



IAC-AH-KRL-V1

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

Appeal Number: IA/22904/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 8 October 2014**

**Determination Promulgated
On 22 October 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TARIQ HUSSAIN

Respondent

Representation:

For the Appellant: Mrs R Pettersen, Senior Home Office Presenting Officer
For the Respondent: In person

DETERMINATION AND REASONS

1. The respondent, Tariq Hussain, was born on 13 June 1987 and is a citizen of Pakistan. By a decision dated 28 May 2014, the appellant refused the respondent's application for further leave to remain in the United Kingdom on the basis of his marriage to Shabana Azam (hereafter referred to as "the sponsor"). I shall hereafter refer to the

appellant as the respondent and to the respondent as the appellant (as they were respectively before the First-tier Tribunal).

2. The appellant appealed against the decision of the Secretary of State to the First-tier Tribunal (Judge R G Handley) which, in a determination promulgated on 5 August 2014, dismissed the appeal under the Immigration Rules but allowed the appeal under Article 8 ECHR. The respondent now appeals, with permission, to the Upper Tribunal.
3. Both parties agreed that the appellant failed to satisfy paragraph 284 of HC 395 (as amended) in that he had failed to provide an original English language test certificate from an English language test provider approved by the respondent. In addition, the respondent considered that the appellant was unable to satisfy the provisions of Appendix FM, R-LTRP1.1(d) because, although it was acknowledged that he had a genuine and subsisting relationship with the sponsor, there were no insurmountable obstacles preventing the appellant and the sponsor (a British citizen) continuing their relationship in Pakistan. Consequently, the provisions of EX1(b) were not met.
4. The appellant and sponsor had begun their relationship in August 2006 and the appellant had entered the United Kingdom on 3 February 2012. He had married the sponsor in Pakistan on 31 July 2010. As regards his private life, the appellant accepted that he did not meet the requirements of paragraph 276ADE because he has not lived in the United Kingdom continuously for at least twenty years nor was he under the age of 18 or 25 years at the date of his application.
5. The grounds of appeal complain that the judge failed to follow the guidance of *Gulshan* (Article 8-new rules-correct approach) [2013] UKUT 640 (IAC). The judge had failed to identify arguably good grounds for granting leave to remain outside the Immigration Rules.
6. The judge did refer to *Gulshan* in the determination although he proceeded directly from a dismissal of the Immigration Rules appeal [16] to a consideration [17] of Article 8 ECHR without identifying any exceptional circumstances. However, I am not satisfied (as I explained to the appellant and Mrs Pettersen) that the First-tier Tribunal erred in law by failing to do so. I referred Mrs Pettersen to the judgment of the Court of Appeal in *MM* [2014] EWCA Civ 985 at [129]:

Sales J's decision therefore follows the logic of Laws LJ's statements in [38]-[39] of *AM(Ethiopia)*, analysed above. However, there is a difference in that in *Nagre* the new rules were themselves attempting to cover, generally, circumstances where an individual should be allowed to remain in the UK on *Article 8* grounds; whereas in *AM(Ethiopia)* and in the present appeals the rule challenged stipulates a particular requirement that has to be fulfilled before the applicant will be allowed to enter or remain. The argument in each case is that it is that specific requirement that offends *Article 8*. *Nagre* does not add anything to the debate, save for the statement that if a particular person is outside the rule then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy

the rule, then there either is or there is not a further *Article 8* claim. That will have to be determined by the relevant decision-maker.

7. The judge's failure to conduct a "further, intermediary, test" did not in itself vitiate his determination of the appeal on Article 8 ECHR grounds. However, the question does remain as to whether the judge should, on the particular facts of this case, have allowed an appeal under Article 8 ECHR. Although *MM* now makes it clear that there is no test to be passed or hurdle surmounted, the principles of *Gulshan* remain good law. The head note of *Gulshan* reads as follows:

On the current state of the authorities:

- (a) *the maintenance requirements of E-LTRP.3.1-3.2 stand, although Blake J in R (on the application of MM) v Secretary of State for the Home Department [2013] EWHC 1900 (Admin) 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 be arguably 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: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);*
- (c) *the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.*

The Secretary of State addressed the Article 8 family aspects of the respondent's position through the Rules, in particular EX1, and the private life aspects through paragraph 276ADE. The judge should have done likewise, also paying attention to the Guidance. Thus the judge should have considered the Secretary of State's conclusion under EX.1 that there were no insurmountable obstacles preventing the continuation of the family life outside the UK. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for him for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.

8. The appellant in this appeal not only appears to have accepted that he could not succeed under the Immigration Rules; he has not challenged the judge's determination dismissing his appeal on that ground. As in *Gulshan*, "the judge should have considered the Secretary of State's conclusion under EX1 that there were no insurmountable obstacles preventing the continuation of the family life outside the UK." There is nothing in the judge's Article 8 ECHR analysis which indicates that there were any arguably good or compelling grounds for granting leave to remain outside the Rules. Indeed, the only factors in the appellant's favour to which the judge refers were factors which were irrelevant (for example, that the appellant had not been engaged in criminal activities whilst in the United Kingdom) or which had already fallen for consideration under the Immigration Rules (that the

appellant's wife is a British citizen and that her relationship with the appellant is genuine and subsisting). The judge has referred to nothing whatsoever in his determination which would justify the granting of leave to remain *outside the Rules*. The appellant's circumstances fall fairly and squarely within the provisions of the Rules themselves which he acknowledges he has failed to satisfy.

9. Consequently, although I find that the judge did not err by failing to identify any compelling circumstances which would enable him to determine the appeal on Article 8 grounds, he did err by proceeding to conduct a full Article 8 consideration where there was no need, on the particular facts of the case, for him to do so. In the circumstances, I set aside the determination. I have remade the decision. This appeal is dismissed on Article 8 grounds and under the Immigration Rules.

DECISION

10. The determination of the First-tier Tribunal promulgated on 5 August 2014 is set aside. I have remade the decision. The appellant's appeal is dismissed under the Immigration Rules. The appellant's appeal is dismissed on human rights grounds (Article 8 ECHR).

Signed

Date 20 October 2014

Upper Tribunal Judge Clive Lane