IAC-HW-AM-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04234/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 November 2014	**On 26 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

NAMRATA GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Parkes of Counsel
For the Respondent: Mr Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nepal, born on 22 December 1989. She applied on 9 September 2013 for leave to remain on Article 8 grounds which was refused by the respondent on 31 December 2013 with an accompanying decision to remove the appellant by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant's appeal against the respondent's refusal was dismissed by Judge P-J White (the judge) in a determination promulgated on 23 July 2014. He found that the appellant was not at risk of any breach of her rights under Article 3 raised before him at the hearing, whether from threatened violence on the part of her father or from more generalised difficulties of a societal nature. As regards Article 8, the judge found she could not satisfy paragraph 276ADE bearing in mind **Ogundimu (Article 8 – new Rules) Nigeria [2013] UKUT 60 (IAC)** and that Article 8 outside the Rules was not engaged.

3. The grounds claim the judge materially erred because he was obliged to carry out an Article 8 assessment outside the Rules. He misunderstood the approach required. See **Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC)** and **Nagre [2013] EWHC 720 (Admin)**. The grounds argue that a full Article 8 analysis outside the Rules was required because of the appellant's circumstances but in any event, the judge erred because he found that the respondent's decision was not such as to engage Article 8, failing to take account of the test in **AG (Eritrea) [2007] EWCA Civ 801**.

4. As regards Article 3, the judge failed to make adequate findings with regard to the appellant's evidence against which to consider the expert report. Further, that he failed to take the appellant's mental health issues into account. See [12]-[13] of the appellant's statement.

5. The appellant's permission to appeal was out of time. She said that the delay in serving the application was due to the failure of clerks in Counsel's chambers not passing the determination to Counsel with the solicitor's request to draft and file the grounds. On that basis, Judge Ford found it would be unjust not to extend time. Nevertheless, she found that there was no reasonable prospect of success with regard to the argument that the judge erred in not considering Article 8 outside the Rules and in particular not considering proportionality. That was because the judge clearly stated that even if he had found that there were circumstances warranting such consideration, he would not find Article 8 engaged in respect of family or private life such that the issue of proportionality did not arise. Judge Ford took the view that the judge did fully consider the mental health evidence and found that the appellant was not currently suffering from mental health difficulties. The judge had made it very clear at [33] that he was not satisfied to the *"low standard applicable"* on the evidence that the appellant's father had made threats to kill her. Judge Ford considered that finding was open to the judge to make on the evidence and it was misleading to suggest that he did not make clear findings

on that issue such that there was no arguable material error of law.

6. The grounds were renewed to the Upper Tribunal maintaining that the judge misdirected himself as to the legal test in determining whether an assessment of Article 8 outside the Rules was required. See [128] of **MM [2014] EWCA CIV 985**. It was claimed that Judge Ford failed to give adequate reasons as to why the arguments at [16]-[18] of the grounds were rejected and that in any event there were insufficient findings of fact in the judge's determination.

7. In granting leave, Upper Tribunal Judge Chalkley said that it was properly arguable that the judge *"may"* have erred in assessing the appellant's entitlement under Article 8. Whether his error made any material difference would have to be decided, but Judge Chalkley said *"……I would not wish to unduly raise the appellant's hopes"*.

Submissions on Error of Law

8. Ms Parkes relied upon her skeleton argument. She submitted that Judge White erred in concluding that he was not obliged to consider Article 8 outside the Rules and relied in that regard upon **Ganesabelan [2014] EWHC 2712 (Admin**). In particular at [10] *"Unlike other Rules which have a built-in discretion based on exceptional circumstances, Appendix FM and Rule 276ADE are not a 'complete code' so far as Article 8 compatibility is concerned"* and at [12] *"These Immigration Rules operate alongside important guidance which is itself part of the relevant overall code and which guidance recognises the discretion outside the Rules and the duty on the Secretary of State to consider exercising that discretion in the individual case."*

9. Ms Parkes submitted that the judge found the appellant had established a private life in the United Kingdom and she therefore had an arguable case that there might have been good grounds for granting leave to remain outside the Rules and erred in concluding that Article 8 was not engaged. If Article 8 was engaged a proportionality test was required. Alternatively or in addition, Ms Parkes submitted that there were sufficient compelling circumstances which the judge ignored in terms of a proportionality exercise, in particular, that she had become pregnant and had to give up the child for adoption, threats to kill from her father, estrangement from her siblings and lack of friends in her own country.

10. Mr Kandola relied upon the Rule 24 response. He submitted that the judge directed himself appropriately. He carried out a clear and detailed analysis of the appellant's circumstances and

concluded that there was no good arguable case for further consideration of Article 8 outside the Rules. The judge had made a clear finding at [32] that the appellant would not be at risk after a proper analysis of her claim. He did not misdirect himself with regard to Article 8.

Conclusion on Error of Law

11. Success on Article 8 grounds under the Immigration Rules was dependent upon showing that the requirements of Appendix FM and/or paragraph 276ADE were met. The fundamental changes brought in on and after 9 July 2012 were far from straightforward. Prior to 9 July 2012, where a person lost under the Rules, judges would generally determine the Article 8 ground of appeal by proceeding to make an assessment outside of the Rules. **Odelola [2009] UKHL 25**. The Rules represented the Secretary of State's policy on immigration matters but private and family life ties were still required to be weighed in assessing proportionality. That broad approach still remains as is clear from **Patel [2013] UKSC**. In that case Lord Carnwath described the most authoritative guidance on the correct approach of the Tribunal to Article 8 as remaining that of Lord Bingham in **Huang**. A person's failure to qualify under the Rules was the point at which to begin, not end, consideration of the claim under Article 8. The terms of the Rules were relevant to that consideration but not determinative. Since the changes on 9 July 2012, there has been much consideration in the courts concerning the precise impact of the Rules which for the first time sought to encapsulate the Article 8 assessment. The Secretary of State's ambition was to make provision under the Rules for Article 8 so that there would be no need to make any assessment outside the Rules. The Court of Appeal held in **MF [2013] EWCA Civ 1192** at least with regard to deportation, that the Rules were a complete code. Having said that, the Court of Appeal said that the public interest in deportation could be outweighed by compelling or exceptional circumstances which produced a disproportionate response. In other words, a proportionality assessment would still be required in the deportation context. Whether that was an exercise conducted completely within the Rules or as a two stage analysis, Rules first and then an assessment outside them, was academic. The position is not so clear with regard to the rest of the Rules outside deportation. In **Gulshan [2013] UKUT 640**, the Upper Tribunal set out what it considered to be the correct approach. After applying the requirements of the Rules, only if the were "*arguably good grounds for granting leave to remain outside them"* would it be necessary for Article 8 purposes to consider whether there were "*compelling circumstances not sufficiently recognised under them"* which built on the approach taken by the High Court in

Nagre [2013] EWHC 720 (Admin). The Court of Appeal in **MM (Lebanon) [2014] EWCA Civ 985** took the view that where the Rules provide a complete code for dealing with a person's human rights in the context of an individual Rule or statutory provision, then the balancing exercise, weighing the competing interests, must be done in accordance with the code. Nonetheless, references in the Rules to "*exceptional circumstances*" will require a proportionality exercise. If the particular Rule or Rules do not amount to a complete code then the proportionality test will be more at large guided by **Huang**. Helpful guidance might come from **Haleemudeen [2014] EWCA Civ 558** where the Court of Appeal appeared to endorse the Upper Tribunal's approach in **Gulshan** and particularly so because **MM** was strictly concerned with an earlier Upper Tribunal decision in the same proceedings regarding the minimum income threshold and that the comments about the correct approach to the Rules generally and to **Gulshan** and **Nagre** were obiter only. See also **Nasim [2014] UKUT 00025**.

12. The grounds raised issues with regard to Article 3 and Article 8 which I will address in turn:

Article 3

13. The grounds claim that the judge failed to make adequate findings in relation to whether or not the appellant's father had threatened to kill her and whether she would be at risk on return. The judge was told at the outset that the appellant was not relying upon Article 3 although as the hearing progressed, Ms Parkes on behalf of the appellant changed her position. That evidence relating to the appellant's father was set out by the judge at [5]-[19] of the determination. See also [24] where the judge summarised that as regards Article 3, he had heard repeated evidence from the appellant that she feared ill-treatment and that she would be at risk on return. The judge took into account the expert report of Dr Malagodi in his findings and reasons at [25]-[35]. He reminded himself of the lower standard with regard to Article 3. See [32] and [34].

14. As regards the appellant's ill-treatment by her father, the judge considered that at [32] pointing up the inconsistencies in her evidence and the qualification the appellant made that the ill-treatment she claimed was *"……not in a bad way."* Apart from two limited references in the appellant's oral evidence before the judge, there was no reference anywhere to actual violence of any kind from her father. The judge carried out a comprehensive assessment of the risk to the appellant on return in terms of the high Article 3 threshold and found that she was not at risk either from threatened violence from her father or from more generalised difficulties of a societal nature.

See [35]. Those were cogent findings that the judge was entitled to come to on the evidence before him and disclose no arguable error of law.

15. The judge carried out a comprehensive assessment of the appellant's medical condition and the documentation she had provided relating to the provision of mental health care in Nepal. See [33]. He took into account that the appellant claimed it was reasonably likely she would need mental health treatment on return. He took into account that she said in her witness statement that she had contemplated suicide and was seeking counselling as of July 2014 although he noted that medical evidence of any kind was conspicuous in its absence. He nevertheless took into account a letter from Open Mindedness Limited which was the extent of the evidence that the appellant had with regard to mental health issues. There was no evidence she had sought or received treatment from her GP or any other medical professional and there was no evidence that she was suffering from any mental health issues or in need of any treatment notwithstanding that she was said to have suffered from severe postnatal depression. On the evidence before the judge and for the reasons he set out, he was satisfied that the appellant had not shown herself to be suffering from mental health issues of any kind. His finding that her attempt to put forward such a case was an attempt to bolster the claim was a finding he was entitled to come to on the evidence before him.

16. The judge took into account that the appellant would be returning to Nepal as a single woman and would have to make a life for herself there. See [34].

Article 8

17. The judge correctly addressed himself to the appropriate approach to Appendix FM and 276ADE at [36]. He found that she could not satisfy either provision. No issue was taken by Ms Parkes in that regard except that she said that if I found the judge erred and I was not minded to remit the matter for a fresh hearing, I must consider paragraph 276ADE as amended which by virtue of the Statement of Changes HC-532 applied to all decisions made on or after 28 July 2014. The new test in 276ADE(1)(vi) was less onerous than that of "*no ties*", inter alia, "……*but there would be very significant obstacles to the appellant's integration into the country to which he would have to go if required to leave the UK.*" Further, that I must have regard to s.117B of the Nationality, Asylum and Immigration Act 2002.

18. Having found the appellant did not satisfy Appendix FM or paragraph 276ADE, the judge went on to consider whether

there remained the possibility of an appeal under Article 8 outside the Rules. He took into account **Gulshan.** At [37], he found there was undoubtedly a strikingly compassionate circumstance in that the appellant became pregnant, had a child and gave up that child for adoption. He commented that he had no doubt that would have been extremely distressing for the appellant but observed that the fact of having given up a child was not advanced as a reason for a grant of leave. The justification for the grant of leave as put forward by Ms Parkes on behalf of the appellant was said to be the adverse consequences that would flow in Nepal from having had the child here. The judge assessed the appellant's circumstances on return. He accepted that the appellant might find life in Nepal significantly more difficult than would have been the case had she not got pregnant but simply completed her studies and returned but he did not accept that the circumstances were worse than that and further, said that he did not consider that unfortunate and distressing incident in her life amounted to a circumstance sufficient for a full consideration of Article 8 outside the Rules. I find in such circumstances, in accordance with the development of the case law I have set out above, the judge directed himself correctly and did not err. Nevertheless, the judge went on to consider Article 8 outside the Rules in the event that as he put it, his view was too harsh. He went on to consider the appellant's circumstances in terms of **Razgar** which he considered at [38] of his decision.

19. I find on the evidence before the judge he was entitled to conclude that the appellant's circumstances were not such as to necessitate consideration of Article 8 outside the Rules, but that he nevertheless carried out such an assessment and was further entitled to conclude that Article 8 was not engaged.

Conclusion

20. In summary I conclude that the determination does not contain a material error of law, such that the decision of the First-tier Tribunal should be set aside.

Decision

21. The decision of the First-tier Tribunal contains no error of law and shall stand.

22. No anonymity direction is made.

Signed Date 26 November 2014

Deputy Upper Tribunal Judge Peart

TO THE RESPONDENT
FEE AWARD

I have found that the decision of the First-tier Tribunal contains no error of law and shall stand such that there can be no fee award.

Signed Date 26 November 2014

Deputy Upper Tribunal Judge Peart