Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26562/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 May 2014	**On 04th Aug 2014**

Before

HON LORD BANNATYNE SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE GILL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS REEM ALSELAMI

Respondent

Representation:

For the Appellant: Mr Tufan, Home Office Presenting Officer
For the Respondent: Mr Jorro, Counsel

DETERMINATION AND REASONS

Introduction

1. The appellant before this Tribunal is the Secretary of State and for ease of reference she will be referred to as "the Secretary of State". The respondent before this Tribunal is Ms Alselami. She will be referred to as "the claimant".

Background

2. On 10 June 2013 the Secretary of State made a decision to refuse the claimant's application to vary her leave to remain in the United Kingdom. She further decided to remove the claimant by way of direction under Section 47 of the Immigration Asylum and Nationality Act 2006. The claimant appealed the decision to the First-tier Tribunal. It allowed the appeal in terms of Article 8 of the Convention and refused the appeal on immigration grounds. The Secretary of State appealed this decision and permission to appeal was granted by First-tier Tribunal Judge Keane.

3. The immigration history of the claimant is conveniently set out in paragraphs 3 to 7 of the First-tier Tribunal's determination. These paragraphs are in the following terms:

> "3. The most recent immigration history of the Appellant begins in February 2008. However, the connection of her and her family with the UK goes back much further. She first arrived in the country in 1997 with her parents and her siblings. They are all nationals of Saudi Arabia. Her parents returned to Saudi Arabia in 2003 and the Appellant went with them and enrolled at a school in Saudi Arabia where she studied from 2003 until 2005. While studying in Saudi Arabia she met the man who is now her ex-husband, Mr Ryid Nassif.
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> 4. The Appellant returned to the UK with her parents in 2005. She was 17 at that time.
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> 5. The Appellant married Ryid Nassif in Saudi Arabia on 21st August 2006 in an Islamic ceremony. She returned to the UK with her parents in September 2006. Following a wedding ceremony reception on 17th March 2007 she set up home with her new husband in Guildford. The marriage broke down. The Appellant and her husband divorced on 22nd October 2007.
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> 6. From 20th February 2008, the Appellant resided in the UK pursuant to a student visa originally expiring on 17th December 2010. That was subsequently extended as a Tier 4 (General) Student visa to 14th October 2013. On 10th December 2012 the Appellant made an application for further leave to remain in the UK as a Tier 4 (General) Student. That application was refused on 22nd February 2013. Further, on the same date the Secretary of State concluded that the Appellant had ceased to meet the requirements of the Immigration Rules under which her leave was granted. She was not prepared to exercise discretion in the Appellant's favour. The Appellant's leave was curtailed under paragraph 323A(a)(ii)(2) and 323(ii) of the Immigration Rules until 23rd April 2013.
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> 7. On 22nd April 2013 the Appellant made a combined application for leave to remain in the UK as a Tier 4 General Student under the points-based system and for a biometric residence permit. The application was refused with a decision to remove the Appellant from the UK by way of directions under Section 47 of the 2006 Act. The Secretary of State's Notice of Refusal was dated 10th June 2013."

Submissions on Behalf of the Secretary of State

4. It was submitted that the approach of the First-tier Tribunal was flawed in that it had approached the Article 8 assessment on the basis of applying the Near-Miss principle. This was a wrong approach and reference was made to the observations of Burnton LJ in **Miah** [2012] EWCA Civ 261 who, at paragraph 26, stated this:

> "… In my judgment, there is no Near-Miss principle applicable to the Immigration Rules. The Secretary of State, and on appeal the Tribunal, must assess the strength of an Article 8 claim, but the requirements of immigration control is not weakened by the degree of non-compliance with the Immigration Rules."

5. Mr Tufan in support of this aspect of his argument referred to paragraphs 50, 52, 55 and 57 of the determination and submitted that when these were considered, it was apparent that the First-tier Tribunal had approached the matter on the basis of the Near-Miss principle.

6. The second detailed basis upon which it was argued on behalf of the Secretary of State that the First-tier Tribunal had erred was this: in **Gulshan** [2013] UKUT 00640 (IAC) it was made clear that the Article 8 assessment should only be carried out when there are compelling circumstances not recognised by the Immigration Rules. He submitted that in the instant case the First-tier Tribunal had not identified such compelling circumstances and for that reason its findings were unsustainable.

7. In addition he argued that **Gulshan** also made clear that at this stage an appeal should only be allowed where there are exceptional circumstances. He then directed our attention to **Nagre** [2013] EWHC 720 Admin which had endorsed the Secretary of State's guidance on the meaning of exceptional circumstances, namely: ones where refusal would lead to an unjustifiably harsh outcome. It was his position that the First-tier Tribunal had not followed this approach and had thereby erred.

8. The third detailed argument put forward on behalf of the Secretary of State was this: the First-tier Tribunal had failed to provide adequate reasons as to why the claimant's circumstances were either compelling or exceptional. He submitted that the claimant had spent her youth and formative years in Saudi Arabia and had been at least partly educated there. He submitted that she would accordingly be familiar with the culture and customs there and could fully re-adapt to life as she had shown she was able to do when she had returned in the past to Saudi Arabia without problems. It was submitted that she had family and would have friends there and she could maintain contact with her family and friends in the UK via modern methods of communication and visits. He

submitted that the First-tier Tribunal had not taken these issues into consideration and had they done so they would not have held that the decision to remove was not proportionate.

Reply on Behalf of the Claimant

9. It was Counsel's position that on a proper analysis of the determination there was no substance to the Secretary of State's arguments.

10. He submitted that the First-tier Tribunal had made full, explicit and entirely relevant references to the new Article 8 rules when setting out the issues (see: paragraphs 10, 11, 12 and 15 of the determination). He submitted that it had introduced its assessment of the relevant law by stating at paragraph 27 that:

> "The legislative starting point in my legal analysis has been the Immigration Rules … read in conjunction with the Statement of Changes … and Appendix FM taking effect from 9th July 2012. I reminded myself of the requirements of paragraph 276ADE; namely 'private life – requirements to be met by an applicant for leave to remain on the grounds of private life.'"

He then submitted that the First-tier Tribunal had gone on specifically to consider the relevant authorities on the new Article 8 rules and was clearly fully and conscientiously aware of the necessity as per the caselaw to find compelling circumstances for going outside the rules (see paragraphs 29 to 36 of its determination).

11. Further the First-tier Tribunal had thereafter gone on in its findings and conclusions between paragraphs 48 and 54 to explain why it considered on the particular facts of the claimant's case that there were compelling circumstances such that the claimant's removal from the United Kingdom to Saudi Arabia would constitute a disproportionate interference in her right to respect for a private life as established in the UK. It had held that her removal to Saudi Arabia would be "unjustifiably onerous and harsh" (see: paragraph 50), would entail "a wholly unjustifiable trauma for her to have to face" (see: paragraph 51) and that her return to Saudi Arabia would be "truly devastating" (see paragraph 54).

12. In summary he submitted that the First-tier Tribunal had not erred in its approach to Article 8 proportionality in that it had taken full account of all relevant considerations and in particular of the Secretary of State's new policy contained in Rule 276ADE and Appendix FM of the Immigration Rules. He submitted that the reasons for allowing the claimant's appeal on Article 8 grounds were both sufficient and adequate.

13. So far as the question of the First-tier Tribunal following a Near-Miss approach it was his submission that there was no merit in this argument.

He submitted that it was clear that they had followed the law as set out in **Gulshan**. It was his submission that having regard to his previous submissions on the approach which the First-tier Tribunal had taken it could not be argued that it had approached this matter on a Near-Miss basis.

Discussion

14. We first turn to consider the issue of whether the First-tier Tribunal has erred in its approach to the issues before it.

15. We note that the First-tier Tribunal, at paragraphs 28 and 29 of its determination, states that it has considered **Gulshan**. It thereafter proceeds between paragraphs 30 and 34 to consider in detail the law as explained in **Gulshan**. It then, at paragraph 35, sets out in some detail further relevant legal principles in relation to the various issues which it had before it.

16. We in particular note that at paragraph 32 the First-tier Tribunal reminds itself regarding the issue of a Near-Miss as follows:

> "A case is not exceptional just because the criterion set out in Appendix FM is missed by a small margin. Instead, exceptional should be taken to mean that the refusal would result in unjustifiably harsh consequences for the individual or their family and therefore such refusal of the application would not be proportionate."

17. Having regard to the foregoing section of the First-tier Tribunal's determination we are satisfied that the relevant law was clearly at the forefront of its mind when considering the issues before it.

18. Turning to how the First-tier Tribunal has applied the law which it has set out to the issues before it we observe that between paragraphs 48 and 56 the First-tier Tribunal sets out its findings and its reasons for these findings.

19. The First-tier Tribunal in this section of its determination correctly, having regard to the law in **Gulshan**, commences by considering the Immigration Rules.

20. Following its decision that the claimant does not satisfy the Rules it then turns, in conformity with the law as set out in **Gulshan,** to see if there are compelling reasons which could justify proceeding to an Article 8 assessment.

21. At paragraph 50 the First-tier Tribunal says this:

> "In all other cultural and social terms, the Appellant has little or no emotional or philosophical relationship with Saudi Arabian society. I believe that she

> would find it unjustifiably onerous and harsh to be forced to reintegrate with that society as a young woman who is truly westernised in all cultural and philosophical respects."

22. In our view, in the above passage, the First-tier Tribunal has identified circumstances which would properly entitle it to hold that there were compelling reasons entitling it to proceed to make an Article 8 assessment. We are satisfied that in approaching the consideration of Article 8 the First-tier Tribunal has followed the law as set out in **Gulshan**.

23. When we then turn to the First-tier Tribunal's consideration of the Article 8 assessment of proportionality it seems to us that the Tribunal then considers all relevant factors.

24. In the course of that assessment it refers to, and has proper regard to, the position of the Secretary of State and the need for proper immigration control. The First-tier Tribunal, however, regard the following factors as outweighing the factors relied on by the Secretary of State.

25. First its finding at paragraph 50 above set out.

26. Secondly its finding at paragraph 51:

> "Although not a freestanding ground it itself I believe that her recent difficult domestic history has a bearing on the consequences for her of a removal to Saudi Arabia. Quite apart from the emotional trauma I believe that the ever-lingering prospect that she would be brought into contact with her ex-husband with all that entails would be a wholly unjustifiable trauma for her to have to face."

27. Thirdly at paragraph 52:

> "If it had been I believe that it would and should have been concluded that it would be wholly disproportionate to remove this young woman from a country she has effectively regarded as her place of residence for something approaching seventeen years."

28. Fourthly at paragraph 53:

> "She is a young woman who has very little by way of ties to family and friends in Saudi Arabia. She is only very sporadically in contact with her family roots and she certainly has no contact at all with the cultural and social norms that are part and parcel of society in Saudi Arabia."

29. We consider all of the above factors are relevant matters to be considered in an Article 8 assessment. It appears to us that the factors which the First-tier Tribunal rely on as outweighing the factors relied on by the Secretary of State are when taken together of sufficient materiality to entitle the First-tier Tribunal to reach the conclusion it did on the Article 8 proportionality assessment.

30. The reasons it has given for its conclusion on that assessment we find to be adequate in the sense of being sufficient.

31. It is clear from the determination when looked at as a whole that the First-tier Tribunal has had regard to all of the evidence that was before it when considering the difficulties which the claimant would have on her return to Saudi Arabia. The First-tier Tribunal has reached the conclusion that it would be unjustifiably onerous and harsh to force a young woman who it has held to be truly westernised to seek to reintegrate into Saudi Arabian society. On the whole evidence before it this was a view which it was entitled to reach. Mr Tufan put forward factors which he said should have caused it not to reach that conclusion. It may very well be that a differently constituted First-tier Tribunal would not have reached that conclusion having regard to the factors relied on by Mr Tufan, however, that does not progress the Secretary of State's case in relation to error of law. The question is: was the First-tier Tribunal entitled to reach that view? We believe that having regard to the whole evidence the First-tier Tribunal was entitled to reach that conclusion.

32. Turning to the issue of whether the First-tier Tribunal's approach was one where it had considered the Near-Miss approach, we do not believe that there is any merit in this argument. As we have said the First-tier Tribunal specifically reminded itself that this was not an approach which it could follow. We are unable to identify any specific circumstances within the determination which cause us to believe that it did follow this approach. Rather we believe for the reasons we have earlier outlined that it at all times followed the approach as set out in **Gulshan**.

33. There are certain infelicities in this determination between paragraphs 50 to 57. In a sense it was upon these infelicities that the Secretary of State relied in putting forward the argument that the First-tier Tribunal had wrongly followed the Near-Miss approach. We have considered in detail these infelicities and are persuaded that when looked at in the context of the whole determination they do not point to the First-tier Tribunal having followed the Near-Miss approach. We are satisfied that these infelicities do not go to the substance of the First-tier Tribunal's decision. Rather it seems to us that the infelicities went to form and not to the substance of the determination.

34. For the foregoing reasons we have reached the conclusion that there is no merit in any of the arguments put forward on behalf of the Secretary of State and that there is no material error of law in the determination of the First-tier Tribunal. We accordingly refuse the appeal.

Signed Date

Lord Bannantyne
Sitting as a Judge of the Upper Tribunal