Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33291/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 16 July 2014	**On 24 March 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MYDUDU ASCENTIA THANDIWE GAVEN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mrs R Pettersen, a Senior Home Office Presenting Officer
For the Respondent: Mr T Hussain, instructed by Imperium Group

DECISION AND REASONS

1. The respondent, Miss Mydudu Ascentia Thandiwe Gaven, was born on 12 June 1982 and is a female citizen of South Africa. I shall hereafter refer to the respondent as the appellant and the appellant as the respondent (as they appeared respectively before the First-tier Tribunal). The appellant

appealed against the decision of the respondent dated 25 July 2013 refusing to grant her leave on the basis of her human rights (Article 8 ECHR). On the same date, the decision was made to remove the appellant by way of directions under Section 10 of the Immigration and Asylum Act 1999. The appellant appealed against that decision of the First-tier Tribunal (Judge Phillips QC) which, in a determination promulgated on 20 March 2014, allowed the appeal on Article 8 ECHR grounds but dismissed it under the Immigration Rules. The respondent now appeals, with permission, to the Upper Tribunal.

2. There are two grounds of appeal. First, the grounds challenge the judge's determination on the basis that he allegedly failed to consider whether there was an arguable case under Article 8 before embarking upon an Article 8 analysis (see *Nagre* [2013] EWHC 720 (Admin)). Secondly, the judge is criticised for having embarked upon a "freewheeling" analysis "unencumbered by the Rules" of Article 8 ECHR contrary to the principals in *Gulshan* (CNL insert reference). Granting permission, Judge Ford acknowledged that Judge Phillips QC had given a "very full consideration to Article 8 factors" but found that it was arguable that he neglected to make a finding as required by the guidance in *Nagre* and *Gulshan* before embarking on his consideration of Article 8 human rights outside the Rules.

3. Judge Phillips QC did, indeed, give a thorough examination of Article 8 outside the Rules. Both parties agreed that the appellant could not succeed under the Immigration Rules. It is significant that the grounds of appeal do not seek to challenge the judge's actual analysis of Article 8 or his application of the relevant jurisprudence (for example, *Huang* [2007] UKHL 11; *EB (Kosovo)* [2008] UKHL 41; *Razgar* [2004] UKHL 27). The judge was also mindful of more recent jurisprudence including *MF (Nigeria) [2013] EWCA Civ 1192* and also *Nagre* (see above). It is true that the judge moved from his consideration of the Immigration Rules to Article 8 recording that, "there can be no presumption [that] the Rules will normally be conclusive of the Article 8 assessment." To that extent, he did not seek to cross any *Gulshan* "hurdle" or to apply a two stage test before moving on to Article 8; it is that failure which the grounds assert led the judge into legal error. However, any such error is, in my opinion, illusory in the light of the most recent jurisprudence in particular, *MM* (Lebanon) [2014] EWCA Civ 985 (in particular, [134]) and, most recently, *Singh* [2015] EWCA Civ 74. Addressing the "two stage approach" in *Singh*, Underhill LJ concluded at [64]:

> In my view that is a mis-reading of Aikens LJ's observation. He was not questioning the substantial point made by Sales J. He was simply saying that it was unnecessary for the decision-maker, in approaching the "second stage", to have to decide <u>first</u> whether it was arguable that there was a good article 8 claim outside the Rules – that being what he calls "the intermediary test" – and <u>then</u>, if he decided that it was arguable, to go on to assess that claim: he should simply decide whether there was a good claim outside the Rules or not. I am not sure that I would myself have read Sales J as intending to impose any such intermediary requirement, though I agree with Aikens LJ that if he was it

represents an unnecessary refinement. But what matters is that there is nothing in Aikens LJ's comment which casts doubt on Sales J's basic point that there is no need to conduct a full separate examination of article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules.

4. In the light of this jurisprudence, there can be no argument that Judge Phillips QC did not err in law by concluding that there was a strong (indeed, successful) appeal on Article 8 grounds in the present instance. His Article 8 analysis is not vitiated by any failure to satisfy a "two stage test" or to surmount any "hurdle" supposedly imposed by *Gulshan* or *Nagre*. There was, to use the language of Singh, no "intermediary test". Having properly embarked upon his Article 8 assessment outside the Rules, I can find no fault (nor is any alleged in the grounds) of the judge's actual analysis. He has had proper regard to all relevant evidence and has not considered matters which were not material whilst his application of the relevant jurisprudence has led him to an outcome which was clearly available to him on the evidence. In the circumstances, I find that the grounds of appeal of the respondent fail to establish that the First-tier Tribunal erred in law and consequently the appeal is dismissed.

Notice of Decision

This appeal is dismissed.

No anonymity direction is made.

Signed Date 28 February 2015

Upper Tribunal Judge Clive Lane