



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/28585/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 20 May 2014

Determination Promulgated  
On 25 June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GV

(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Mr G Jack of the Specialist Appeal Team

For the Respondent: Mr P Ward, solicitor of James & Co

**DETERMINATION AND REASONS**

**The Respondent**

1. The Respondent (the Applicant) is a citizen of Uzbekistan born on 26 January 1989. On 16 July 2005 she entered with leave as a student which was subsequently varied on a number of occasions. She was lastly granted leave to remain as the dependant of a Points-Based System migrant, expiring on 30 April 2013. On 5 September 2007 she married. On 17 July 2013 her husband was granted indefinite leave to remain.

They have two children who were both born in this country, a daughter in 2008 and a son in 2012. On 30 April 2013, but before expiry of her then extant leave, the Applicant applied through her solicitors for further leave as the dependant of her husband who had made an application for indefinite leave which was granted on 17 July 2013. The gap between 30 April and 17 July 2013 is to be noted.

### **The Original Decision and the First-tier Tribunal's Determination**

2. On 8 August 2013 the Respondent refused the Appellant's application on the basis that the Appellant could not meet the requirements of paragraphs 276B and 276ADE of the Immigration Rules and Appendix FM. The Respondent stated the Applicant had no British citizen children in the United Kingdom and so the provisions of paragraph EX.1 of Appendix FM did not apply and although her husband had been granted indefinite leave he together with her and their son could return as a family to Uzbekistan. She had not been lawfully resident for a continuous period of ten years and so could not meet the requirements of paragraph 276B of the Immigration Rules and had not been living continuously in the United Kingdom for sufficiently long to meet any of the requirements of paragraph 276ADE. The Respondent found there was no aspect of the Applicant's case which constituted exceptional circumstances such as to engage the United Kingdom's obligations under Article 8 of the European Convention outside the Immigration Rules.
3. On 14 August 2013 the Applicant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended. The grounds were that the Respondent's decision was not in accordance with the Immigration Rules and placed the United Kingdom in breach of its obligations to the Applicant and her family to respect her private and family life protected by Article 8 of the European Convention.
4. By a determination promulgated on 7 February 2014 Judge of the First-tier Tribunal N J Bennett allowed the Applicant's appeal under Article 8 outside the Immigration Rules. He found it would be disproportionate to require the Applicant to leave the United Kingdom while her son's application for British citizenship remained pending with the Respondent and remarked that if the Appellant's son and indeed her daughter were registered as British citizens the Respondent would need to consider the family's circumstances in the light of the judgment in *Zambrano v Office National de l'emploi* [2011] EUECJ C-34/09.
5. The Appellant (the SSHD) sought permission to appeal on the grounds that the Judge had made an error in law by allowing the appeal under Article 8 so as to give her the opportunity to register her children as British citizens and had failed first to identify circumstances which would make her removal unjustifiably harsh or second to have identified any compelling circumstances not recognised by the Immigration Rules such as to require the Tribunal to consider the claim under Article 8 outside the Rules, following the determination in *Gulshan (Article 8 - new Rules - correct approach)* [2013] UKUT 00640 (IAC).

6. On 25 February 2014 Judge of the First-tier Tribunal Foudy granted the SSHD permission to appeal referring in particular to the Judge's treatment of the determination in *Gulshan*.

### **The Upper Tribunal Hearing**

7. The Appellant and her husband attended the hearing. At the start they handed up certificates to show that both their daughter and their son were now naturalised British citizens.

### **Error of Law Submissions for the SSHD**

8. Mr Jack submitted it was a material error of law on the part of the Judge to have allowed the Applicant's appeal on grounds relying on Article 8 so as to afford an opportunity for the Applicant's children to be registered as British citizens. The Judge had failed to identify any circumstances which indicated that the removal of the Applicant would be unjustifiably harsh. The application for naturalisation as a British citizen of the Applicant's daughter had been made while the daughter was not even in the United Kingdom. So that there was in any event no need for the Applicant to remain in the United Kingdom for registration of her children as British citizens. At the time of the hearing before the Judge they had not been so registered.
9. The Judge had clearly found that the Applicant could not meet the relevant requirements of Appendix FM and that it would not be unreasonable for her husband to return to Uzbekistan. He had properly considered the interests of the Applicant's son who was in the United Kingdom at paragraphs 39-41 of his determination and gone on to dismiss the appeal under the Immigration Rules.
10. Although the Judge had referred to the determination in *Gulshan* he had not highlighted any non-standard and particular features demonstrating that removal would be unjustifiably harsh: see paragraph 45 of the Judge's determination. The only matter which could be considered relevant was the registration of the Applicant's son as a British citizen. Her daughter was in any event living with the Applicant's mother in Uzbekistan and had been since 2008. There were no circumstances sufficient to justify the Applicant remaining in the United Kingdom and removal would not be unduly harsh. Even if her son had at the time of the hearing before the First-tier Tribunal Judge been registered as a British citizen the appeal should still have failed.

### **Error of Law Submissions for the Applicant**

11. Mr Ward submitted the grounds for appeal were ill-conceived. At the time of the First-tier Tribunal hearing there was evidence before the Judge to show that both the Applicant's daughter and son had been born in the United Kingdom. Section 1(3) of the British Nationality Act 1981 provided that:-

A person born in the United Kingdom after commencement who is not a British citizen ... shall be entitled to be registered as a British citizen if, while he is a minor -

- (a) his father ... becomes settled in the United Kingdom; and
- (b) an application is made for his registration as a British citizen.

Both children were born in the United Kingdom and hence even if not registered as British citizens at the date of the hearing before the Judge, applications had been made for such registration and the 1981 Act provided that the children were entitled to be registered. The Judge had taken this into account and his determination did not contain an error of law.

12. At paragraph 47 of his determination the Judge had noted that once the children became registered as British citizens other rights would accrue to them and to the Applicant as their carer in the light of the judgment in *Zambrano*. The registration of the children as British citizens was an unusual feature so as to meet the "*Gulshan* test" for the engagement of a consideration of rights under Article 8 of the European Convention outside the Immigration Rules.
13. At paragraph 48 of his determination the Judge had referred to the Respondent's guidance to caseworkers. His assessment of the proportionality of the decision under appeal at paragraph 49 was sustainable in the light of the reasons he had given and he had reached a perfectly fair and proper conclusion.
14. Mr Ward concluded that the Applicant's children, and in particular her son, had been granted British citizenship and so the provisions of paragraph EX.1 of Appendix FM would be engaged. The determination did not contain any material error of law and should stand.

### **Findings and Consideration**

15. At paragraph 40 the Judge doubted the explanation which had been given by the Applicant why her daughter had become stranded in Uzbekistan but did not reject the claim that the Applicant had failed to appreciate the possibility of obtaining a duplicate birth certificate to enable her daughter to obtain a passport.
16. The issue of the registration of the Applicant's children as British citizens was addressed by the Judge at paragraph 47 of his determination. There is no express mention of their legitimate expectation under Section 1(3) of the 1981 Act but the Judge was entitled to take into account that by the time there was any prospect of immediate removal the likelihood would be, as in fact has turned out to be the case, that the Applicant's children would be registered as British citizens. The consequence would be that the Applicant's son would be required to leave the United Kingdom and the Union. This would engage what the Judge referred to as rights arising from the decision in *Zambrano* and the Respondent's policy in respect of *Zambrano* although at the date of the hearing Regulation 15A of the Immigration (EEA) Regulations 2006 as amended had already come into effect.
17. The Judge recorded the gap between the expiry of the Applicant's previous leave to remain and that of her husband at paragraph 2 of his determination. This was a factor he was entitled to take into account at paragraph 49 when assessing the

proportionality of the decision under appeal to the State's need to maintain proper immigration control. Crucially and essentially, he referred to the SSHD's policy that leave may be granted on a short term temporary basis to enable particular issues relating to a child's welfare to be addressed. There is no reason why when referring to this the Judge was not entitled to include not only the Applicant's son but also her daughter whose interests also needed to be taken into account by way of reference to Section 55 of the Borders, Citizenship and Immigration Act 2009 and the determination in *Mundeba (s.55 and para 297(i)(f)) DRC [2013] UKUT 88 (IAC)* and in particular at paragraph 47. The registration as British citizens of the children must be considered to be a valuable benefit to the children and in their best interest.

18. The Judge addressed the length of the period of leave that might be granted to the Applicant in the light of his determination at paragraph 49 noting that it was not appropriate for him to give any direction about the length or type of leave on a short term temporary basis to enable particular issues relating to a child's welfare to be addressed which should be granted outside the Immigration Rules. This is of a piece with the jurisprudence at paragraph 75 of the judgment in *MS (Ivory Coast) v SSHD [2007] EWCA Civ 133* which also involved the application of a policy or instructions to caseworkers issued by the SSHD.
19. Taking these matters into account the Judge gave sustainable reasons for the conclusion reached, following his assessment of the proportionality of the SSHD's decision to the need to maintain proper immigration control.
20. The SSHD has also challenged the Judge's application of the "*Gulshan* test" to engage a consideration of Article 8 outside the Immigration Rules. The Judge referred expressly to this at paragraph 45 of his determination and identified the non-standard features at paragraph 47 so that his proportionality assessment cannot be impugned on the basis that the Judge did not apply the "*Gulshan* test".
21. In any event, the *Gulshan* test is extracted from the SSHD's guidance for caseworkers and was promulgated after the judgment in *Patel and Others v SSHD [2013] UKSC 72* in which at paragraph 54 Lord Carnwath found that the Immigration Rules are no more than the starting point for the consideration of any claim outside the Rules under Article 8.
22. The First-tier Tribunal's determination did not contain an error of law such that it should be set aside and it shall stand.

### **Anonymity Order**

23. At paragraph 50 of his determination the Judge made an anonymity direction and I see no reason why that should not be continued and accordingly order that the Judge's anonymity direction shall continue.

### **DECISION**

**The determination of the First-tier Tribunal did not contain an error of law such that it should be set aside and it shall stand.**

**Anonymity Direction**

**Unless and until a Tribunal or court directs otherwise, the Applicant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Applicant and to the SSHD. Failure to comply with this direction could lead to contempt of court proceedings.**

Signed/Official Crest

Date 24. vi. 2014

Designated Judge Shaerf  
A Deputy Judge of the Upper Tribunal