Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50197/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 July 2014	**On 20 August 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ELISE BRIANNE HAGMAN

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Ms C Record of Counsel

DETERMINATION AND REASONS

1. The respondent, Elise Brianne Hagman, was born on 7 March 1989 and is a female citizen of Canada. I shall hereafter refer to the respondent as the appellant and to the Secretary of State as the respondent (as they were respectively before the First-tier Tribunal). The appellant had appealed to the First-tier Tribunal (Judge Maciel) against the decision of the respondent dated 23 October 2013 to refuse her leave to remain outside the

Immigration Rules. The First-tier Tribunal had allowed the appeal under Article 8 ECHR.

2. Mr Whitwell, for the respondent, explained that there are two grounds of appeal. First, referring to *Gulshan* **[2013] UKUT 00640 (IAC)**, the judge had failed to identify compelling circumstances to justify considering the appeal under Article 8 ECHR outside the Immigration Rules. Mr Whitwell did not seek to persuade me that the judge had failed to adopt a two-stage process as indicated in *Gulshan*. At [17], the judge had indicated that she found that there were "good reasons" to consider Article 8; Mr Whitwell submitted that that the judge had not particularised those "good reasons". Secondly, the Article 8 assessment itself was flawed. The judge had failed to have proper regard to the fact that the appellant had previously returned to Canada in order to apply for leave and that her absence from the United Kingdom applying for entry clearance out-of-country was likely to be a very short one.

3. I find that the judge did not err in law. I have reached that conclusion for the following reasons. Mr Whitwell is correct to say that the judge was well aware that he needed to identify good reasons for going on to consider Article 8 ECHR where both parties agreed that the appellant could not succeed under the Immigration Rules. I disagree with Mr Whitwell's submission that the judge failed to specify the "good reasons". First, at [17] the judge found that "the circumstances of the appellant [are] not covered by the Immigration Rules." At [5], the judge had found that the appellant, who had begun work as a teacher at a primary school in Southampton, had intended to return to Canada in the summer vacation of 2013 to apply for a new visa out-of-country. However, the appellant had been let down by her immigration agent. As the judge wrote,

> The appellant made desperate attempts with the school and they sought to process an application for her Tier 2 visa but this could not be done prior to her return to the UK to commence the new term. Accordingly, the appellant returned and commenced teaching in the new academic year on the valid Tier 5 visa that she had. She thereafter had no option but to seek leave to remain outside of the Immigration Rules. This is because she would need to leave the country to secure a Tier 2 visa and in that intervening time there would be an indefinite period during which the students she teaches will be deprived of her care and skill.

Again, at [17], when discussing the existence of good reasons for her to continue with an Article 8 analysis, the judge wrote, "I find that there are 25 children who are dependent upon the appellant teaching them to the end of the academic year and I find that the disruption in her leaving the UK is now a compelling circumstance." Whilst the Secretary of State may disagree that the circumstances of this particular appellant were compelling, the judge has provided her own reasons for finding that compelling circumstances did exist in this case. The children whom the appellant teaches in Southampton live in an inner city, economically deprived area of the city and there was evidence before the judge from the headmaster of the school that the appellant had "succeeded in

creating a safe and positive working environment for the children." Examples are given in the headmaster's letter of 16 October 2013 of the positive impact upon the lives of individual children (including a child from Mexico, who speaks little English) of the appellant's teaching. The headmaster also writes of the efforts made by the school to obtain local education authority sponsorship for the appellant. Whilst that sponsorship was sought too late to assist her, a resident labour market test was undertaken to see whether the appellant's teaching position could be filled by a United Kingdom national. The result of that test was that it was "abundantly clear that [the appellant] far outshone [other candidates] in terms of experience." In the light of these observations, I find that the judge's decision that there were compelling circumstances in this instance was open to her. The judge was right to find that there was no Immigration Rule to cover the circumstances of this appellant and that factor, combined with the detrimental impact which the appellant's cessation of her teaching duties would have upon vulnerable children was sufficient, in my opinion, to constitute compelling reasons justifying the judge carrying out an Article 8 analysis.

4. Further, I find that the Article 8 ECHR analysis itself is not flawed by legal error. The judge considered all the relevant facts and, in assessing proportionality, had regard to those factors which weighed against the appellant as well as those in her favour. The judge had regard to the best interests of the children in the appellant's primary school class (see Section 55 of the Borders, Citizenship and Immigration Act 2009) and found that the appellant was "providing stability, care, love and support to each child in circumstances where they are often from broken homes and/or have special needs and/or behavioural issues." The judge concluded that "the balancing exercise is overwhelmingly in the appellant's favour principally because the best interests of the children in her care." [25]. That was a finding which was clearly open to her on the evidence.

5. Curiously, at [21] the judge states that "the respondent considers [her decision] to be necessary in pursuance of the legitimate aim of the prevention of crime and disorder." I cannot find any reference to such a public interest in the respondent's refusal letter and, in any event, it seems more likely that the public interest would be that of maintaining immigration control as part of securing the economic wellbeing of the country. Having said that, the grounds do not take issue with this apparent misstatement of the public interest. Rather, the grounds submit that the appellant's job could have been kept open for her pending the resolution of her immigration status and that supply teachers could cover her class whilst she returned to Canada to apply for entry clearance. In his oral submissions, Mr Whitwell made it clear that the Secretary of State has no objection to this appellant continuing to teach her class in Southampton; her only objection is to the appellant seeking to do so without first returning to Canada to apply for the necessary visa from there.

6. I acknowledge that the public interest in maintaining immigration control is a strong one but the weight attaching to the public interest will vary from case to case. The public interest in this case is conditioned by the fact that the respondent has no objection to the appellant's presence here and, indeed, shares with the appellant a wish that the appellant carry on teaching and assisting the children in her class in Southampton. In the light of that fact, the judge's finding that the proportionality "balancing exercise is overwhelmingly in the appellant's favour" because of the disruption which would be caused to the children in her care by her absence was clearly open to her. Any error on the part of the judge in misstating the public interest is not, on the particular facts of this case, material.

7. In the circumstances, this appeal is dismissed.

DECISION

8. This appeal is dismissed.

Signed Date 18 August 2014

Upper Tribunal Judge Clive Lane