Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46029/2013

THE IMMIGRATION ACTS

Heard at Field House, Birmingham	**Determination Promulgated**
On 4 November 2014	**On 12 November 2014**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ROBERTSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MS NOELA KAWIRA MUCHUNKU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Presenting Officer.
For the Respondent: Miss G Kiai, Counsel, instructed by Elizabeth Millar, Solicitors.

DETERMINATION AND REASONS

Immigration History

1. The Appellant in this appeal was the Respondent at the First-tier Tribunal hearing on 6 May 2014. However, for ease of reference, the Appellant and Respondent are hereinafter referred to as they were before the First-tier Tribunal. Therefore Ms Muchunku is referred to as the Appellant and the Secretary of State is referred to as the Respondent.

2. The Appellant is a female citizen of Kenya, whose date of birth is 9 November 1976. Her appeal against the decision of the Respondent, dated 17 October 2013, to refuse her application for leave to remain on the basis of her private and family life was allowed under Article 8 ECHR by First-tier Tribunal Judge Griffith, the reasons for which are contained within her determination dated 26 July 2014, it having been accepted before the Judge that the Appellant could not meet the provisions of the Immigration Rules.

3. In the grounds of application it is submitted that that the Judge erred in (i) failing to consider whether there were exceptional circumstances not covered by the rules as provided by **Gulshan [2013] UKUT 00640 (IAC)** and **Nagre [2013] EWHC 720 (Admin)**, before going on to determine the Appellant's appeal under Article 8 directly applied; and (ii) in her consideration of the evidence (a) by attaching weight to the Appellant's relationship with Mr Stephen Leadbeatter because it was commenced when her immigration status was precarious; and (b) in failing to identify why Mr Leadbeatter would be unable to relocate to Kenya with the Appellant or why she could not return to make an entry clearance application. It is submitted that the Tribunal should have found that the decision to remove was proportionate.

4. Permission to appeal was granted by First-tier Tribunal Judge McDade, who stated that it was arguable that the Judge gave insufficient reasons to satisfy the test laid down in **Gulshan** before making her findings in respect of Article 8.

5. The Appellant filed a detailed Rule 24 Response, in which it is submitted that **MM v SSHD [2014] EWCA Civ 985** confirms that the intermediary step of needing to identify compelling circumstances before an Article 8 claim can be considered outside the Immigration Rules was of little utility, and that in any event, the Judge did properly direct herself in accordance with **Gulshan,** that she referred to the public interest and set out in detail the factors to which she gave weight in the assessment of proportionality.

Submissions

6. Mr Avery relied on the grounds of application, submitting that:

   a. There was no reference to the Immigration Rules for leave to remain in the UK as a partner in the assessment of proportionality and therefore no reference to the Secretary of State's view of where the public interest lies in the assessment of proportionality. Without this starting point, he submitted, the overall starting point must be wrong and the Judge therefore erred in law.

   b. The Judge also failed to identify compelling circumstances before deciding whether the appeal could be determined by applying Article 8 directly. There were no compelling reasons and the outcome would not be unduly harsh. The Judge points to factors in favour of the Appellant to which she attaches considerable weight but no obvious reason is given as to why the Appellant did not simply seek leave to remain as a Tier 2 Migrant. The Judge also

referred to the close relationship between The Appellant and her family in the UK but the Appellant also had relatives in Kenya. The starting point for the Article 8 assessment was the relationship between the Appellant and her partner and that was formed whilst her leave in the UK was precarious. The Judge considered the reasonableness of the Appellant's partner moving to Kenya and concluded that the disruption was not justified. There were, therefore, a number of quite serious flaws due to the failure to establish a starting point and due to lack of reasoning.

c. As to the Rule 24 Response, which relied on **MM** to establish that there was no need to identify compelling circumstances before applying Article 8 directly, in that case, the Court of Appeal was considering the lawfulness of the Immigration Rules and Article 8 was being considered in a different context; far from saying that the **Gulshan** approach was wrong, they simply stated that it made no difference.

d. As to the factors identified in the Appellant's favour in the Rule 24 Response at paragraph 14, many of them were neutral factors. The fact that overstaying was not deliberate is neutral, as was the fact that she had lived in the UK lawfully, bar short periods, for almost 14 years, and that the Appellant was of good character. People who wish to remain in the UK are expected to abide by their conditions of leave. The Appellant may be pregnant but this is not a compelling factor nor is the fact that she is an experienced, specialist nurse working in an occupation where there is a skills shortage.

7. Miss Kiai relied on the Rule 24 Response and I have had regard to them in my analysis and findings below. She additionally submitted that:

a. The Judge made no reference to the provisions of the Immigration Rules because it was conceded that the Appellant could not meet them. Permission was granted on the basis that compelling circumstances were not identified but the Judge gave adequate reasons for considering the appeal under Article 8; she referred to the test in **Gulshan** and then set out the reasons why it should be considered outside the Rules.

b. The Respondent now raised a number of issues which were not raised before the Judge; there was no reference to the Appellant making an application under Tier 2. Witnesses were tendered for evidence and the Respondent's representative chose not to cross-examine them. The Respondent's representative at the hearing accepted the relationship between the Appellant and her partner, as set out in the determination. The Respondent's representative did not state that the Appellant and her partner could live in Kenya. The Judge considered the evidence before her.

8. Miss Kiai stated that she had made submissions before the Judge based on **R (Forrester) v SSHD 2008 EWHC 2307 (Admin)** (as set out in the skeleton argument before the First-tier Tribunal at p 14), because this case

applied to the assessment. The fact that there were brief periods of overstaying and that these were beyond her control was not a neutral factor. Furthermore, the Appellant was pregnant, her partner was a British citizen and her child would also be a British citizen. The Judge balanced all the factors before her. Permission was granted on the **Gulshan** point only.

9. Mr Avery in reply, stated that (i) the Judge was obliged to consider the issues of law whether or not raised by the Respondent's representative; (ii) **MM**, at paragraph 29, only stated that **Nagre** added nothing to the debate as to whether or not the Immigration Rules were lawful. It was not saying that **Nagre** and **Gulshan** should not be applied; (iii) the fact that witnesses were not cross-examined was not relevant because the issue was in relation to the law not the facts; (iv) he could not see the relevance of **Forrester**, which appeared to be a near miss argument; (v) the only point at which the public interest was considered by the Judge was at paragraph 33, when she referred to the wider public interest.

10. Following submissions, I reserved my decision, which I give below together with my reasons. When asked to make submissions on whether or not a resumed hearing would be necessary if I were to find that the Judge had materially erred in law, Mr Avery submitted that there was no reason why I should not go on to remake the decision on the basis of the findings made by the Judge without a further hearing. Miss Kiai stated that if I did find a material error of law in the determination of the Judge, there should a resumed hearing because the matters now raised by the Respondent would need to be addressed with additional evidence.

Decision and reasons

11. There was no dispute before me as to the findings of fact made by the Judge; the dispute related to (i) whether or not the Judge should have gone on to consider the Appellant's appeal by applying Article 8 directly; (ii) the assessment made by her of the public interest in the proportionality assessment; and (iii) the weight she gave to the particular factors which affected her proportionality assessment exercise (the argument that she should have found that the decision was proportionate) which was disguised as an 'inadequate reasons' challenge.

12. This is a case in which both parties were represented at the First-tier Tribunal hearing and in which the reasons for refusal letter dated 17 October 2013 did not consider the Appellant's rights based on family life with her partner. The fact that she was in a relationship with a British Citizen and was expecting his child was not challenged on behalf of the Respondent. In fact none of the evidence tendered was challenged and Mr Avery submitted that the challenge was not in relation to the facts.

13. Whilst the general guidance as set down in case law is that the Immigration Rules post 9 July 2012 (the new Rules) establish with greater specificity the Respondent's view of where the public interest lies in Article 8 claims, there is no need for the Judge to set out in her determination every part of the Rules which the Appellant has failed to satisfy. The fact that she has not referred to them specifically, in the same way that the Respondent's representative did not refer to them specifically in

submissions, does not mean that she did not have them in mind. She was entitled to accept the Appellant's representative's concession that the Appellant could not meet the Immigration Rules. Contrary to the submissions on behalf of the Respondent, the Judge in fact referred to the public interest at [31] and [32]. Mr Avery did not state what other matters within the public interest the Judge should have had regard to. The Judge was aware of the need to conduct a balancing exercise. She does not overlook the negative factors (at [33] she refers to periods of overstaying and at [34] to the Appellant's immigration status when her relationship with Mr Leadbetter was commenced).

14. Mr Avery argues firstly that compelling factors were not identified and secondly that the factors to which the Judge gave weight were not compelling. However, firstly, the Judge stated that there were compelling factors "on the totality of the evidence concerning the Appellant" and she then went on to the factors that were not considered under the Immigration Rules (bearing in mind that the partner route would not be open to the Appellant). When considering the analysis in **Nagre**, the Court of Appeal in **MF (Nigeria) [2014] EWCA Civ** confirmed, at 42, the analysis of Sales J "…that in a "precarious" family life case, it is only in "exceptional" or "the most exceptional circumstances" that a claim based on Article 8 outside the Rules would succeed"; and at paragraph 44, that "We would…hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence." This was the approach the Judge took and her approach was therefore not flawed by legal error.

15. As to the submission that the factors the Judge considered were not significantly compelling, the Judge has, on the basis that the new Rules did not result in an adequate consideration of the Appellant's claim, considered it under Article 8 directly applied. There was no submission before her that facts set out in the various witness statements could not be described as 'sufficiently compelling'. Absent the provisions of s 19 of the Immigration Act 2014, which was not in force at the date of decision or at the date of hearing, there is no checklist against which the weight to be attributed to various factors is to be measured. The Judge did consider the fact that the Appellant's relationship was formed whilst she did not have settled status but she had already lived in the UK lawfully for many years [34]. It is to be expected that where individuals have been residing and working lawfully there will be the development of relationships because those with valid leave do not reside in a vacuum devoid of human relationships. The weight attributed to the various factors and the evidence is a matter for the Judge and if the Respondent wished to argue that significant weight should not be attached to the various factors, the time to have done this would have been before the First-tier Tribunal.

16. Mr Avery submitted that there was nothing to prevent the Appellant from applying for leave as a Tier 2 Migrant if her occupation was on the list of shortage occupations. This again was not a matter explored by the Respondent's representative at the First-tier Tribunal hearing and the Judge does not have to give reasons on every aspect of the facts in order for her decision to be sustainable (see **Budhathoki (reasons for**

decisions) **[2014] UKUT 00341 (IAC)**). Mr Avery also referred to the fact that the Judge had taken into consideration that the Appellant had almost resided in the UK lawfully for 14 years and that this was suspiciously like a near miss argument (the submission under **Forrester**). However, this was not the only factor which the Judge took into account; it was one of a number of factors.

17. Whilst another Judge may have reached a different conclusion on the facts of this case, the Judge did not materially err in the ways for which permission to appeal was granted and the grounds and the submissions amount to no more than a disagreement with the conclusions of the Judge.

Decision

18. The decision of Judge Griffiths discloses no material errors of law and her decision must therefore stand.

19. I dismiss the Respondent's appeal.

Anonymity

20. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No request has been made for an anonymity order and pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I find no reason to make an order.

Signed Date **12 November 2014**

M Robertson
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT

In light of my decision, I have considered whether to make a fee award (Rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4) (a) of the Tribunals Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). As the appeal has been dismissed, Judge Griffiths' fee award is confirmed.

Signed Dated **12 November 2014**

M Robertson

Deputy Judge of the Upper Tribunal