The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: IA/40380/2013**

IA/40384/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On September 8, 2014	**On September 9, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

MRS MA ELENITA AQUINO CONVENTO
MR ROMEO RC ARCEO DELOS REYES
(NO ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Reid, Counsel, instructed by Blakewells
For the Respondent: Mr Avery (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellants, born November 2, 21983 and January 5, 2010 respectively, are citizens of the Philippines. The first-named appellant entered the United Kingdom as a student on June 23, 2009 with leave to enter as a student until August 23, 2011. The second-named appellant, her partner, joined her in March 2010 as a family dependant with leave to remain until the same date. On July 19, 2013 the appellants applied for further leave to remain under article 8 ECHR.

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2. The respondent refused their applications on September 17, 2013 and decisions to remove them, including a direction under section 47 of the Immigration, Asylum and Nationality Act 2006, were issued the same day.

3. The appellants appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on October 2, 2013 and on April 11, 2014 Judge of the First Tier Tribunal Britton (hereinafter referred to as the "FtTJ") considered their appeals on the papers and dismissed them in determination promulgated on April 17, 2014. The appellants sought permission to appeal this decision on April 28, 2014 and on June 3, 2014 Judge of the First-tier Tribunal Hollingworth granted permission finding it arguable the FtTJ had erred in his approach to article 8 ECHR. The respondent field a Rule 24 response on June 12, 2014 accepting the FtTJ had erred in his approach.

4. The matter initially came before me on July 30. 2014 and I adjourned the case for evidence to be served.

5. The matter came back before me on the above date. The appellants were in attendance. The second-named appellant was unable to give evidence in English but there had been no request for an interpreter. Miss Reid was content to rely on the evidence of the first-named appellant.

EVIDENCE

6. Mrs Convento adopted her recent statement. She confirmed she had come to Liverpool, United Kingdom, to study in 2009 and in 2010 her partner had joined her as a dependent. He had remained here as her dependent and she had extended her stay as a post study work migrant. Prior to the expiry of that leave she had submitted her current application to remain. She stated she and her partner:

    a. Were law abiding.
    b. Were hard-working.
    c. Had built up strong community ties.
    d. Had regular contact with her partner's aunt who lived in Wimbledon.
    e. She had a twenty-seven year old brother who lived in the City and her partner's family lived outside Manila.

    She stated that if she and her partner were removed it would be unfair after they had spent the crucial years of their lives in the country. They were expecting their first child in December 2014 and her doctor had advised her not to travel because of her pregnancy and diabetes.

Mr Avery did not cross-examine her.

SUBMISSIONS

7. Mr Avery relied on the refusal letter and submitted that the appellants could not satisfy the Immigration Rules for the purposes of family or private life. He submitted that the Tribunal should only consider their appeal outside of the Rules if they had compelling circumstances that merited consideration. He submitted they had none. The main appellant had come as a student with no expectation of being allowed to remain beyond her studies. Although she had obtained work as a Tier 1 post study work migrant this also brought no long-term expectations. The Tribunal in Nasim and others (Article 8) [2014] UKUT 00025 (IAC) was relied on. This appeal was also being heard after the Immigration Act 2014 came into effect and consequently Section 117B of the 2002 Act affected this appeal. Of particular relevance to this appeal were subsections (2) to (5) because the second named appellant spoke little English and their private life had been created at a time when their status was temporary. The fact the first-named appellant was pregnant did not alter their situation. He submitted that even if article 8 was engaged it was not disproportionate to expect their private life to continue in the Philippines.

8. Miss Reid accepted they could not met the requirements of either Appendix FM or paragraph 276ADE HC 395. She submitted the fact they were law abiding, hard working, not reliant on any benefits and had integrated well meant article 8 was engaged. Removal would be disproportionate especially in light of the fact the first-named appellant had been advised not to fly during the remainder of her pregnancy and they would continue to work and contribute to the economy.

9. I reserved my decision.

ASSESSMENT OF EVIDENCE AND FINDINGS

10. The appellants entered the United Kingdom lawfully and had been living here lawfully ever since. The first named appellant had entered as a student in 2009 and the second named appellant had joined her as dependent partner. They had committed no offences and there was no suggestion that during this period there had been any recourse to public funds.

11. The first-named appellant spoke good English but I was told her partner did not. Section 117B(2) of the 2002 Act makes clear that

> "It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to

> enter or remain in the United Kingdom are able to speak English, because persons who can speak English— (a) are less of a burden on taxpayers, and (b) are better able to integrate into society.”

12. The appellants cannot meet the Immigration Rules for Appendix FM or paragraph 276ADE HC 395. The appellants had no other basis to extend their stay in the United Kingdom other than article 8 and since July 2013 article 8 has been encompassed within the Rules.

13. There are inherent difficulties facing this couple because of the decision of Nasim and others (Article 8) [2014] UKUT 00025 (IAC). The Tribunal considered the position of students, persons seeking to extend their stay for work and people who were law-abiding.

14. The Tribunal stated:

> “19. It is important to bear in mind that the “good reason”, which the state must invoke is not a fixity. British citizens may enjoy friendships, employment and studies that are in all essential respects the same as those enjoyed by persons here who are subject to such controls. The fact that the government cannot arbitrarily interfere with a British citizen’s enjoyment of those things, replicable though they may be, and that, in practice, interference is likely to be justified only by strong reasons, such as imprisonment for a criminal offence, cannot be used to restrict the government’s ability to rely on the enforcement of immigration controls as a reason for interfering with friendships, employment and studies enjoyed by a person who is subject to immigration controls.
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> 20. We therefore agree with Mr Jarvis that [57] of Patel and Others is a significant exhortation from the Supreme Court to re-focus attention on the nature and purpose of Article 8 and, in particular, to recognise its limited utility to an individual where one has moved along the continuum, from that Article’s core area of operation towards what might be described as its fuzzy penumbra. The limitation arises, both from what will at that point normally be the tangential effect on the individual of the proposed interference and from the fact that, unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail

in striking the proportionality balance (even assuming that stage is reached).

21. In conclusion on this first general matter, we find that the nature of the right asserted by each of the appellants, based on their desire, as former students, to undertake a period of post-study work in the United Kingdom, lies at the outer reaches of cases requiring an affirmative answer to the second of the five "Razgar" questions and that, even if such an affirmative answer needs to be given, the issue of proportionality is to be resolved decisively in favour of the respondent, by reference to her functions as the guardian of the system of immigration controls, entrusted to her by Parliament.

The effect on human rights of paying one's way and not committing criminal offences

26. We do not consider that this set of submissions takes the appellants' cases anywhere. It cannot rationally be contended that their Article 8 rights have been made stronger merely because, during their time in this country, they have not sought public funds, have refrained from committing criminal offences and have paid the fees required in order to undertake their courses. Similarly, a desire to undertake paid employment in the United Kingdom is not, as such, a matter that can enhance a person's right to remain here in reliance on Article 8.

27. The only significance of not having criminal convictions and not having relied on public funds is to preclude the respondent from pointing to any public interest in respect of the appellants' removal, over and above the basic importance of maintaining a firm and coherent system of immigration control. However, for reasons we have already enunciated, as a general matter that public interest factor is, in the circumstances of these cases, more than adequate to render removal proportionate."

15. I am satisfied that any private life created was during the first appellant's studies and also her work (similarly for the second-named appellant) and the fact they had worked here did not in itself create an expectation that they would be allowed to remain. The fact they had not been in trouble and had paid their taxes was to their credit but again this did not make their position any stronger. Section 117B(5) of the 2002 Act makes

clear that little weight should be attached to private life established when immigration status is precarious. Whilst I accept the appellants were here lawfully they both knew they had limited leave to be here.

16. I am invited to consider the appeal outside the Rules under article 8 ECHR. The Courts in MM (Lebanon) & Ors, R (on the application of) v Secretary of State for the Home Department & Anor [2014] EWCA Civ 985 considered the approaches in Gulshan [2013] UKUT 00640 (IAC) and Nagre [2013] EWHC 720 Admin and confirmed the approach to be taken.

17. The Court of Appeal in MM examined numerous authorities and stated:

> "128. … In Nagre the new rules were themselves attempting to cover, generally, circumstances where an individual should be allowed to remain in the UK on Article 8 grounds… Nagre does not add anything to the debate, save for the statement that if a particular person is outside the rule then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker.
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> 134. Where the relevant group of 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 references to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of Immigration Rules 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.
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> 159. … It seems clear from the statement of Lord Dyson MR in MF (Nigeria) and Sales J in Nagre that a court would have to consider first whether the new MIR and the "Exceptional circumstances" created a "complete code" and, if they did, precisely how the "proportionality test" would be applied by reference to that "code".
>
> 162. … Firstly, paragraph GEN.1.1 of Appendix FM states that the provision of the family route "takes into

> account the need to safeguard and promote the welfare of children in the UK", which indicates that the Secretary of State has had regard to the statutory duty. Secondly, there is no legal requirement that the Immigration Rules should provide that the best interests of the child should be determinative. Section 55 is not a "trump card" to be played whenever the interests of a child arise..."

18. The burden of proving article 8 is engaged falls on the appellants. I have considered all of the evidence including the fact the first-named appellant is expecting their child. There is no evidence that children in the Philippines cannot be catered for and despite the concerns about the Philippines stated in their witness statements they both have family members there.

19. They do not come anywhere near to satisfying the Immigration Rules and having considered all of the above evidence I am not persuaded that this is a case that engages Article 8 outside of the Rules because there are no compelling circumstances that make removal unjustifiably harsh. In reaching this conclusion I have considered their private/family life arguments and had regard to the decision of Nasim in so far as their private life is concerned and the fact that they have no dependence on any UK based family as they stated they are able to care for themselves with no reliance on benefits.

20. Even if I was obliged to consider this case outside the Rules I am satisfied following the test set out in Razgar [2004] UKHL 00027 that removal would be interference but it would be in accordance with the law and for the purpose of immigration control. Any removal would be proportionate having regard to the above facts.

Decision

21. The decision of the First-tier Tribunal did disclose an error. I have remade the original determination and I dismiss the appellants' appeals.

22. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order for anonymity was made in the First-tier and I do not vary that decision.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

<u>TO THE RESPONDENT</u>

I make no fee award as the appeal was dismissed.

Signed: Dated:

Deputy Upper Tribunal Judge Alis