Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/47456/2013
IA/47459/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
on 6th May 2014	**on 7th May 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SANTIAGO MARCELINO PROSPER NELSON
LORNA COLLINGWOOD DE PROSPER

Respondents

Representation:

For the Appellant: Mr Melvin – Senior Home Office Presenting Officer.
For the Respondent: Mr A Malik of Counsel.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge Newberry promulgated following a hearing at Taylor House on the 9th January 2014, in which the Judge allowed the appeal on Article 8 ECHR grounds.

2. The decision is challenged by the Secretary of State on the basis that although the Judge noted the reasons why the Secretary of State had refused the application under Appendix FM of the Immigration Rules, this fact does not

feature in the determination. The Judge failed to follow the correct approach when assessing an Article 8 claim and did not consider whether there were good grounds for granting leave outside the Rules or the existence of compelling circumstances not recognised under the Rules.

Background

3. Mr Nelson, who was born on 24th September 1949, is a citizen of Venezuela. His wife was born on 5th November 1951 and is a citizen of Venezuela too. Their immigration histories show that Mr Nelson entered the United Kingdom lawfully on 28th January 2001 as a visitor. His leave was extended following a successful appeal until 31st October 2003, as a student. Since this date he has been an overstayer. Mrs Nelson joined her husband in the UK approximately six months after his arrival and presumably was granted leave in line. She brought their two children with her who are now over the age of 18.

4. On 31st August 2012 an application was made for leave to remain under Article 8 ECHR. This was refused by the Secretary of State in a refusal letter dated the 29th October 2013 under both the Immigration Rules and Article 8 ECHR when considering whether there were any exceptional circumstances.

5. Having heard evidence and the advocate's submissions it appears the Judge's findings are set out in paragraphs 18 and 19 of the determination in the following terms:

> 18. The Appellant and his family have been in the UK since 2001, almost 14 years. There is no doubt they have established a family life as well as a private life. The First Appellant is a self-employed electrician and has not been in receipt of benefits. The children of the family have been educated in the UK and his son is due to attend university. Both Appellants are closely involved with the care of their grandchildren, one of whom is unwell and hospitalised from time to time.
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> 19. Were the Appellant to be returned, he would have no home and no wider family support. His children, with one exception, do not live in Venezuela. The business he has successfully built up over the years would be lost. Both Appellants are deeply involved in the church and it is not challenged that they are involved in charitable work, in addition to regular churchgoing. In my view, the severance from their children and grandchildren would be particularly harsh and in my view disproportionate in the context of a long period of continual residence.

Discussion

6. There are a number of clear errors in the determination. The first of these is structural in that the Judge appears to note the fact the appeal was refused under the Immigration Rules but then, having set out the Razgar principles, proceeds to determine it on the basis of Article 8 ECHR, without more.

7. The Judge was required to consider the merits of the human rights claim in accordance with the approach set out by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192, the High Court in Nagre [2013] EWHC 720 (Admin) and by the Upper Tribunal in Gulshan [2013] UKUT 640, as confirmed by Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC). These judgments have made it clear that the question of proportionality must be looked at in the context of the Immigration Rules with no need to go on to a specific assessment under Article 8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring that course to be taken.

8. That approach is consistent with what the Court of Appeal said in MF (Nigeria) and with the approach of the House of Lords, particularly in cases such as Huang [2007] UKHL 11 and Razgar [2004] UKHL 27. In Shahzad it was found that where an area of the Rules does not have such an express mechanism such as that found in the deportation provisions, the approach in Nagre ([29]-[31] in particular) and Gulshan 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.

9. The starting position for the Judge was to look at the Rules and see whether the Applicant was able to meet their requirements. If not, the question arises whether the decision would lead to a breach of Article 8 but in the context of whether there are factors not covered by the Rules which give rise to the need to consider Article 8 further.

10. The key question in relation to the assessment of Article 8 is whether the decision to refuse to grant leave will result in compelling circumstances giving rise to unjustifiably harsh consequences for the Applicant or any family member, such as to establish an arguable case at this time. In Gulshan it was held that the term ”insurmountable obstacles” in provisions such as Section EX.1 are not obstacles which are impossible to surmount 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. The material provided to the Judge did not arguably establish that such circumstances exist.

11. The second error is that even if the Judge was entitled to consider the merits of the appeal by reference to Article 8 ECHR he fails to particularise the nature of the family and private life that he claims exists in paragraph 18 and appears to go on to undertake a proportionately balancing exercise in paragraph 19 in the briefest of terms without giving adequate reasons for findings made and making no mention whatsoever of the weight given to the Secretary of State's case which is a relevant part of any properly conducted proportionality exercise under Article 8 ECHR.

12. Mr Malik, whilst not conceding any error, properly recognised that the Judge had erred in his approach and assessment to the evidence but submitted that any error was not material, on the basis that if the exercise was properly conducted the result will be exactly the same.

13. When asked to specify the nature of the human rights that it is claimed exist it was submitted that these include family life between both Appellants and their children and grandchildren. Private life included their ties to the church, the First Appellants electricians business in the United Kingdom, the house they have purchased, and the life they have established in the United Kingdom during the time they have been here.

14. Length of residence in the UK is a matter that is now incorporated into the Immigration Rules. It is also a relevant consideration the majority of the private life they seek to rely upon has been acquired during a time when they had no lawful leave to remain in the United Kingdom. Their immigration history shows that for approximately ten years they have been overstays with no legitimate expectation that they will be permitted to remain or lawful right to do so. They have therefore developed the life they now have, and are seeking to protect, knowing their situation is precarious.

15. In relation to the children; their son is over 18 years of age, lives with them in their property in the United Kingdom, and hopes to start university in September 2014. It is settled jurisprudence that Article 8 does not given an individual the right to choose the country in which they live and neither is there a right for a non-national to be educated in this country. Their son has leave to remain until 23rd October 2016 but it was not established that he cannot attend university in Venezuela or that it will be unreasonable in all the circumstances to expect him to do so. This is not a case in which an individual is halfway through a course of education as his university education has yet to be started. I accept that further to the decision of the European Court of Human Rights in AA v United Kingdom individuals circumstances can establish that family life continues to exist between him and his parents, notwithstanding having attained the age of majority.

16. In relation to the Appellants' daughter; she is over 18 and independent having her own home and family. It was not established that the relationship between the Appellants and their daughter is anything other than one of the normal emotional ties one would expect between parents and their children in a close family unit. It is not been established on the evidence that the necessary degree of dependency exists to satisfy the requirement for family life recognised by Article 8.

17. The relationship with the children does fall outside the Rules as they are both adults as does the relationship with the grandchildren. This latter claim is based upon the fact the grandchildren have medical needs, as evidenced by the material available to the Judge, that the Appellants play a role helping their daughter to enable her to attend appointments and to make it easier for her to meet the needs of her family unit.

18. Mr Malik was asked about the consequences of removal for this family. He submitted that if they return they will be homeless as the government had taken their flat and given it to the tenant who is an occupation. It was also submitted the First Appellant is in his mid-60s and would find it difficult to find work meaning that the family will be destitute. It was also submitted there will be "great concerns" regarding the impact upon the grandchildren and their daughter and that when everything is considered in the round there are exceptional circumstances resulting in harsh consequences if the Appellants are forced to leave the country.

19. The reality of the changes to the Immigration Rules which came into force in July 2012 is that they now present a formidable hurdle for individuals unable to succeed under paragraph 276 ADE or Appendix FM.

20. The fact the Appellants have overstayed for ten years and are unable to succeed under the Rules is material for in such circumstances it is necessary to consider whether the Secretary of State's decision will result in compelling circumstances giving rise to unjustifiably harsh consequences for the Appellants' or any family member as stated above.

21. The First Appellant has established his own business and brought a property in the United Kingdom and both he and his wife have a private life established; which includes the church and their family in this country. As stated above, they were fully aware that their position is precarious. Whilst I accept that returning to Venezuela after such a period of time in the United Kingdom will cause some degree of hardship and need to readjust it is accepted that the Appellants have another son who has remained in Venezuela and it has not been shown that he will be unable to assist them in making necessary practical arrangements. They may have lost their flat but it has not been shown that they will be unable to secure appropriate accommodation. They have a property in the United Kingdom, in Mitcham in Surrey, which has equity in the region of

£35,000 and it has not been shown that it could not be sold or rented out to produce an income. If sold it has not been shown that from the proceeds the Appellants would not be able to accommodate or maintain themselves until they are able to re-establish their lives in Venezuela.

22. The First Appellant is a qualified electrician who has established a business in the United Kingdom. It has not been shown that he will be unable to re-establish a business or obtain employment in that country from which he can support himself and his wife.

23. The Appellants son has no right to be educated in the United Kingdom and it was accepted that he is likely to return with his parents to Venezuela. This has not been shown to be unreasonable in all the circumstances as it has not been shown that he cannot attend university in the country of which he is a national. No sufficiently adverse impact on the future welfare or educational prospects of this young man has been established.

24. The private life the Appellants enjoy with their daughter will be materially changed and become reliant upon indirect contact and I accept that there will be some distress if the Appellants are returned to Venezuelan with their daughter and grandchildren remaining in the United Kingdom. It has not been shown, however, that the impact of removing the Appellants will be such that the degree of any physical or emotional harm that may result will be sufficient to cross the necessary threshold. It appears to be one of emotional distress, confusion, and the need for a period of adjustment but it is not been shown that the family who remain in the United Kingdom will not be able to readjust and re-establish a routine. It is not been shown that the best interests of the grandchildren require the Appellants to remain in the United Kingdom as it has not been shown that their fundamental needs cannot be met by their mother; with or without the assistance of the statutory services.

25. Having considered the appropriate legal provisions and the case as advanced by both parties, with the degree of anxious scrutiny required in an appeal of this nature, I find that the Judge's approach to this case is infected by legal error material to the decision to allow the appeal. I set the determination aside. In light of the material advanced and the correct application of the law to this case I do not find that the Appellants have substantiated their claim to be entitled to a grant of leave to remain in the United Kingdom under Article 8 or on any other basis.

26. It was submitted during the course of the hearing by the Appellants that in Venezuela life was difficult for them but no Article 3 claim was advanced before the First-tier Tribunal and if they believe they have a valid asylum/protection claim the Secretary of State has set out procedures for making such a claim in the Immigration Rules. It is not an issue before this Tribunal in any event.

Decision

27. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

28. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Fee Award.

Note: this is **not** part of the determination.

29. In the light of my decision to re-make the decision in the appeal by dismissing it, 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…….
Upper Tribunal Judge Hanson

Dated the 6th May 2014