



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: IA/36543/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 5th September 2014**

**Decision and Reasons
Promulgated
On 12th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MR ZAKA GULUZADE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Pease (Counsel)

For the Respondent: Ms L Kenny (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. It will be convenient to refer to the parties as they were before the First-tier Tribunal. The appellant is a national of Azerbaijan. The respondent is the Secretary of State.
2. The appellant's appeal against decisions to refuse to vary his leave and to remove him by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006 was allowed by

First-tier Tribunal Judge Hussain (“the judge”) in a determination promulgated on 25th June 2014.

3. The appellant applied for leave in form FLR(O), relying upon Article 8 of the Human Rights Convention. He claimed to be married to a person with discretionary leave. His application was made on 9th August 2013, shortly before expiry of his Tier 4 student leave. The Secretary of State refused the application on 22nd August that year, finding that section D-LTRP of the rules was not met as the appellant’s partner was not a British citizen or present and settled in the United Kingdom or a refugee or a person with humanitarian protection. Exception EX.1 could not benefit him as he did not meet the eligibility requirements of the rules. Moreover, there appeared to be no insurmountable obstacles preventing the appellant from continuing family life with his partner in Azerbaijan. Paragraph 276ADE of the rules was also not met, as the appellant had not lived continuously in the United Kingdom for twenty years and had not spent at least half of his life here either.
4. Before the judge, the Presenting Officer accepted that the appellant and his wife enjoyed family life together. The judge asked whether the Secretary of State had made any investigation regarding the wife’s circumstances, in the light of the grant of discretionary leave to her, in order to ascertain whether or not it was reasonable to expect the couple to relocate. Following a short adjournment, the Presenting Officer told the judge that there was no record of the appellant’s wife in the Home Office database. In evidence, the appellant said that his wife’s discretionary leave would expire in 2015 but she would be able to apply for indefinite leave to remain. Originally from Azerbaijan, his wife has been present in the United Kingdom for ten years. She was last in Azerbaijan in 2006.
5. In evidence given by the appellant’s wife, she said that she left Azerbaijan as a minor.
6. The judge expressed concerns about the quality of the respondent’s decision. In the first place, the appellant was described as being “in a parental relationship” with his partner. Secondly, the Secretary of State maintained in the letter giving reasons for the decisions that the appellant could not benefit from EX.1 because he failed to meet the substantive requirements of the rules and yet, on the other hand, he could relocate to Azerbaijan with his partner as there were no insurmountable obstacles preventing them from continuing their relationship there. In other words, the Secretary of State applied EX.1(b).
7. In the light of these difficulties, the judge observed that any reasonable reader of the Secretary of State’s letter could have no

confidence that there had been any serious consideration as to whether the appellant's circumstances were exceptional. There was no engagement with the fact that he was married to a person who had discretionary leave to remain. There was no evidence from the respondent showing why the appellant's wife had been given discretionary leave in the first place.

8. The judge found that there were good reasons for making an Article 8 assessment outside the rules. First, there appeared to be no rule dealing with the appellant's circumstances, as a person who wished to remain here on the basis of marriage to a person with discretionary leave. Secondly, the grant of discretionary leave to his spouse suggested that there might be good reason why she was not required to return to Azerbaijan. Proceeding with his Article 8 assessment, the judge found that family life was present. In the absence of any explanation for the leave granted to the appellant's spouse, the judge found that the Secretary of State had not justified the proposed interference with the appellant's right to respect for his family life. He allowed the appeal.
9. The Secretary of State applied for permission to appeal. It was contended that the judge erred in his approach to Article 8. MF (Nigeria) [2013] EWCA Civ 1192 showed that the rules are a complete code that form the starting point for a decision maker. The judge did not have regard to the rules and so his subsequent proportionality assessment was not sustainable. Furthermore, as was clear from Gulshan [2013] UKUT 00640, an Article 8 assessment should only be carried out where there are compelling circumstances not recognised by the rules but in this case the Tribunal did not identify such circumstances. Moreover, the judge failed to provide adequate reasons why the appellant's circumstances were either compelling or exceptional. The appellant's wife only had limited leave until 2015 and so there was no guarantee that she would be permitted to remain after that. Her reluctance to return to Azerbaijan was a matter of choice rather than necessity.
10. Permission to appeal was granted on 14th July 2014. The grantor of permission considered that the judge's concerns with the decision letter might be justified but it was arguable that his brief analysis and reasons for considering the matter outside the rules and thereafter his approach to insurmountable obstacles amounted to an error of law, given that the spouse only had limited leave to remain until 2015 and was in Azerbaijan as recently as 2006.

Submissions on Error of Law

11. Ms Kenny said that there was an absence of any consideration of the case under the rules. Paragraph 20 of the determination showed that the judge simply moved to make an Article 8 assessment, without giving adequate reasons why the case fell to be considered in this way. The appellant's wife had limited leave until 2015. Even though details of the wife's circumstances might have been helpful, she had discretionary leave, which undermined her claim to be unable to return to Azerbaijan. Her asylum claim had failed. Paragraph 15 of the determination showed that the judge found that the wife did not wish to return to Azerbaijan but had not tried to obtain a passport. Even though she intended to apply for indefinite leave in 2015, she was not at present "settled" in the United Kingdom. Insufficient reasons were put forward showing why the Article 8 claim should succeed. The judge had not made an assessment and at paragraph 24 he appeared to speculate on reasons why the appellant's wife could not return. She had a wish to stay here, rather than a legally relevant need to do so.

12. Ms Pease said that although the determination was brief, it covered everything that was required. The judge moved to an Article 8 assessment because it was accepted that the appellant could not meet the requirements of the rules, as his wife only had discretionary leave. The requirements of Appendix FM could not be met. Thereafter, the judge clearly did provide good reasons why it was appropriate to move to an Article 8 assessment. These appeared at paragraph 24. The fact that there was no rule covering the appellant's circumstances was a good reason and the fact that his wife had discretionary leave was another. The Presenting Officer found no trace of her in the Home Office records. The proportionality assessment at paragraph 26 was free from error. The judge was entitled to find that there must have been a good reason for the grant of leave and so it was not reasonable to expect her to return to Azerbaijan with her husband. It was true that the appellant's wife had not been granted asylum but the Secretary of State, in her decision letter, should have given reasons for her conclusion that the appellant and his wife could continue family life in Azerbaijan. The judge was also entitled to note that the Secretary of State had had ample time to find out why discretionary leave was given. After all, the adverse decisions were made in August 2013. The judge was entitled to take all of this into account in his proportionality assessment.

Conclusion on Error of Law

13. In the grounds in support of the Secretary of State's application, it is first contended that the rules are a complete code, in the light of MF (Nigeria) [2013] EWCA Civ 1192. As is now clear, not least from the judgment of the Court of Appeal in MM [2014] EWCA Civ

985, which appeared shortly after those grounds were prepared, the rules are a complete code in the deportation context, in part 13, but probably not elsewhere. In any event, as Ms Pease submitted, the judge took the rules as a starting point and only proceeded to make his Article 8 assessment after taking them into account. This is clear from paragraph 24 of the determination.

14. So far as Gulshan [2013] UKUT 640 is concerned, I again accept Ms Pease's submission that the judge did carefully consider whether there were good reasons for proceeding to make his Article 8 assessment. It may now be doubted that good reasons or compelling circumstances amount to an intermediate threshold, between consideration under the rules and an Article 8 assessment outside them, in the light of paragraphs 128 and 135 of the judgment in MM & Others, but in any event the judge identified as a good reason the absence of a rule applicable in this case, where the Secretary of State accepted, through the Presenting Officer, that family life existed but where the rules did not cater for a spouse with discretionary leave to remain.
15. The judge maintained his focus on the grant of discretionary leave. He gave the respondent an opportunity to find out the reasons for the grant but was told that there was no record of the appellant's wife. He was concerned at the reasons given for the adverse decisions, as the letter from the Secretary of State contained almost nothing about the appellant's spouse. At paragraph 22, he observed that a reasonable reader of that letter could not have confidence that any serious consideration had been given to whether the appellant's circumstances were exceptional. There was no engagement with the fact that he is married to a person with discretionary leave. A careful reading of that letter shows that the judge's concerns here were justified. There is an indirect reference to the appellant's spouse in the first part of the letter, concerning the "partner route". She is described as the appellant's partner, in relation to EX.1, but in the context of a curious error. Their relationship is described as "a genuine and subsisting parental" one. The appellant's wife is described as "partner" again, in the short paragraph dealing with section D-LTRP and there is mention of relocating to Azerbaijan "together", so that their relationship can be continued in that country. There is no detail at all regarding the appellant's wife's particular circumstances or an explanation for the grant of leave to her and no consideration of the impact of that leave on the prospects of the couple returning to Azerbaijan together.
16. Similarly, in the short paragraph dealing with exceptional circumstances which might "warrant consideration by the Secretary of State of a grant of leave to remain ... outside the requirements of the Immigration Rules" there is no mention of the

appellant's spouse at all and, more than that, no substantive reasons at all for the conclusion reached: "It has been decided that it does not" (meaning here that the application does not raise or contain any exceptional circumstances). I find that the judge was entitled to give adverse weight to the absence of reasons from the Secretary of State and to factor this in when he came to his proportionality assessment. In the absence of any sensible consideration of the appellant's wife's circumstances, he was entitled to weigh the competing interests as he did. In referring (paragraph 26) to a burden upon the Secretary of State, he was clearly not intending to refer to a formal burden of proof. What he had in mind here was an absence of any justification, contained in the decisions under appeal, for the interference with the appellant's family and private life. His finding that there was no justification, in the particular circumstances of the case, and more particularly in the absence of a fully reasoned decision, was open to him.

17. The judge's decision to allow the appeal on Article 8 grounds does not entail the grant of any period of leave to the appellant or confer any substantive benefit on him. The judge's decision simply means that the decisions under appeal do not, in present circumstances, amount to a proportionate response. The net result may simply be that the Secretary of State considers the appellant's circumstances, and those of his wife, in more detail and that she then makes a decision in the light of what may emerge. I conclude, however, that no material error of law has been shown in the judge's decision, which shall stand.

NOTICE OF DECISION

18. The decision of the First-tier Tribunal contains no material error of law and shall stand.

Signed
2014

Date **11th December**

Deputy Upper Tribunal Judge R C Campbell