Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/47696/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23rd June 2014	**On 1st July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

Mr Orestes Rapadas
(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Lams, instructed by Palis Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer.

DETERMINATION AND REASONS

1. I shall refer to the parties as they were referred to in the First Tier Tribunal that is Mr Rapadas as the appellant and the Secretary of State as the respondent although the application for permission to appeal was made by the respondent.

2. The appellant is a citizen of the Philippines and born on 7th April 1979. He made an application dated 28th November 2012 for leave to remain outside the Immigration Rules and this was refused by the Secretary of State under Paragraph 276 ADE as he had not spent half his life in the UK and he had not lost ties with his home country. The matter was also considered under the 'exceptional circumstances consideration'.

3. The background to the case was that the appellant's mother was born in the Philippines and never married. She had one son, the appellant. She worked in the UK as a domestic worker at St Mary's Hospital and was granted indefinite leave to remain. In 2008 she had a stroke from which she recovered. In 2011 she had a 'massive right hemisphere haemorrhage and was admitted to hospital and then a rehabilitation unit. In May 2012 she had a third stroke whilst in an assisted home, the Willow Housing Association. Power of attorney was granted to a friend Miss L Lamido and on 17th June 2012 the appellant entered the United Kingdom on a visit visa, having made clear that he intended to visit to take care of his mother during his stay. The appellant made an application outside the rules for leave to remain.

4. The respondent asserted in the refusal letter that the local authority and social services were under a duty to provide suitable care for his mother. She had assisted housing, meals on wheels and carers in the UK. Ms L Llamido, a friend, was listed as next of kin and had power of attorney for his mother. If she needed alternative care this could be arranged by Ms Llamido. The appellant had failed to provide a letter from a registered medical practitioner and thus his presence in the UK was not required to provide care. Grants of leave outside the rules were rare and given only in genuinely compassionate reasons. The Secretary of State was not satisfied that his circumstances were such that discretion should be exercised outside the Immigration Rules and thus the application was refused further to Paragraph 322(1).

5. First-tier Tribunal Judge Oakley allowed the appellant's appeal on Article 8 grounds.

6. An application for permission to appeal was made on the basis that the Judge had misdirected himself because he had failed to follow the guidance in **Nagre** [2013] EWHC 720 (admin) and **Gulshan v SSHD** [2013] UKUT 640 IAC. There should not be a freewheeling Article 8 analysis unencumbered by the rules. The judge had addressed Article 8 family aspects through the rules. He failed to have adequate regard to the rules when making the Article 8 assessment.

7. Application for permission was granted by First Tier Tribunal Judge Osborne on the basis that the First Tier Tribunal judge missed out the essential step of considering whether there were compelling or exceptional circumstances in the appellant's case before moving on to undertake such as assessment.

8. At the hearing before me Ms Everett stated that there was one point of challenge and that was that the judge did not follow the guidance in Gulshan or the provisions of Appendix FM. She referred me to the judgement in **Haleemudeen v SSHD** 2014] EWCA Civ 558 and in particular paragraphs 40 and 41 which stated

'*These new provisions in the Immigration Rules are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Overall the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it had previously been. The new Rules require stronger bonds with the United Kingdom before leave will be given under them. The features of the policy contained in the Rules include the requirements of twenty year residence, that the applicant's partner be a British citizen in the United Kingdom, settled here, or here with leave as a refugee or humanitarian protection, and that where the basis of the application rests on the applicant's children that they have been residents for seven years.*

The FTT's decision on Mr Haleemudeen's Article 8 appeal is contained in [34]-[41], which I summarised and set out in part at [21] – [23] above. Those paragraphs do not refer, either expressly or implicitly, to paragraph 276ADE of the rules or to Appendix FM. None of the new more particularised features of the policy are identified or even referred to in general terms'

9. Mr Lams asserted that the case turned on its own unusual facts and was the paradigm 'exceptional' case requiring separate consideration. This case differed from **Nagre** and **Gulshan**. The appellant fell outside the ambit of the Rules and Appendix FM. Rule 276 ADE was of little relevance to his application and thus the **Nagre** 'coverage' did not apply. Both **MF Nigeria v SSHD** [2013] EWCA Civ 1192 and **Nagre** confirmed that any decision should be compliant with Article 8. The judge had identified that the appellant had a family life with his mother. It was right that a separate consideration was given and unless the Judge's conclusion that removal was disproportionate was plainly wrong there were clearly arguably good grounds for considering the matter outside the rules. The appellant had offered his mother close daily support over the last 18 months and this conclusion was central to the judge's conclusions. The judge took in evidence from Janet Ellwood of Harrod Court, from the Sheltered Housing Support worker and from the Willow Housing and Care Scheme Manager dated 15th November 2013 which remarked on the improvement of the appellant's health since the arrival of her son and her depression at the thought of him returning. There was also reference to the extent to which Ms Llamido could continue to provide for the appellant's mother as she had her own family commitments.

10. He submitted that was unarguable that there were good grounds for considering the matter outside the rules and thus there was no error of

law in the Judge carrying out the assessment. He also argued that as the respondent herself had cited that the matter was considered outside the rules this in itself demonstrated that the matter should be considered outside the rules by the judge with reference to Article 8. Appendix FM did not apply in this case. There were no standard factors in this case and thus the judge was bound to go outside the rules. The judge would have been wrong not to go on to consider Article 8 in the way he did. This was a different case from **Nagre** and in particular the appellant only applied for limited leave. This appellant had not applied for settlement. The judge had found that there were compelling circumstances.

11. Ms Everett submitted that she accepted that the grounds had only been framed with respect to the challenge to the approach under **Gulshan** and that the determination was not challenged with respect to the weight put on the Secretary of State's case in proportionality.

Conclusions

12. The appellant made an application which was refused by the respondent not only with reference to Paragraph 276ADE but also under the 'exceptional circumstances policy'. The respondent identified that the application was refused under Paragraph 322 (1) but the respondent also noted that the application was made on exceptional and compelling grounds. Inherent in this is, in my view, an acceptance that exceptional grounds did apply from the outset.

13. This is not a case where the judge made no reference to the rules and was not aware of the rules. In particular he found that the appellant could not succeed under the Immigration Rules paragraph 276 ADE at [20] of the determination.

14. Although he did not specifically make reference to **Gulshan**, when reading the determination as a whole and in the light of the respondent's decision which confirmed that the matter was considered outside the rules on the basis of exceptional and compelling grounds, I am not persuaded that there was an error of law in the approach of the judge. This was an unusual case. I find that the judge set out the unusual circumstances of the appellant's situation. On a reading of the determination it is clear there were arguably good grounds for considering the matter outside the rules. The mother had had 3 strokes and the judge went through the evidence with regard the care for the mother and the 'profound emotional effect on his mother which has translated into improved health'. The appellant had entered the UK to care for his mother and made this plain to the Immigration authorities when he made that application.

15. Ms Everett submitted that there was no provision in the Immigration rules for issuing entry clearance on the basis of an applicant wishing to come to the UK to care for a sick family member and this type of application was catered for by the visit visa provisions. It was set out by the judge in his proportionality exercise that this was not an application for

settlement and indeed the appellant only wished to remain on a temporary basis. Mr Lams pointed out Appendix FM and paragraph 276ADE referred to settlement or route to settlement applications and in this manner the appellant's claim differed.

16. I take the point that Ms Everrett makes that the fact that no rule in the Immigration Rules covers an application for a carer and this in itself underlines the Secretary of State's position regarding carers, there is none the less policy guidance regarding carers and leave to remain. This states specifically that 'each case must be looked at on its individual merits'. Indeed initially the guidance states that 3 months leave might be granted to arrange alternative care. The guidance goes on to state that where there are further requests detailed enquiries will be made to establish the full facts.

17. I concur that the circumstances of this appeal are not such that are envisaged under the Immigration Rules that is Paragraph 276ADE which has some but limited relevance in this instance and, as I state, was in any event cited.

18. Even if this is incorrect, overall I find that the failure to address **Gulshan** in the judge's approach, was not a material error in the light of the subsequent analysis and findings by the judge. There are particular circumstances of this case which found a good arguable ground for addressing the matter outside the rules, not least the very poor health of the mother and the cost saving to the state by the presence (at present) of the appellant and the appropriate care that could be made for the mother. I am not persuaded that there is an adequate mechanism in the Immigration Rules to address these issues and note that it is the guidance, not part of the rules, which addresses the matters to be asked.

19. The judge explored the relevant factors under Razgar and made a detailed analysis of the evidence. He did factor in the, albeit briefly the 'countervailing interests of immigration control' albeit briefly but this in itself was not challenged by the respondent, as Ms Everett noted.

20. In all the particular circumstances of this case I am not persuaded that the judge made an error of law which would materially affect the outcome. I find that the decision of Judge Oakley should stand.

Signed Date 23rd June 2014

Deputy Upper Tribunal Judge Rimington