



**The Upper Tribunal
(Immigration and Asylum Chamber)
IA/03436/2014**

Appeal number:

THE IMMIGRATION ACTS

**Heard at Field House
On October 28, 2014**

**Decision Promulgated
On 30 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

**Ms DO THIEN THJANN HUYNH
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Malik (Legal Representative)
For the Respondent: Mr Tarlow (Home Office Presenting
Officer)

DETERMINATION AND REASONS

1. The appellant, born August 29, 1984 is a citizen of Vietnam. She entered the United Kingdom as a student with leave until May 1, 2010. She was subsequently granted discretionary leave to remain until December 15, 2013 based on her relationship with

her father. On November 20, 2013 she applied for further discretionary leave to remain and the respondent refused this application on December 31, 2013 and issued a removal direction under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on January 13, 2014 and on May 8, 2014 Judge of the First Tier Tribunal Hunter (hereinafter referred to as the "FtTJ") heard her appeal and dismissed it in determination promulgated on July 4, 2014.
3. The appellant lodged grounds of appeal on July 22, 2014 and on September 12, 2014 Judge of the First-tier Tribunal Hollingworth granted permission to appeal finding it arguable the FtTJ had erred in his approach to article 8 in that the decisions of Gulshan (article 8-New rules)-Correct Approach [2013] UKUT 00640 (IAC) and Shahzad (Article 8: Legitimate Aim) [2014] UKUT 00085 (IAC) had been superseded by the Court of Appeal in MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA civ 985. The respondent filed a Rule 24 response dated September 26, 2014 disputing the ground.
4. The matter came before me on the above date and I took submissions from both Mr Malik and Mr Tarlow.

SUBMISSIONS

5. Mr Malik submitted the FtTJ had erred as follows:
 - a. The decisions of Gulshan and Nagre were no longer legally sound following the decision of MM. Reference should be made to paragraphs [128] to [135] of MM for the correct approach. As Lord Justice Aikens stated at paragraph [129]-

"I cannot see much utility in imposing this further intermediary test. If the applicant cannot satisfy the rule then there either is or there is not a further article 8 claim. This will have to be determined by the relevant decision maker."
 - b. The FtTJ referred to the two-stage test set out in Gulshan in paragraphs [58] to [59] of his determination and at paragraph [66] he did not consider article 8 ECHR.
 - c. The FtTJ erred in this approach. If he erred then he argued the matter should be remitted to the respondent to consider the matter afresh because the respondent had considered the application outside of her own policy that applied in

cases where the appellant had previously been given discretionary leave.

- d. He accepted this latter point could not amount to an error in law, as it had never been raised prior to this hearing.
6. Mr Tarlow responded and submitted there was no material error. He submitted the appellant either had an exceptionality argument under article 8 that would lead to unjustifiably harsh consequences or she did not. The FtTJ found she did not and it was therefore open to him to proceed in the manner he did because the outcome was the same and any possible error was not material.
7. I reserved my decision.

MY FINDINGS ON ERROR IN LAW

8. The FtTJ dealt with an application that the appellant knew she could not meet the Rules and in particular Appendix FM or paragraph 276ADE HC 395. The FtTJ set out in paragraphs [3] to [12] of his determination the issues under appeal and noted at paragraph [8] that the appellant was separated from her husband and was unaware of his whereabouts and why she felt it would be unjust to require her to leave the United Kingdom. The FtTJ set out in paragraphs [9] to [11] the relevant content of her witness statement and he also recorded the content of her sister's witness statement. I am satisfied the FtTJ was fully au fait with the documentary evidence.
9. Between paragraphs [13] and [49] the FtTJ set out in detail the oral evidence and submissions made at the conclusion of the evidence. He then made findings on the application under the Rules between paragraphs [50] and [57] and whilst those findings relate to an application under the Rules his findings are also relevant to any relevant issue under article 8 such as length of stay here, ties to Vietnam and contact with her mother. The FtTJ rejected her claim that she had no contact with her mother and concluded she still had ties to Vietnam because she lived there for eighteen years and had returned in both 2009 and 2012.
10. Mr Malik's submission is that from paragraph [58] of his determination the FtTJ erred. In assessing whether the approach was flawed or whether there has been any material error it is important to have regard to the whole determination.
11. I have set out above the evidence the FtTJ had regard to and some of the findings he made. In paragraph [59] the FtTJ had

regard to those matters that were cited as good grounds for granting an extension of her stay but between paragraphs [60] and [65] he considered each and every point made on her behalf and made findings. These findings are significant because following MM an article 8 consideration is only necessary if there are exceptional and compelling circumstances that would make removal unjustifiably harsh.

12. In examining all of the evidence and the submissions in the manner he did the FtJ concluded there were no exceptional and compelling circumstances that would make removal unjustifiably harsh. He did not refer to MM because it had not been handed down at that time. Whist he applied the Gulshan test he did not identify any article 8 claim outside of the Rule and consequently, in line with MM, he found there as no article 8 claim.
13. I am satisfied that the findings made were open to him and there was no material error in his approach.
14. Finally, Mr Malik did refer me to the respondent's policy. I pointed out to him at the hearing that this neither formed part of her original grounds of appeal lodged on January 9, 2014 nor any argument at the hearing nor his grounds of appeal lodged on July 22, 2014. At all times his firm represented her. I saw no reason to expand the grounds of appeal especially in light of the firm findings made.

DECISION

15. There is no material error of law. The original decision shall stand.
16. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed:

Dated: **30 October 2014**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I do not make a fee award as the application did not succeed.

Signed:

Dated: **30 October 2014**

Deputy Upper Tribunal Judge Alis