



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/12037/2013

THE IMMIGRATION ACTS

**Heard at Newport
On 29th July 2014**

**Determination
Promulgated
On 05th Aug 2014**

Before

UPPER TRIBUNAL JUDGE POOLE

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

**BILGE OZTURK EDGE
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Erwin Richards, Home Office Presenting Officer
For the Respondent: Mr SP Edge

DETERMINATION AND REASONS

1. In this determination I will refer to the parties by the description adopted before the First-Tier Tribunal.
2. The appellant is a female citizen of Turkey born 8 August 1972. She is the wife of Mr Simon Phillip Edge.
3. The appellant had sought leave to enter the United Kingdom and the respondent considered the application pursuant to Appendix FM of the

Immigration Rules HC295. That application was refused and the appellant appealed that decision but did not elect to have an oral hearing.

4. The matter came before Judge of the First-Tier Tribunal Frankish as a “paper case” on 17 April 2014 and by a determination of that date found that the appellant could not succeed under the Rules but the appeal was allowed under Article 8 ECHR.
5. The respondent Entry Clearance Officer then sought to appeal that decision alleging that there was a material misdirection of law on the part of the First-Tier Tribunal Judge. In those grounds it was noted that the appellant’s case failed to meet the requirements of the Immigration Rules but then it is alleged that the judge erred by not following the case of **Gulshan [2013] UKUT 640** having not identified any compelling circumstances. The outcome of the respondent’s initial decision was not “unjustifiably harsh”.
6. In granting leave to appeal another judge of the First-Tier Tribunal gave the following as reasons:

“1. The respondent seeks permission to appeal in time against a decision of the First-Tier Tribunal (Judge Frankish) who, in a determination promulgated on 22 April 2014, allowed the appellant’s appeal against the decision of the respondent to refuse to grant her leave to enter the UK as a spouse.

2. The appeal dated 30 April 2014 was in time. The grounds of appeal asserted that although the appeal had been dismissed under the Immigration Rules, the judge had erred in law in allowing the appeal under Article 8. Following **Gulshan [2013] UKUT 00640(IAC)** an Article 8 assessment should only be carried out where there were compelling circumstances not recognised by the Rules. **Nagre [2013] EWHC 720 Admin** endorsed the Secretary of State’s guidance on the meaning of exceptional circumstances. The judge had also erred in law in not giving appropriate regard to the relevant date.

3. In the determination the judge mentioned **Gulshan** but arguably failed to take its guidance into account. There was no reference to **Nagre**.

4. I find that the judge arguably failed to take note of the appropriate guidance on the meaning of “exceptional circumstances”. There was therefore an arguable error of law”.

7. At the commencement of the hearing the appellant (who was present!) was represented by her husband/sponsor Mr SP Edge. I explained the nature of the proceedings. Mr Edge indicated his understanding. I enquired as to whether or not there had been a response to the appeal and Mr Edge referred me to a copy of that response.
8. In his submission Mr Richards referred to the grounds of appeal but said that he did not rely upon them completely as they were not strictly

accurate. It had been alleged that the judge had failed to identify “compelling circumstances”. That was not true. Mr Richards referred me to paragraph 12 of the determination where the judge clearly directs himself accurately to the law by reference to “compelling” circumstances. The question was, were they sufficiently compelling and would there be a harsh outcome should the appellant have to reapply out of the country. The question of harsh outcome was the only identifiable material error of law.

9. Having previously noted the comments made by Mr Edge following the grant of leave I did not need to call upon him and announced my decision that I considered there was no material error of law and that the appeal of the Entry Clearance Officer was accordingly dismissed.
10. In giving my reasons I can now comment that there seemed to be little issue in whether or not the appellant could succeed under the Immigration Rules. She could not.
11. 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] 1192** and the High Court in **Nagre [2013] EWHC 720 (Admin)** and by the Upper Tribunal in **Gulshan**. These judgments make it clear that the question of proportionality must be looked at in the context of the Immigration Rules with no need to go to a specific assessment under Article 8 if it is clear from the facts that there was no particular compelling or exceptional circumstances requiring that course to be taken.
12. In this particular case the judge quite properly concluded that the Immigration Rules would not apply (paragraph 11). The judge then directs himself with regard to the case of **MF** and **Gulshan**. He mentions other cases but does not (as pointed out in the reasons for the grant of leave) refer to the case of **Nagre**. However despite this the judge properly directed himself as to the question of “compelling circumstances”. He clearly had in mind the relevant and appropriate test. He gave examples of the circumstances faced by this appellant and properly explains himself in paragraph 12 of his determination. Whilst not using the word the judge clearly found the outcome of the Entry Clearance Officer’s original decision would be harsh.
13. There is no error identifiable in the judge’s determination and its outcome must stand.
14. The challenge by the Entry Clearance Officer is accordingly dismissed.
15. No application was before me in respect of anonymity and no application has been made to consider the refusal by Judge Frankish to make a fee order.

Signed

Date

Upper Tribunal Judge Poole