



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/02049/2014

THE IMMIGRATION ACTS

Heard at Bradford
On 1 July 2014

Determination Promulgated
On 25 July 2014

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

ISRAR AHMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Aslam, Aman Solicitors Advocates, Luton
For the Respondent: Mr M Diwnycz, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Israr Ahmed, was born on 18 October 1988 and is a male citizen of Pakistan. On 9 December 2013, the respondent refused to vary the appellant's leave to remain in the United Kingdom and also decided to remove him by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The appellant appealed to the First-tier Tribunal (Judge Hindson) which, in a

determination promulgated on 27 March 2014, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The judge had entered the United Kingdom on a visit visa and had overstayed. Whilst he had stated to the First-tier Tribunal that he feared returning to Pakistan (he claimed to have been accused of a murder there which he had not committed) that aspect of the appeal was not actively pursued in the Upper Tribunal and, in any event, at [13] the judge had found that the appellant was not at real risk on return to Pakistan, a finding which has not been challenged in this appeal to the Upper Tribunal. At [14], the judge wrote as follows:

I do accept however that his evidence about the situation in the UK and how it has evolved is true. I have evidence that the couple [the appellant and his wife with whom he lived in the United Kingdom] have married both in an Islamic marriage and in a civil ceremony. I have evidence that the appellant's wife is pregnant, in the form of a letter from her GP. I have medical evidence to the effect that the appellant's wife has mental health problems, specifically depression. The appellant's wife is not fit to work and is in receipt of state benefits in the form of Employment and Support Allowance. In those circumstances an out of country application for settlement under the Rules would inevitably be refused on the financial requirements.

3. The judge went on [15] to find that the appellant's wife could not reasonably be expected to live with her husband in Pakistan. She had been born in the United Kingdom, is a British citizen and has a daughter by a previous relationship who is a British citizen. The judge did, however, find [19] that it would be possible for the appellant and his wife to visit each other in the UK, in Pakistan or indeed a third country. He also noted that the couple had "chosen to have a child together, notwithstanding the precarious immigration status of the appellant". He also stated that, "whilst it is generally accepted the children are best served by growing up with both of their parents present, the appellant's wife would no doubt provide a good home and upbringing for her as yet unborn child, as she appears to have done for her daughter."
4. The judge went on then to consider *Gulshan (Article 8-new rules-correct approach) [2013] UKUT 640 (IAC)* in particular, [24]:

Drawing the threads together, and not without some difficulty, we conclude that on the current state of the authorities:

(a) the maintenance requirements of E-LTRP.3.1-3.2 stand, although Blake J in MM (now under appeal) said that they could constitute an unjustified and disproportionate interference with the ability of spouses to live together; he suggested that an appropriate figure may be around £13,400, and highlighted the position of young people and low-wage earners caught by the higher figure in the rules;

(b) after applying the requirements of the rules, only if there may arguably be good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: Nagre;

(c) the term “insurmountable obstacles” in provisions such as Section EX.1 are not obstacles which are impossible to surmount: *MF (Nigeria)*; they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, if removal is to be disproportionate it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: *Nagre*.

5. The judge went on to conclude that he did not “find that there are arguably good grounds for granting leave to remain outside the Rules. There are no compelling circumstances not sufficiently recognised by the Rules.”
6. The appellant now asserts that the judge’s application of the *Gulshan* “test” led him to refrain from carrying out an analysis of Article 8 ECHR outside the Rules was perverse given that he had accepted the appellant’s account of his circumstances in the United Kingdom. The grounds of appeal submit that the judge failed to follow the five-stage approach set out in *Razgar 2004 UKHL 27*. That submission found favour with Judge Pullig who granted permission noting that, “whilst *Chikwamba 2008 UKHL 40* may have no application in this case on the facts, the judge clearly did not follow *Razgar* and did not make any proper assessment of proportionality.”
7. I find that both the grant of permission and the grounds fall into a similar error. *Gulshan*, following on from the line of authority established in *MF (Nigeria) [2013] EWCA Civ 1192* and *Nagre [2013] EWHC 720*, makes it clear that the circumstances of the majority of applicants for leave to remain will fall within the provisions of the complete code as regards Article 8 ECHR now provided in the Immigration Rules. Only those cases in which the circumstances are particularly compelling *and*, crucially, “not sufficiently recognised by the Rules” (in the sense that the circumstances are so unusual as not to have been anticipated by Rules), should lead a judicial decision maker to consider Article 8 ECHR outside the Immigration Rules. That “test” requires the exercise of a judicial discretion; it does not require a full-scale application of Article 8 ECHR jurisprudence (applying, for example, the detailed analysis indicated in *Razgar*) or a detailed assessment of proportionality. If a judge were required to carry out such an analysis, then nothing would be achieved by the application of the *Gulshan* “test” at all and the very “free-wheeling” Article 8 ECHR assessment deprecated in *Gulshan* would become the norm. The judge did not, therefore, fall into error by refraining from carrying out a full scale assessment of proportionality; he exercised his discretion not to consider Article 8 ECHR outside the Immigration Rules and he did so judicially; there is no suggestion that the judge had regard to irrelevant matters in exercising his discretion not to consider the appeal outside the Immigration Rules nor has he failed to take account of all relevant facts. He has had proper regard for the fact that this appellant did not fall to be considered under EX1 because he was in the United Kingdom as a visitor (see E-LTRP2.1). Significantly, the judge was aware that the appellant, notwithstanding his precarious immigration status, had chosen to start a family in the United Kingdom. Although the judge does not say so expressly, the public interest concerned with the

removal of an individual who seeks to circumvent the Immigration Rules is clearly a very strong one. In the circumstances, I am not satisfied that he erred in law by refraining from considering Article 8 outside the Rules. Accordingly, the appeal is dismissed.

DECISION

8. This appeal is dismissed.

Signed

Date 25 July 2014

Upper Tribunal Judge Clive Lane