Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10003/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th July 2015	**On 2nd September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MRS LUCY MARY INOJIE-ONIHA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Praisoody, Counsel instructed by Chris Solicitors
For the Respondent: Ms J Isherwood, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, Mrs Lucy Mary Inojie-Oniha, appeals with permission against the decision of First-tier Tribunal Judge Hodgkinson dismissing her appeal against the Secretary of State's decision to refuse her application for indefinite leave to remain under Appendix FM as the dependent parent of her daughter, Christiana Oniha, under human rights grounds pursuant to Article 8 ECHR and against removal directions set for the Appellant's country of origin, Nigeria.

2. The Appellant at her appeal hearing opted to pursue her appeal outwith the rules alone under Article 8 ECHR. First-tier Tribunal Judge Hodgkinson dismissed the Appellant's appeal on the basis that the Respondent's

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decision was a proportionate interference with her family and private life under Article 8 ECHR.

3. The Appellant appealed against that decision. The grounds may be summarised as follows:

   (i) The decision at paragraph 37 and paragraph 48 referred to the decisions in *Gulshan (Article 8 – new Rules – correct approach) Pakistan* [2013] UKUT 640 (IAC) and *Nagre, R (on the application of) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin) and applied an intermediary test when considering whether there was an Article 8 claim outside the rules. This approach was contrary to that in *MM, R v Secretary of State for the Home Department* [2014] EWCA Civ 985 at paragraphs 128-130;

   (ii) The decision conflates the immigration rules with the Article 8 assessment at paragraphs 38, 45 and 47 in contradiction of the "no near miss" train of arguments made popular by *Miah v Secretary of State for the Home Department* [2012] EWCA Civ 261 and the rules could not form part of any Article 8 assessment;

   (iii) The decision does not reveal any credibility findings in respect of the witnesses;

   (iv) The decision fails to apply the guidance in *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 and *Ghising (family life - adults - Gurkha policy) Nepal* [2012] UKUT 160 (IAC) in assessing whether there is any family life.

4. The Appellant was granted permission to appeal by First-tier Tribunal Judge Levin by way of a decision wherein it was observed that the approach in *Gulshan* and *Nagre* no longer represented the correct approach to the consideration of Article 8 outside the rules and the judge conflated his consideration under Appendix FM with his assessment outside the rules.

5. I was provided with a Rule 24 response from the Respondent which confirmed reliance on the decision of *Singh and Khalid v Secretary of State for the Home Department* [2015] EWCA Civ 74 which upheld the approach taken in *Nagre*.

Submissions

6. In advancing the Appellant's grounds of appeal, Ms Praisoody submitted inter alia that the approach in *Gulshan* is incorrect in whether to make a decision outside the Rules. The final ground was no longer pursued in light of the judge acknowledging that family life was engaged at paragraph 35 of his decision. Ms Praisoody further sought to remind me about the facts of the underlying appeal however, these submissions were not of a legal nature and did not refer to any legal error in the judge's decision.

7. I then heard submissions from Ms Isherwood who submitted in reply inter alia that the judge took the immigration rules into account because one should always start with those. She also highlighted that at paragraph 33 of the decision, the judge found that there was no dependency between the Appellant and her family members and that at paragraph 27 the judge highlighted the contradictory evidence between the Appellant and her witnesses. Ms Isherwood submitted that paragraph 34 of the decision was the crux of the conclusion and emphasised the judge's finding that there was no independent evidence before him from the Appellant and the new evidence the Appellant now sought to present should have been done sooner and was not before the judge. Regarding the threshold of engagement of Article 8, Ms Isherwood relied upon *Singh & Khalid* at [62 and 67] and confirmed that there need to be "compelling grounds" to go outside the rules. Ms Isherwood also referred to *Secretary of State for the Home Department v SS (Congo) & Ors* [2015] EWCA Civ 387 regarding consideration of the rules in an Article 8 assessment which may go in an Appellant's favour. She submitted that ultimately the judge did not materially err by referring to *Gulshan* anyhow as he looked at the evidence and found it inconsistent and contradictory and because of the lack of evidence the appeal could not be found in her favour.

8. In concluding her application, Ms Praisoody accepted that there had been a consideration outside the Rules of Article 8, but the wrong test of *Gulshan* had been applied. In response to my query as to whether there was a material error in the decision given that the Appellant accepted there had been an Article 8 consideration, Ms Praisoody contended that there remained an error because the judge had applied the incorrect *Gulshan* threshold throughout his decision as a 'compass' when deciding the issue of whether removal would not be disproportionate even though he did consider the appeal outside the rules. She submitted in closing that the main point she relied upon was that the test was applied wrongly.

9. I asked both parties at the close of submissions whether they had anything further to add and both confirmed that they did not.

10. At the close of submissions, I indicated that I would reserve my decision which I shall now give. I do not find that there was an error of law in the decision such that it should be set aside. My reasons for so finding are as follows.

No Error of Law

11. In relation to the first ground, I am satisfied that in considering the appeal the judge clearly went to great lengths to approach the appeal in a lawful and Article 8-compliant manner. At the First-tier Tribunal the Appellant's previous legal representative stated that the appeal was advanced on Article 8 outside the rules alone. This is clearly reflected in the judge's decision at paragraph 23 and demonstrates that the decision itself was entirely focussed upon an Article 8 assessment outside the rules. Therefore, the first ground of appeal as drafted is flawed as it is seemingly

premised upon the misapprehension that there was no Article 8 assessment which is clearly incorrect. For example, at paragraphs 35-48 of his decision, it is clear that the judge is performing a step-by-step assessment of the *Razgar* questions which are the hallmark of a lawful proportionality assessment. Thereafter, paragraphs 35-36 notes that family life and private life are both engaged, and so on. Therefore, the reference to *Gulshan* is a non-issue and in any event immaterial given that Article 8 was already engaged and the judge went on to consider the remaining limbs of the *Razgar* test.

12. It is unfortunate that it was thought necessary to refer to *Gulshan* given that it has not been upheld or followed by the Court of Appeal even in the recent matter of *Singh and Khalid*. A recent decision of Mr Justice Edis equally comments fairly that the threshold stated in Gulshan is a misstatement of the law (see [47] of *Sunassee, R v Upper Tribunal (Immigration and Asylum Chamber) & Anor* [2015] EWHC 1604 (Admin)). It is now well-settled that there is no intermediary test before a decision-maker or Tribunal must consider whether there is an Article 8 claim not dispensed with by the rules. That consideration will always need to take place and the two-stage approach stated in *Izuazu* remains good law as followed by Mr Justice Sales (as he then was) in *Nagre* and as followed by Lord Justice Underhill in *Singh and Khalid*. One does not need to demonstrate “compelling grounds” as asserted by Ms Isherwood.

13. As to the argument that the judge applied the *Gulshan* threshold as a ‘compass’ throughout his decision as to whether the removal was disproportionate, that is not how I understand the grounds to have been drafted. However, I am of the view that there is no indication in the decision that the judge applied *Gulshan* as a compass or other threshold concerning the proportionality assessment. I was not referred to any paragraph (other than paragraph 37 which simply mentions the ‘reasoning’ in *Gulshan* was borne in mind by the judge) which could corroborate or support that submission.

14. In conclusion, although the reference to *Gulshan* was unfortunate and infelicitous it did not affect the judge’s decision-making nor preclude him from considering Article 8 substantively nor did it form the threshold upon which he decided whether removal might be proportionate or not.

15. Concerning the second ground, I also find this is misconceived. Although it is correct that the Court of Appeal stated in *Miah* that there is no “near miss” principle, this was clarified in my view by the later *dicta* of Lord Carnwath in the Supreme Court authority of *Patel & Ors v Secretary of State for the Home Department* [2013] UKSC 72 [at 56] which confirms as follows:

> “Although the context of the rules may be relevant to the consideration of proportionality … this cannot be equated with a formalised "near-miss" or "sliding scale" principle”.

16. If further authority were necessary to establish this point, it can be found in the recent judgment of Lords Justice Sales in *Secretary of State for the Home Department v SS (Congo) & Ors* [2015] EWCA Civ 387 [at 56] which states as follows:

> "However, it cannot be said that the fact that a case involves a 'near miss' in relation to the requirements set out in the Rules is wholly irrelevant to the balancing exercise required under Article 8. If an applicant can show that there are individual interests at stake covered by Article 8 which give rise to a strong claim that compelling circumstances may exist to justify the grant of LTE outside the Rules, the fact that their case is also a 'near miss' case may be a relevant consideration which tips the balance under Article 8 in their favour. In such a case, the applicant will be able to say that the detrimental impact on the public interest in issue if LTE is granted in their favour will be somewhat less than in a case where the gap between the applicant's position and the requirements of the Rules is great, and the risk that they may end up having recourse to public funds and resources is therefore greater".

17. Therefore, it is clear from the above passage that the rules can form part of a proportionality assessment, much to the benefit of appellants it would seem. In this particular decision, it is clear to me that the reason why the judge referred to the rules at paragraph 38 was to gauge whether the decision taken by the Respondent was "*in accordance with the law*" in tackling the third limb of the *Razgar* test.

18. I was not persuaded by Ms Isherwood's submission that a judge should always start every Article 8 ECHR assessment by taking the Immigration Rules into account. In this particular scenario, it was for the judge to balance the facts as he saw them. It is not mandatory that a judge consider the extent to which the Immigration Rules are met where an appeal is advanced on Article 8 ECHR alone. If an appeal is not pursued on the basis that the Rules are met, a judge can immediately proceed to consider the appeal on its second stage outwith the rules. However, as stated above, the reference to the Rules in this particular decision did not adversely affect the overall approach taken by the judge anyhow but was a gauge to whether the decision was in accordance with the law. In light of the above, the second ground must also fail.

19. Regarding the third ground, I find that the judge made credibility findings upon the oral evidence before him (see paragraphs 25 and 34) and discussed the evidence he had heard as a whole. I find that the judge reached findings upon the evidence before him that were open to him and which he was entitled to reach. Those findings are neither perverse nor irrational in a *Wednesbury* sense.

20. In relation to the final ground that the decision failed to apply the guidance in *Kugathas* and *Ghising* in assessing whether there is any family life, Ms Praisoody rightly accepted that this ground should not be pursued given that the judge found that family life was engaged (see paragraph 35 of the decision). Had that concession not been made, I still would have found against the Appellant on this issue given that the guidance in

Ghising specifically requires a fact-sensitive assessment in determining whether family life is engaged between an adult-child and a parent, and that fact-sensitive assessment was performed and fell in favour of the Appellant and consequently it is difficult to see what possible complaint the Appellant can have had with that finding.

21. Therefore, in conclusion, the grounds do not reveal an error of law such that the decision should be set aside.

22. In the circumstances the appeal to the Upper Tribunal is dismissed and the decision of the First-tier Tribunal is affirmed.

Decision

23. The appeal to the Upper Tribunal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Saini