Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30889/2013

THE IMMIGRATION ACTS

Heard at Field House
On 3 July 2014

Determination Promulgated
On 10 July 2014

Before

Deputy Upper Tribunal Judge Pickup
Between

Amina Gad-Asomaning
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the claimant: Mr R Arkhurst, instructed by ROCK Solicitors
For the respondent: Ms K Pal, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Amina Gad-Asomaning, date of birth 13.11.87, is a citizen of Ghana.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Seifert, who allowed the claimant's appeal on human rights grounds against the decision of the Secretary of State, dated 9.8.13, to refuse her application made on 14.1.13 for leave to remain in the UK outside the Immigration Rules on compassionate grounds with reference to articles 3 and 8 ECHR, and to remove her from the UK.

3. The First-tier Tribunal Judge heard the appeal on 23.10.13, but the decision was not promulgated until 4.2.14.

4. First-tier Tribunal Judge Astle granted permission to appeal on 7.4.14.

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5. Thus the matter came before me on 13.5.14 as an appeal in the Upper Tribunal. As set out in my decision, promulgated on 15.5.14, I found there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Seifert should be set aside. I set the decision of the First-tier Tribunal aside and adjourned the continuation hearing, reserved to myself. In doing so, I preserved the findings of fact of the First-tier Tribunal and gave leave to the claimant to adduce further evidence to bring her circumstances up to date and in particular as to the health of her daughter.

6. In summary, I found that the First-tier Tribunal Judge went straight from considering private life under paragraph 276ADE to an article 8 ECHR proportionality assessment, without considering whether there were compelling circumstances not sufficiently recognised in the Immigration Rules to justify doing so. The judge failed to follow the approach set out in the prevailing case law, including MF (Nigeria) in the Court of Appeal, and Gulshan in the Upper Tribunal, judgements promulgated before that of the First-tier Tribunal. I also found that in the light of MM (Zimbabwe), in conducting the article 8 proportionality assessment undue weight had been placed on the claimant's health issues, which were and remain insufficient to cross the article 3 threshold, as conceded by Mr Arkhurst.

7. My error of law decision is annexed to this determination.

8. Thus the matter was relisted before me on 3.7.14. The representatives agreed that as the facts were preserved there was no need for any further oral evidence and the matter could proceed by way of submissions.

9. In addition to the immigration history set out in refusal decision and the First-tier Tribunal decision, the other preserved findings of fact include the following:

   (a) That the claimant and Mr Ayeni both entered the UK illegally and have no legal basis to remain;

   (b) That the claimant and Mr Ayeni were in a genuine relationship as partners, had developed a private life in the UK, and have two children born in the UK in 2008 and 2012;

   (c) That the claimant is HIV positive and has a treatment regime at public expense under the NHS (to which she is not in fact entitled) and that her drug treatment regime is not available in Ghana but that her condition does not reach the article 3 threshold;

   (d) That the evidence of the claimant and Mr Ayeni as to her medical and emotional condition, their children, their home and family circumstances, and social connections is credible, to the extend that family and private life in the UK has been established;

   (e) That neither the claimant nor Mr Ayeni provided a complete account of their work histories in the UK or their relationships with claimed family members;

(f) That the claimant had not shown that she had no ties to Ghana, including family, social and cultural. She spent the formative years of her life in Ghana;

(g) That removal directions have been given for removal to Ghana or Nigeria and that if returning to either country the family would be returning together;

10. It follows from the above that the family would not be split up by the Secretary of State's decision, but removed together either to Ghana or Nigeria.

11. Pursuant to section 55 of the Borders Citizenship and Immigration Act, I have to take into account as a primary consideration the best interests of the two children, born in the UK but Nigerian citizens. Whilst a primary consideration it is not necessarily the paramount consideration and is not a trump card over all other considerations.

12. In her submissions, Ms Pal referred me to Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC) in relation to the approach to the best interests of children.

> (1) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:
>
> i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
>
> ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
>
> iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
>
> iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.
>
> v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases.
>
> Onward appeals
>
> (2) Duties to have regard as a primary consideration to the best interests of a child are so well established that a judge should take the point for him or herself as an obvious

point to be considered, where the issue arises on the evidence, irrespective of whether the appellants or the advocates have done so.

(3) Although in some cases this may require a judge to explore whether the duty requires further information to be obtained or inquiry to be made, the judge primarily acts on the evidence in the case. Where that evidence gives no hint of a suggestion that the welfare of the child is threatened by the immigration decision in question, or that the child's best interests are undermined thereby, there is no basis for any further judicial exploration or reasoned decision on the matter.

13. In all the circumstances, given the ages and limited life in the UK, I do not find that there are in this case developed social cultural or educational ties that it would be inappropriate to disrupt in the absence of compelling circumstances to the contrary.

14. I bear in mind that given their ages the children's life will have revolved around the claimant and Mr Ayeni. Only the older child will have had any schooling in the UK. I find that their best interests are clearly to remain with their mother and Mr Ayeni, whether in the UK, Nigeria, or Ghana. I have taken into account the recent information as to their health. However, they are young and will be able to quickly adapt to life with the family outside the UK. It is obvious that they come nowhere near close to meeting the requirements under paragraph 276ADE for private life in the UK, nor has it been shown that it would be unreasonable to expect them to accompany their mother on her removal from the UK.

15. Without needing to set out reasons in detail, bearing in mind the concessions made by Mr Arkhurst, it is obvious and I so find that the claimant has failed to demonstrate that she meets either the requirements of Appendix FM or paragraph 276ADE of the Immigration Rules. Despite submissions to the contrary, Judge Seifert found that the claimant did not meet the requirements of 276ADE and there was no cross-appeal against that finding, which must stand along with the preserved findings of fact. Mr Arkhurst also accepted that the claimant could not meet the requirements of Appendix FM.

16. That the claimant cannot meet the relevant immigration rules for leave to remain in the UK is a highly relevant factor. Appendix FM and paragraph 276ADE are the Secretary of State's response to claims in respect of private and family life under article 8 and also in respect of section 55 in relation to the best interests of children.

17. Neither the claimant nor Mr Ayeni have any legitimate right or expectation to be able to remain in the UK other than in compliance with Immigration Rules. That they have had children whilst in the UK does not materially alter their position. They are not entitled to choose to live and settle in the UK just because that is their wish and that they have conspicuously and deliberately ignored or set at defiance the immigration rules implemented by the Secretary of State to control immigration into the UK as part of the legitimate aim to protect the economic well-being of the state.

18. I accept that as there was no 'mechanism' in the Immigration Rules for consideration of exceptional circumstances or insurmountable obstacles to family life being continued in Ghana or Nigeria, following Shahzad, 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.

19. In reality, this appeal comes down to whether the claimant's health amounts to such arguably compelling circumstances insufficient recognised in the Immigration Rules. For the reasons set out herein, I find that they do not.

20. Between §41 and §51 Judge Seifert summarised the evidence and submissions in relation to the claimant's health and emotional well-being. There is no need to set that out again and I adopt it and take it into account as part of this determination. In passing, I note that the expert report suggests that the NHS has assumed responsibility for the claimant's care. That cannot be correct; the claimant has been receiving treatment to which she is not entitled, having no legitimate basis for her presence in the UK.

21. I take into account that the claimant is again pregnant, expecting a third child. Her other children are in good health and HIV negative. She had an outpatient appointment at the ante natal department on 27.6.14.

22. Not previously before the First-tier Tribunal and submitted a few days before the continuation hearing before me, are the following additional documents which I have carefully considered and taken into account:

    (a) An undated letter from Dr Hawkins, explaining that the claimant has been known to be HIV positive since 2005. She had responded well to antiretroviral therapy but has had to be switched to a different combination of drugs. It is said that this regime is not currently available in Ghana and that "it is imperative that she continues to receive antiretroviral therapy to maintain her own health;"

    (b) The letter also states that her medical and the stress of the immigration proceedings is markedly affecting her psychologically;

    (c) A letter from Dr Jayasundaram, locum consultant psychiatrist, dated 18.6.14, sets out a number of concerns of the claimant affecting her mental state, including the pending immigration appeal and the prospect of returning to Ghana; feeling unwell during the pregnancy; uncertainly (now resolved favourably) about her second daughter's HIV status; claims of being a victim of rape in Ghana; and claiming that her family relationships in Ghana had broken down.

23. Dr Jayasundaram has obviously taken the claimant at her word and on the assumption that everything she has said was true and reliable. In the light of the findings of the First-tier Tribunal, that is not necessarily so. I have to bear in mind that the doctor found it difficult to make a full assessment because the claimant was crying throughout the single outpatient appointment on 6.6.14. It was thought that she might benefit from antidepressants. She was referred on to the psychology department. In effect, the letter is not conclusive as to the claimant's mental state. However, I have taken it into account and given as much weight as I can, assuming from this evidence that the claimant is depressed as a result of number of

uncertainties. One of those was the HIV status of her second daughter, which Dr Hawkins reported was HIV negative.

24. There is no evidence of any illness or medical concern in respect of either of the children or the pregnancy.

25. I referred in my error of law decision to the authority of MM (Zimbabwe) in relation to the relationship of health issues not meeting the high threshold of article 3 to considerations in respect of article 8 family life. In that case, Lord Justice Moses found that it made no sense to refuse to recognise a medical care obligation in relation to article 3, only to acknowledge it in relation to article 8, except where an individuals private or family life ties have a direction bearing on health prognosis.

26. In her submissions Ms Pal referred me to the Upper Tribunal decision of Akhalu (health claim: ECHR Article 8) [2013] UKUT 000400 (IAC), where it was held that MM does not establish that a claimant is disqualified from accessing the protection of article 8 where an aspect of her claim is a difficulty or inability to access the health care in her home country unless her private or family life has a bearing on her prognosis.

> "The correct approach, where the proportionality assessment stage is reached, is not to leave out of account what is, by any view, a material consideration of central importance to the individual concerned, but to recognise the countervailing public interest in removal will outweigh the consequences for the health of the claimant because of a disparity of health care facilities in all but a very few rare cases. Those consequences have to be weighed against the public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interest in removal."

27. In that case the claimant was a person who had no knowledge of her condition before arriving in the UK and in respect of whom, by the nature of her valid leave to be in the UK, had entitlement to care under the NHS. She had developed kidney failure and was given a transplant in the UK. It was accepted that in the UK her life expectancy and quality of life would be normal but she would not be able to afford to access treatment in Nigeria and would die within weeks. On the facts of that case, the Upper Tribunal accepted that it was open to the judge to find that it was a case falling within what was correctly recognised to be a very small number of cases that could succeed.

28. The correct approach was to have regard to every aspect of the claimant's private life including the consequences for her health if removed, "but to have in mind when striking the balance of proportionality that a comparison of levels of medical treatment available is something that will not in itself have any real impact on the outcome of the exercise. The judge must recognise…that it will be a rare care that succeeds where this is an important aspect of the claimant's case."

29. I accept that her health and prospects for continuing treatment is an important aspect of the claimant's case. That there is a disparity between the quality of the medical

treatment that the claimant has been accessing in the UK and that which may be available in Ghana or Nigeria, is pretty obvious from the background material and other evidence relied on by the claimant. However, the Convention does not impose any obligation on the UK to provide medical care that cannot be accessed in the claimant's home country. The treatment the appellant has had was treatment to which she had no entitlement and it was wrong to suggest that the NHS had assumed any formal or legal responsibility for her care. It is not entirely clear when the claimant came to the UK, but she has been HIV positive at least since 2005, which seems to be around the time she arrived her illegally. Treatment remains available in Ghana. It may be different treatment or a different drug regime to that which the claimant is presently on, but treatment will be available. There is no concession in this case, as there was in Akhalu, that the claimant would inevitably suffer an unpleasant death within a short period of time if she is returned to her home country. Further, it is clear that the appellant will be returning with her family.

30. I take into account the physical and mental health concerns for the claimant, along with her emotional stability, and that she is under ante natal care for a further child. I take into account that her current particular drug regime may not be available in Ghana (or Nigeria, although there is no evidence on that). I take into account that her stress may be exacerbated by returning to Ghana.

31. I also take into account that the children are settled and doing well at school and nursery. However, they are in good health and will be able to continue schooling and adapt to life in Ghana, supported by the family unit. There was no evidence and remains no evidence that Mr Ayeni would not be able to live with the claimant in Ghana and no reason that he could not use the skills he employed in coming to the UK and finding work (albeit illegally) to support his family. They are members of church communities and will be able to follow their Christian faith in Ghana, which has a large number of Christian denominations. Any private life would be able to be continued from Ghana.

32. In all the circumstances, I find that this is not one of those rare cases where the circumstances are so compelling that it would be disproportionate to remove her. I have not in fact reached the proportionality assessment stage as I find, for the same reasons set out above, that there are no arguably compelling circumstances insufficiently recognised in the Immigration Rules that justify, exceptionally, allowing this appeal on the basis of article 8 private and or family life outside the Immigration Rules on the basis that the decision is unjustifiably harsh. I find that having failed to meet the Immigration Rules, the appeal falls at this stage without going on to article 8.

33. However, in taking into account all those matters considered by the First-tier Tribunal and raised in the papers before me and the submissions of the claimant's representative, I find that it would also follow from the above considerations that even if there were good reasons to consider article 8 private and family life outside the Immigration Rules on the basis of article 8 ECHR, the appellant would fall at the proportionality assessment stage, as even taking collectively the facts in relation to her health, her personal, private and family circumstances, including her two children and further child expected, the countervailing public interest outweighs the

consequences for her health on the basis of a disparity between levels or quality of medical treatment. Her other circumstances, whilst relevant to the proportionality balancing exercise, do not by themselves or in conjunction with her physical and mental health concerns render the decision disproportionate.

Conclusions:

34. In the circumstances, and for the reasons set out herein, I find that the claimant has failed to demonstrate that she meets the requirements of the Immigration Rules. I also find that she has failed to demonstrate arguably good grounds for considering that there are compelling circumstances insufficiently recognised in the Immigration Rules which would justify, exceptionally allowing the appeal under article 8 ECHR or that demonstrate on the basis that the decision was unjustifiably harsh (Nagre). I further find that even if the claimant's circumstances were considered in an article 8 proportionality assessment, balancing the interests of the claimant, her children and partner on the one hand against on the other the legitimate aim of the state to protect the economic well-being of the UK through the application of Immigration controls, the decision is not disproportionate. In particular, the claimant's physical and mental health concerns do not outweigh the public interest in her removal.

Decision

35. The appeal is dismissed on all grounds.

Signed: Date: 7 July 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.

Signed: Date: 7 July 2014

Deputy Upper Tribunal Judge Pickup

ANNEX: ERROR OF LAW DECISION

Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/30889/2013

THE IMMIGRATION ACTS

Heard at Field House
On 13 May 2014

Determination Promulgated

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Before

Deputy Upper Tribunal Judge Pickup
Between

Amina Gad-Asomaning
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the claimant: Mr R Arkhurst, instructed by ROCK Solicitors
For the respondent: Ms SL Ong, Senior Home Office Presenting Officer

DECISION AND REASONS

36. The claimant, Amina Gad-Asomaning, date of birth 13.11.87, is a citizen of Ghana.

37. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Seifert, who allowed the claimant's appeal on human rights grounds against the decision of the Secretary of State, dated 9.8.13, to refuse her application made on 14.1.13 for leave to remain in the UK outside the Immigration Rules on compassionate grounds with reference to articles 3 and 8 ECHR, and to remove her from the UK.

38. The Judge heard the appeal on 23.10.13, but the decision was not promulgated until 4.2.14.

39. First-tier Tribunal Judge Astle granted permission to appeal on 7.4.14.

40. Thus the matter came before me on 13.5.14 as an appeal in the Upper Tribunal.

Error of Law

41. 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 Seifert should be set aside.

42. In granting permission to appeal, Judge Astle noted that, "the grounds assert that the judge failed in her assessment under article 8 to identify the compelling circumstances required under Gulshan [2013] UKUT 00640 (IAC). It is argued that the Rules are a complete code and the Judge misdirected herself as to the appropriate test in MM (Zimbabwe) v SSHD [2012] EWCA Civ 279. The lack of equivalent medical care in the home country was only an additional factor. Reference is made to GS and EO India [2012] UKUT 00397 (IAC)."

43. "The appellant's representative accepted that they could not meet the Article 3 threshold. The judge found that the first named appellant could not meet the requirements of paragraph 276ADE. She then proceeded to consider article 8 on its own and it is arguable that she failed to give sufficient reasons for her conclusion given the caselaw referred to above. Permission is therefore granted."

44. There is a long and convoluted history to this appeal. Judge Seifert's determination sets it out between §17 and §28.

45. The claimant has an appalling immigration history. There have been a number of applications by the claimant for permission to remain in the UK on several different grounds, including EEA residence card and human rights. Each has been refused. I note that on 21.11.11 an application for leave to remain as the dependent partner of Mr Olumuyiwa Stephen Ayeni under articles 3 and 8 ECHR was refused. The decision letter cites the use of deception in a previous application in an attempt to gain leave to remain. This was the use of a settlement endorsement from her alleged employers, Admiral. However, the document contained a permit number relating to a totally different individual. Her partner has also used false documents in other previous applications.

46. The claimant has never had lawful leave to enter or remain in the UK, she is assumed to have entered the UK clandestinely. She has produced evidence to suggest that she was working in the UK, when she had no right to work in the UK and must have been doing so illegally. She has also been in receipt of state benefits to which she has never been entitled.

47. The refusal decision in respect of the present application is set out virtually in full at §9 of the determination. It is clear that her application in respect of private and family life was properly considered under Appendix FM, paragraph 276ADE, Article 3, and exceptional circumstances.

48. In respect of Appendix FM, because the claimant's relationship with her partner and children did not meet the eligibility requirements there could be no consideration of EX1 and 'insurmountable obstacles,' within Appendix FM.

49. Although Mr Arkhurst submitted to the First-tier Tribunal that the claimant met 276ADE, it is clear from §39 that the judge found that she had not lost all ties with Ghana. There is no challenge to that finding and it must stand.

50. The judge does not seem to have directly addressed Appendix FM, but as it is clear that the claimant did not meet the requirements, there is no material error of law in that regard. However, the judge went straight from dealing with paragraph 276ADE in §39 to the question of article 8 ECHR proportionality in §40.

51. The grounds complain and permission to appeal was granted because the judge failed to apply MF Nigeria [2013] EWCA Civ 1192 in the Court of Appeal and Gulshan in the Upper Tribunal, to the effect that the Immigration Rules are to be regarded as a complete code and that an article 8 assessment should only be carried out where there are compelling circumstances not recognised by the Rules and which would, exceptionally, render the decision of the Secretary of State unjustifiably harsh, referred to in the grounds as exceptional circumstances as defined in Nagre [2013] EWHC 720 Admin.

52. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) the Upper Tribunal 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);
>
> (c) the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.

53. In Gulshan the Upper Tribunal considered that it was not unduly harsh for a husband who originated from Pakistan but was now a British national, to return to Pakistan with his wife who was seeking leave to remain as his spouse. The panel acknowledged that the couple would suffer some hardship, as he had been in the UK since 2002, he had worked here and was receiving a pension, and housing benefit and other state benefits, some of which could not be transferred to Pakistan.

54. The Tribunal explained that the Secretary of State addressed the Article 8 family aspects of the respondent's position through the Rules, in particular EX1, and the private life aspects through paragraph 276ADE. The judge should have done likewise, also paying attention to the Guidance. Thus the judge should have considered the Secretary of State's conclusion under EX.1 that there were no insurmountable obstacles preventing the continuation of the family life outside the UK. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for him for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.

55. More recently, in Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), the Upper Tribunal held:

(i) Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it.

(ii) "Maintenance of effective immigration control" whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of "prevention of disorder or crime" or an aspect of "economic well-being of the country" or both.

(iii) "[P]revention of disorder or crime" is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.

(iv) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.

(v) It follows from this that any other rule which has a similar provision will also constitute a complete code;

(vi) Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. 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.

56. In summary, given that there is scope within the Immigration Rules to consider article 8 rights in respect of family and private life, there is no need to consider article 8 outside the Rules, unless there are cogent reasons for considering that there are compelling circumstances which would justify, exceptionally, allowing the application under article 8 on the basis that the decision produced a result that was unjustifiably harsh.

57. Judge Siefert did not follow the principles set out above. Gulshan was decided 23.10.13, the same day as the First-tier Tribunal hearing before Judge Seifert, and not promulgated until 17.12.13, so the judge could not have been aware of it at the First-tier Tribunal hearing, but the judge's determination was not promulgated until 4.2.14, long after Gulshan. The Court of Appeal decision in MF (Nigeria) had been promulgated on 8.10.13, before Judge Seifert's hearing. In the circumstances, the judge should have followed the case law. It is far from clear whether, the case law properly applied, the claimant's circumstances could be regarded as so compelling to justify a consideration of article 8 outside the Immigration Rules. One relevant factor may be that because the claimant did not meet the eligibility requirements of FM there was no consideration of her family life circumstances under the Rules, and thus

no proportionality assessment. However, failing to identify compelling circumstances amounts to an error of law such that the determination must be set aside and remade.

58. It was further submitted that the First-tier Tribunal Judge erred in placing undue weight on the claimant's health issues in the article 8 considerations, misapplying MM (Zimbabwe) v SSHD [2012] EWCA Civ 279. There it was held that it makes no sense to refuse to recognise a medical care obligation in relation to article 3, but to acknowledge it in relation to article 8. At §23 Lord Justice Moses stated that the only cases he could foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage article 8. The example was given, "Supposing…the appellant had established firm family ties in this country, then the availability of continuing medical treatment here coupled with his dependence on the family here for support, together establish 'private life' under article 8." Thus medical care is only relevant to article 8 where an individual's personal ties to the UK have a direct bearing on their prognosis. In MM family support in the UK was a key factor in keeping well a person suffering from schizophrenia.

59. In the light of that case law, the circumstances of claimant's health in the present case are not such as to establish or support an article 8 claim. At their highest, they may be an additional factor, to be weighed in the balance, but there would have to be other factors sufficient to engage article 8. Mr Arkhurst had conceded that the heath issues were insufficient to cross the article 3 threshold. At §59 the judge stated that her HIV and emotional conditions, referring to her mental health, including depression, had been taken into account in assessing whether there is a breach of article 8. The same reliance was repeated in §60 of the determination. I find that the judge gave undue prominence to the claimant's health in the proportionality assessment, when it is doubtful that it was a relevant factor for article 8 at all.

Conclusions:

60. In the circumstances, and for the reasons set out herein, I find that making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I adjourn the remaking of the decision.

Signed: Date: 13 May 2014

Deputy Upper Tribunal Judge Pickup

Directions

1. The continuation hearing is reserved to myself.

2. The findings of fact of the First-tier Tribunal are preserved.

3. The claimant has leave to adduce further evidence to bring her circumstances up to date and in particular as to the health of her daughter; there being a pending examination. However, given the length of the adjournment, the Tribunal will not likely entertain an application to further adjourn and the parties must prepare for the hearing accordingly.

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 decision of the First-tier Tribunal has been set aside.

Signed: Date: 13 May 2014
Deputy Upper Tribunal Judge Pickup