her partner turned his mind as to how the relationship would continue if the claimant were to be removed to Japan.

7. The Judge found that the decision had a basis in law, taking into account the considerations under s.117B of the amended 2002 Act. Accordingly, the decision to remove was disproportionate to the achievement of that aim, having regard to the strength of her private life here, including the length of time she had remained here and the positive attributes in the shape of speaking fluent English and her integration into society here.

8. Permission to appeal to the Upper Tribunal was granted in December 2014.

9. Following a hearing before the Tribunal on 20 January 2015, I found that the Judge had made an error of law by failing to set out and identify the basis for the summary conclusion that he "agreed" that there may be arguably good grounds for granting leave outside the rules. No analysis or consideration was given as to what those compelling or compassionate reasons were. He stated that "the only ground" is Article 8.

10. As noted above, the Judge did not accept that the claimant had no ties to Japan. He gave no reasons as to why no proper consideration was given to s.117B having regard to the fact that the claimant's relationship was started and developed at a time when her status was precarious and when she had no leave to be in the UK. That submission had been advanced by the secretary of state but had not been adequately dealt with by the Judge.

11. The failure by the Judge to set out and identify the basis for that conclusion resulted in the secretary of state not knowing the basis upon which she had lost before the First-tier Tribunal.

12. The Judge needed to look at the evidence to see if there was anything which had not already been adequately considered by the secretary of state in the context of the immigration rules and which could lead to a successful Article 8 claim. That exercise did not take place.

13. In the event, I set the decision aside and directed that the claimant file and serve on the Tribunal written submissions setting out anything which had not been adequately considered in the context of the immigration rules and which could lead to a successful Article 8 claim.

14. At the resumed hearing on 27 May 2015, Mr Nath on behalf of the secretary of state contended that there was nothing additional which could be added to the secretary of state's reasons for refusal with regard to exceptional circumstances. There has been adequate consideration given.

15. Despite the opportunity given to the claimant to file any submissions as to whether there was anything which had not been properly considered in the context of the immigration rules and which could lead to a successful Article 8 claim, no such written submissions were filed.

16. Moreover, at the hearing, Mr Khan did not seek to make any submissions with regard to that issue. He stated that there was nothing additional to be added.

17. I have had regard to the Court of Appeal decision in Singh v SSHD; Khalid v SSHD [2015] EWCA Civ 74. At [63] and [64], where Lord Justice Underhill found that Aikens LJ's observations in MM (Lebanon) was not questioning the substantial point made by Sales J at paragraph 30 in Nagre. He was simply stating that it was unnecessary for the decision maker, in approaching the "second stage" to have to decide first whether it was arguable that there was a good Article 8 claim outside the rules - that being what he calls "the intermediary test" - and then, if he decided that it was arguable, to go on to assess that claim: he should simply decide whether there was a good claim outside the rules or not.

18. Lord Justice Underhill would not himself have read Sales J as intending to impose any such intermediary requirement, though he agrees with Aikens LJ that if he was it represents an unnecessary refinement. But what matters is that there is nothing in Aikens LJ's comment which casts doubt on Sales J's basic point that there is no need to conduct a full separate examination of Article 8 outside the rules where, in the circumstances of this particular case, all the issues have been addressed in the consideration under the Rules.

19. The second stage can, in an appropriate case, be satisfied by the decision maker concluding that any family life or private life issues raised by the claim have already been considered at the first stage, in which case obviously there is no need

to go through it all again. That is a conclusion which must be reached by way of a conscious decision and cannot simply be assumed. That the decision maker must be in a position to demonstrate that she has given the necessary consideration is simply a reflection of the ordinary obligation to record a material decision.

20. If the decision maker's view is straightforward, that all the Article 8 issues raised have been addressed in determining the claim under the rules, all that is necessary, as Sales J says, is to say so.

21. Neither MM (Lebanon) nor Ganesalaban undermine the point made by Sales J in Nagre, which together with his endorsement of the approach in Izuazu remains good law [67].

22. In the reasons for refusal in the current appeal, the secretary of state has considered whether there were any exceptional circumstances warranting a grant of leave. These have been considered in full from paragraphs 24 to 31 of the reasons for refusal. In addition there has been consideration of her claim based upon the approach outlined in Razgar [2004] UHL 27.

23. The circumstances relating to the claimant as set out were fully considered. The secretary of state noted that the appellant failed to meet the requirements under paragraph 276ADE or Appendix FM of the rules. That was accepted by the First-tier Tribunal Judge. In particular it was not accepted that there would be very serious obstacles to her integration into Japan if she were required to leave.

24. I accordingly find that in the circumstances, there are no factors of a sufficiently compelling or compassionate nature warranting the grant of any period of leave to remain in the UK exceptionally outside the rules.

25. I have also had regard to the provisions of s.117 of the Nationality, Immigration and Asylum Act 2002. That requires me to have regard to the public interest considerations applicable in this case. This includes the maintenance of effective immigration controls, which is in the public interest. This is not a case where there is any parental relationship with a qualifying child.

26. In the circumstances, there was no need to conduct a full separate examination of Article 8 outside the rules where all the issues had been addressed in consideration under the rules. The conclusion reached by the secretary of state in this regard was by way of a conscious decision. The secretary of state has demonstrated that she has given the necessary consideration as to whether there is a good claim outside the rules or not.

27. Having regard to the circumstances as a whole, I find that the decision of the respondent was in accordance with the law and the immigration rules.

28. For these reasons, the appeal to the Upper Tribunal of the secretary of state is allowed and I substitute a fresh decision dismissing the claimant's appeal against the secretary of state's refusal of her claim for leave to remain and a decision to remove her.

**Notice of Decision**

The determination of the First-tier Tribunal involved the making of an error on a point of law is set aside.

I substitute a fresh decision dismissing the appeal.

No anonymity direction is made.

Signed Date 8 June 2015

Deputy Upper Tribunal Judge Mailer