Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/37856/2013

<u>THE IMMIGRATION ACTS</u>

Heard at Field House
On 11 December 2014

Determination Promulgated
On 5 January 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

Melisa Singh
[No anonymity direction made]

<u>Appellant</u>

and

Secretary of State for the Home Department

<u>Respondent</u>

<u>Representation</u>:

For the appellant: Ms P Yong, instructed by City Legal Partnership
For the respondent: Mr C Avery, Senior Home Office Presenting Officer

<u>DETERMINATION AND REASONS</u>

1. The appellant, Melisa Singh, date of birth 17.5.86, is a citizen of Guyana.

2. This is her appeal against the determination of First-tier Tribunal Judge Dennis, promulgated 2.9.14, dismissing her appeal against the decision of the respondent, dated 9.9.13, to refuse her further application for indefinite leave to remain (ILR) outside the Immigration Rules on human rights grounds. The Judge heard the appeal on 17.7.14.

3. First-tier Tribunal Judge Hollingworth granted permission to appeal on 17.10.14.

© CROWN COPYRIGHT 2015

4. Thus the matter came before me on 11.12.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Dennis should be set aside.

6. The relevant background to the appeal can be briefly summarised as follows. The appellant first came to the UK as a minor student in 2003. With one break, that leave was subsequently extended to 28.2.10. On 18.4.11, after her leave to remain had long since expired, she applied for ILR outside the Rules. The application and a resubmission of the application were both rejected for non-payment of the correct fee. A further application was submitted on 11.10.11, on the basis that she had lived in the UK for 8 years and established a private and family life with her aunt, Zabeena France. This too was refused, with no right of appeal on 26.11.11. Further submissions on the same basic grounds were submitted on 11.1.13 and the further refusal of 9.9.13 is the subject matter of this appeal.

7. The appellant's claim is that having lived in the UK since 2003 she has established strong ties as part of her private life and close links to her relatives in the UK as part of her family life. She expressed concerns about her future in Guyana, where employment prospects are poor.

8. It is clear that the appellant could not meet the requirements of the Immigration Rules for leave to remain in the UK, either under paragraph 276ADE or Appendix FM. Judge Dennis considered whether the appellant's circumstances merited allowing the appeal under the article 8 ECHR by applying the Razgar steps, but found that there was no protected family life with her aunt or other relatives and no such dependency as to engage the principles of Kugathas v SSHD [2003] EWCA Civ 31.

9. At §16 of the decision, Judge Dennis considered whether private life should be considered outside the Rules, again referencing Razgar. The judge made an incorrect summary of the current case law when suggesting that "It will only be in an unusual case where the traditional Razgar approach outside these rules would be warranted." The judge went on to observe that there is a "somewhat back to front view", noting that whether Razgar should be considered depended on whether it would reach a different conclusion.

10. Although the statement of the correct approach was somewhat muddled, it is clear from §16 that the judge did consider whether a Razgar analysis, i.e. article 8 ECHR private life outside the Rules, would have produced any different outcome, but concluded that it would be precisely the same. The reasons for that given in §16 are that the economic lack of opportunity or claimed lack of family in Guyana does not render the decisions of the Secretary of State, whether in 2011 or 2013, disproportionate. There were no unusual, compelling or compassionate circumstances. The judge noted that the appellant was simply unwilling to face the same circumstances her fellow citizens face in Guyana. The judge also noted the

appellant's failure as a student and that she "appears to have invested no effort at all to her own or her aunt's benefit" whilst in the UK. In essence, all the appellant had done was to come to the UK as a student, fail to complete her studies and simply by inertia, remained living with her aunt and taking advantage of life in the UK to which she was not entitled.

11. In granting permission to appeal, Judge Hollingworth found that there was an arguable error of law in relation to the judge's approach to article 8. It is suggested that the judge failed to set out why he would have reached the same conclusion if article 8 were to be considered outside the Rules.

12. The Rule 24 response accepts that the judge's language is convoluted, but submitted that "it is clear when the determination is read as a whole what the judge found." Further, "the appellant did not have a family life with her aunt and was reliant on her private life. The judge indicates that he is considering the flow of authorities that resulted from codification of the rules. The judge notes that it is only in an unusual case that an appellant will be successful. The judge concludes that there is no good arguable case to proceed to a full Razgar style analysis. There after the judge considers the matter in the alternative and concludes on the facts that the appellant's removal would not be disproportionate. On close analysis the findings are clear. Such a finding is fully open to him."

13. With respect to Judge Hollingworth, I agree with the Rule 24 submissions and those of Mr Avery at the hearing before me that whilst the decision could have been set out more clearly, it covered the essential grounds of the Rules and article 8 outside the Rules. The judge was satisfied at §14 that the 2011 application had been decided and served on the appellant so that the further submissions of 2013 did not render this a pre-July 2012 application. The respondent was entitled to consider the application under the Rules of 276ADE and Appendix FM.

14. Article 8 first has to be considered under Appendix FM and paragraph 276ADE.

15. Ms Yong submitted that the judge did not consider paragraph 276ADE properly and did not consider the issue of ties to Guyana. However, it is clear from §14 that it was not contended at the First-tier Tribunal that the appellant could meet any of the Rules; the case was put on the basis of article 8 outside the Rules. The appellant had been in the UK over 10 years but had spent the previous 17 in Guyana, where she was born and raised. The judge was doubtful of her evidence about lack of family in Guyana, noting at §8 that she at first denied even knowing who her parents were but later was able to recall their names. Even if the appellant did not have any immediate family in Guyana, it is clear that she must have retained cultural ties, and had completed her high school education there. The judge reached the conclusion that in coming to the UK the appellant had no intention to return and in effect was an economic migrant. In the circumstances there was no material error of law in failing to consider paragraph 276ADE. It is clear that the appellant does not meet the requirements of Appendix FM. Neither can she meet the requirements of paragraph 276ADE.

16. In relation to article 8, at paragraph 17 of Razgar v Secretary of State for the Home Department [2004] UKHL 27, Lord Bingham of Cornhill stated:

"In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the Tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on Article 8, these questions are likely to be:

(1) Will the proposed removal be an interference by a public body with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

17. However, in MF (Nigeria) v SSHD [2013] EWCA Civ 1192, the Court of Appeal held that in relation to deportation cases the 'new' Immigration Rules are a complete code but involve the application of a proportionality test. Whether that is done within the new rules or outside the new rules as part of the article 8 general law was described as a sterile question, as either way the result should be the same; what matters is that proportionality balancing exercise is required to be carried out. In other words, a proportionality test is required whether under the new rules or article 8. MF (Nigeria) was followed in Kabia (MF: para 398 - "exceptional circumstances") 2013 UKUT 00569 (IAC).

18. More recently, Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) has set out, inter alia, that on the current state of the authorities:

> (b) after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);

19. Although case law continues to develop, the current position is perhaps best expressed in paragraph 135 of R(MM (Lebanon)) v SSHD [2014] EWCA Civ 985:

> "135. Where the relevant group of IRs [immigration rules], upon their proper construction provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although reference to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law."

20. Judges should also recall that the threshold to engage article 8(1) is not particularly high (see VW (Uganda) v SSHD [2009] EWCA Civ 5).

21. Ms Yong also relied on Ganesabalan v SSHD [2014] EWHC 2712, to the effect that paragraph 276ADE and Appendix FM are not a complete code for article 8 compatability; there should always be a second stage of consideration of the exercise of discretion outside the Rule.

22. To that extent the approach of the First-tier Tribunal judge was incorrect. However, on the facts of this case, I find that, whilst it could have been expressed more clearly, the judge has in effect considered the appellant's private and family life claims outside the Rules and that there is therefore no material error of law in the decision.

23. In relation to family life, Kugathas concerned an adult's relationship with his mother and adult siblings, the Court of Appeal thought that the following passage in S v United Kingdom [1984] 40 DR 196 was still relevant:

> "... generally, the protection of family life under Article 8 involves cohabiting dependants, such as parents and their dependent minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults ... would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties."

24. In Ghising (family life - adults - Gurkha policy) Nepal [2012] UKUT 160 (IAC) it was held that:

> "1. A review of the jurisprudence discloses that there is no general proposition that Article 8 of the European Convention on Human Rights can never be engaged when the family life it is sought to establish is between adult siblings living together. Rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1). Whilst some generalisations are possible, each case is fact-sensitive.

25. I find that it was open to the judge to come to conclusion on an assessment of the appellant's circumstances that her life in the UK with her aunt and other family members did not amount to family life. The judge has considered the issue and given reasons for reaching that conclusion. It cannot be said that the conclusion was perverse or one to which no other judge could come. In the circumstances, there is no material error of law disclosed in the finding that there is no protected family life that could engage article 8 ECHR.

26. The judge also considered whether a Razgar consideration of the appellant's private life rights under article 8 ECHR would produce any different outcome to the consideration under paragraph 276ADE. I find that within the decision there are all the elements and consideration of the relevant factors as to private life. The appellant's entry to the UK was as a student. She had no legitimate expectation of being able to remain in the UK except in accordance with the Rules. She failed to continue as a student and failed to leave. It is quite clear that she came to the UK with the dishonest intention of settling here, encouraged to do so by her aunt. Article 8 is not a shortcut to compliance with the Rules. She does not meet the 20 years long residence requirement. Neither can she meet the other aspects of paragraph 276ADE,

even if she no longer has immediate family in Guyana. She is now some 28 years of age and one would expect a person of that age to be making his or her own way in the world. There are no particularly compelling, compassionate or exceptional circumstances in this case; the appellant simply does not want to return to Guyana and wants to continue living in the UK. As cases such as Nasim and Patel have explained, temporary admission as a student does not give rise to a right to remain on the basis of private life and the return of the appellant to Guyana does not interfere with her moral or physical integrity.

27. Even if the judge of the First-tier Tribunal had given a more elaborate treatment of article 8 private and/or family life, I find that it is inevitable that the appeal would have been dismissed. The appeal to the Upper Tribunal does no more than clutch at straws by seeking to exploit a certain lack of clarity or defect in the decision of the First-tier Tribunal. It is clear to me that the decision of the First-tier Tribunal was one fully open to the judge on the evidence and frankly, properly directed, no other judge could or would have come to any different conclusion on the facts of this case.

28. Ms Yong sought to argue a new issue, that the appellant would be at risk on return as a young single female. However, the appellant has made no asylum or humanitarian protection claim and this is an issue that has not been raised with the respondent or in the previous hearing. If the appellant wishes to pursue this matter she should make the appropriate application. My task is to consider whether the First-tier Tribunal made an error of law in the making of the decision such that it should be set aside and remade. This is not a further opportunity to reargue the case.

Conclusion & Decision

29. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed: Date: 19 December 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the 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).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed: Date: 19 December 2014

Deputy Upper Tribunal Judge Pickup