Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24188/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30th April 2014	**On 30th May 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

GRACE IGLESIAS BONAFICIO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs C Dzuiti on behalf of CS Legal Consultants Ltd
For the Respondent: Mr P Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Doyle made following a hearing at Hatton Cross on 19th February 2014.

2. The background to this case is as follows. The claimant is a citizen of the Philippines who was born on 28th August 1973. She entered the UK on 2nd September 2008 as a student and her leave was extended so that she had leave to remain valid until 22nd March 2013.

3. On 5th March 2013 she submitted an application to vary leave to remain in the UK on discretionary grounds which was refused on 4th June 2013 and it is this decision which was the subject of appeal before Judge Doyle.

4. The judge recorded that in or around February 2013 the claimant met a British citizen, Michael Rowell, and a relationship developed between them. She lived with him in a two bedroom property with two of Mr Rowell's sons from a previous relationship. There is some confusion in the evidence in relation to those sons in that in the claimant's witness statement she said that the oldest son lived with them full-time and the other two shared houses between their father and their mother, whereas her fiancé said that the two younger children lived with him and the claimant.

5. The judge said that it was beyond dispute that the claimant could not fulfil the requirements of paragraph 276ADE of the Immigration Rules since she has not lived in the UK for at least 20 years. Neither can she meet the requirements of Appendix FM either as a partner or as a fiancée and therefore cannot take advantage of any exceptions under EX1.

6. The judge was struck by the sincerity of the oral evidence from the claimant and from Mr Rowell and. Mr Rowell was born in the UK and lived his entire life here, brought up his sons here and established his business here. He said that he would maintain the relationship if the claimant was returned to the Philippines and would consider moving there to be with her. The claimant and Mr Rowell have set up home together and have lived together, albeit for less then twelve months. Mr Rowell's youngest son was approaching his 18th birthday there was family life not only between the claimant and Mr Rowell but also between the claimant and the sons.

7. Article 8 was engaged. He took into account the relevant case law including that of Chikwamba v Secretary of State [2008] UKHL 40 and said that implementing the Secretary of State's decision would force separation on the couple. The claimant would have to return to the Philippines and whilst she could apply to return to the UK as a fiancée, the Secretary of State has not explained why the Appellant's separation and consequent delay was necessary. There was adequate accommodation and the claimant had maintained herself without recourse to public funds for the last five years.

8. He concluded that there was no reliable evidence to explain what purposes would be served in forcing separation on the claimant and Mr Rowell, nor why her removal would be necessary. The Secretary of State had failed to discharge the burden of proving that the interference was necessary or proportionate and on that basis he allowed the appeal.

The grounds of application

9. The Secretary of State sought permission to appeal relying on the case of MF (Nigeria) [2013] EWCA Civ 1192 which confirmed that the Immigration Rules were a complete code, forming the starting point for the decision maker. It was made clear in Gulshan [2013] UKUT 00640 that an Article 8 assessment should only be carried out when there are compelling circumstances not recognised by the Rules. In this case the Tribunal had not identified such circumstances and the findings were unsustainable.

10. Gulshan made it clear that an appeal should only be allowed where there were exceptional circumstances, in reliance on the case of Nagre [2013] EWHC 720 which endorsed the Secretary of State's guidance on the meaning of exceptional circumstances, i.e. where refusal would lead to an unjustifiably harsh outcome. The claimant had begun her relationship in the full knowledge that her stay was temporary and she may be required to leave. It had only commenced around February 2013 and was not one akin to marriage.

11. Permission to appeal was granted by Judge Plimmer on 17th March 2013. She said that it was arguable that, in considering that there was no reliable evidence to explain the purpose of separating the claimant and her spouse, the judge had failed to take into account the Secretary of State's position that the Rules were not met and in those circumstances an unjustifiably harsh outcome ought to have been identified.

Submissions

12. Mr Deller relied on his grounds and on the grant of permission. He submitted that although the judge had made reference to the fact that the claimant could not meet the requirements of the Rules, he had not approached the decision in the light of the fact that they are a complete code, and a consistent transparent and fair application of the Immigration Rules. The judge had not proper regard to the public interest as identified in the Rules, nor to the fact that if the requirements of the Rules were not met, it was necessary for the claimant to establish compelling circumstances. The judge had adopted the wrong approach in simply saying that there was no need for the claimant to leave the country and apply for entry clearance in the normal way.

13. Miss Dzuiti defended the determination. She said that the judge had considered the position under the Immigration Rules but it was not in dispute that they could not be complied with. The judge had then asked himself the correct questions, had been guided by the case law, and was entitled to conclude that the Secretary of State had failed to establish why it was necessary for her to go to the Philippines and apply for entry clearance. The judge was entitled to rely on the fact that Mr Rowell had a minor child who was 17 at the time of the hearing and who could not be left. She said that she now had evidence that the claimant was pregnant and in fact had been at the time of the hearing although she was unaware of that fact. If she had to return to the Philippines there would be a substantial delay.

14. By way of reply Mr Deller submitted that it was insufficient to simply refer to the fact that Mr Rowell had a child who was approaching the age of 18. His situation had to be considered in the round and the claimant would still have to demonstrate an adverse effect on her by being required to apply for entry clearance.

Findings and conclusions

15. Mr Deller's submissions have force. The position so far as Article 8 is concerned has been changed by the introduction of the new Rules and the case law has reflected that change. In particular the case of Gulshan which says in terms that, after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them was it necessary for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under them.. In the absence of insurmountable obstacles it was necessary to show other non-standard and particular features demonstrating that removal would be unjustifiably harsh. No compelling circumstances were identified by the judge and none have been identified today.

16. In this case the judge did not approach his consideration of Article 8 through the prism of the relevant case law, in particular Gulshan.

17. The fact of the pregnancy was not before the judge and not taken into account by him since it was unknown to the claimant herself.

18. So far as the family of Mr Rowell is concerned, in fact the evidence is discrepant as to who was living with who, but in any event, the mere fact that Mr Rowell has a child who is approaching his 18th birthday and may or may not be living with him but has close contact with him is not, as Mr Deller put it, a train stopping event. The claimant has the opportunity of returning to the Philippines and applying for entry clearance in the normal way. Accordingly the Secretary of State has established that it would not be disproportionate for her to be removed.

Decision

19. The judge erred in law and his decision is set aside. A decision is substituted dismissing the appeal.

Signed Date

Upper Tribunal Judge Taylor