



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/02763/2014**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

**Determination
Promulgated**

On 4 September 2014

On 4 September 2014

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**Mr RICHARD JEREMIAS BUIGOS
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer

For the Respondent: Ms G Loughran, Counsel

(instructed by Legal Rights Partnership)

DETERMINATION AND REASONS

Introduction

1. The Appellant (the Secretary of State) appealed with permission granted by First-tier Tribunal Judge Pooler on 21 July 2014 against the determination of First-tier Tribunal

Judge Handley who had allowed the Respondent's appeal in a determination promulgated on 2 July 2014.

2. The Respondent is a national of the Philippines, born 23 April 1967, who had sought further leave to remain in the United Kingdom on the basis of his family and private life, i.e., Article 8 ECHR. That was refused by the Secretary of State on 19 December 2013. The Respondent's immigration history is important. Perhaps because it was familiar to the parties, Judge Handley merely alluded to it in parts of his determination, without setting it out in any detail. For present purposes it is sufficient to record that the Respondent had a bad immigration history, which included deception. Nevertheless, his appeal against removal made on Article 8 ECHR grounds had been allowed by the First-tier Tribunal on 17 December 2012, after which the Secretary of State had granted the Respondent leave to enter for 6 months. The appeal before Judge Handley was against refusal of further leave to remain on the same basis. That might usefully have been stated in the determination.
3. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Pooler because he considered that it was arguable that the judge had approached Article 8 ECHR on an incorrect basis, by failing to conduct his analysis in accordance with Gulshan (Article 8 - new rules - correct approach) [2013] UKUT 00640 (IAC). Judge Pooler saw little merit in the challenge to the judge's credibility findings, but did not restrict the terms of the grant. The Respondent indicated by a rule 24 notice that the appeal was opposed.

Submissions - error of law

4. Mr Tufan for the Appellant relied on the grounds of onwards appeal on which permission to appeal had been granted. The judge had not started with the Immigration Rules (paragraph 276ADE and Appendix FM) when considering Article 8 ECHR. There was no finding of exceptional circumstances which justified a departure from the rules and a Razgar [2004] UKHL 27 analysis. Gulshan (above) and Nagre [2013] EWHC 720 (Admin) had not been applied. The judge's credibility findings were inadequately reasoned. The determination should be set aside and the

original appeal remade and dismissed. The Respondent could seek entry clearance from the Philippines in accordance with Appendix FM.

5. Ms Loughran for the Respondent relied on the rule 24 notice which had been filed. Although the judge had not mentioned it in his determination, Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702 applied to the First-tier Tribunal's earlier determination. That determination had not been appealed: on the contrary, the Respondent had been granted leave to remain on Article 8 ECHR grounds, albeit for 6 months. The brevity of the leave was because it been treated as a port case. Although the judge had not mentioned Devaseelan (above), that background had been mentioned at [17] and, more importantly, at [25] of the determination, where the judge's finding had been that "the Appellant's family life is stronger than at the time of the previous hearing". There was no material error of law and the determination should stand.

No material error of law finding

6. The tribunal indicated at the conclusion of submissions that it found that the judge had not fallen into material error of law. The tribunal reserved its determination which now follows.
7. As Judge Pooler indicated, the assertion in the grounds seeking permission to appeal that the judge's assessment of the evidence was deficient had no substance. It was plain that the judge had properly weighed and considered all of the evidence produced, and had given sufficient reasons to support his findings. Although the judge did not say so expressly in his determination, [25] as cited by Ms Loughran indicates that the judge had used the First-tier Tribunal's previous findings as his starting point, as indeed he was bound to do absent any good reason for doing otherwise. The citation of Devaseelan (above) although obvious and perhaps almost trite would have helped make that clear, and illuminated the judge's reasoning process.
8. Notwithstanding the First-tier Tribunal's previous decision in 2012, the judge was obliged to take into account Gulshan (above) and Nagre (above), because they clarified

the law as to the correct approach to Article 8 ECHR under the post 9 July 2012 Immigration Rules. The Secretary of State's decision had to be examined on that basis and the judge failed to do so. That was an error of law.

9. The tribunal concludes, however, that the error of law was not in the end material. Given that the Respondent's previous appeal on family life Article 8 ECHR grounds had been allowed by the First-tier Tribunal, and that there had been found to be no change of circumstances, and that no new facts had emerged, it would have been a surprising conclusion to have dismissed the appeal. The Secretary of State's decision to refuse the Respondent further leave to remain ignored the First-tier Tribunal's determination from 2012 and may be characterised as perverse. It would have been useful for the judge to have mentioned that in his determination, because that was a critical issue. The proportionality assessment had already been made in the Respondent's favour and the Secretary of State had not shown any basis for departing from it. Thus Gulshan (above) if applied as should have happened could have made no difference. Put another way, exceptional circumstances justifying a departure from Appendix FM had already been found.
10. The tribunal adds that had the judge spelt out the underlying factual situation more clearly, the Secretary of State would have been unlikely to have been granted permission to appeal. Applications made by the Secretary of State are frequently if not invariably made without access to the appeal file and so are based on the content of the determination without reference to the wider context.
11. Thus the tribunal finds that there was no material error of law in the determination and there is no basis for interfering with the judge's decision.

DECISION

The making of the previous decision did not involve the making of an error on a point of law and stands unchanged

Signed

Dated

Number: IA/02763/2014

Appeal

Deputy Upper Tribunal Judge Manuell