



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/39449/2013

THE IMMIGRATION ACTS

Heard at Field House
On May 30, 2014

Determination Promulgated
On 2nd June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

MR SATEEV KAVISH NUNDLALL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Heybrook, Counsel, instructed by Carmelite
Solicitors

For the Respondent: Mr Saunders (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant, born June 15, 1990, is a citizen of Mauritius. In October 2005 he entered the United Kingdom as a dependant child under the Legacy programme. He was granted leave to remain until March 31, 2007. On April 14, 2008 his application for leave to remain as a dependant under the legacy programme was granted enabling him to

remain in the United Kingdom until June 30, 2009. Further applications on June 27 and July 16, 2009 to remain as a dependant over the age of 18 were rejected and on August 13, 2009 the appellant submitted a further application to remain as a dependant but this was rejected on November 22, 2010. The appellant appealed this decision on December 8, 2010 but a Judge of the First-tier Tribunal rejected his appeal on February 4, 2011. His appeal rights were exhausted on April 14, 2011. On May 12, 2012 the appellant submitted an application under article 8 but this was rejected on July 19, 2013 without a right of appeal. The appellant applied for reconsideration of that decision and on September 11, 2013 his application to remain on human rights grounds was reconsidered but rejected and a decision to remove him as an illegal entrant was served the same day.

2. On September 24, 2013 the appellant appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002.
3. The matter came before Judge of the First-tier Tribunal Sullivan (hereinafter referred to as "the FtTJ") on February 7, 2014 and in a determination promulgated on February 26, 2014 she dismissed his appeal under the Immigration Rules.
4. The appellant appealed that decision on March 7, 2014. Permission to appeal was granted by Judge of the First-tier Tribunal Garratt on the basis the FtTJ might not have followed the approach laid down in Gulshan (Article 8- New Rules-Correct Approach) [2013] UKUT 00640 (IAC).
5. The respondent filed a Rule 24 response dated May 8, 2014 arguing that whilst the FtTJ did not set out the terms of the new Rules it was clear the FtTJ had had regard to the relevant points.
6. The matter was listed before me on the above date and the appellant was in attendance.

SUBMISSIONS

7. Mrs Heybrook adopted the grounds of appeal and when challenged accepted the appellant was unable to meet the requirements of either Appendix FM or paragraph 276ADE of the Immigration Rules. She submitted this was an exceptional case and the FtTJ had failed to give sufficient weight to the arguments put forward on his behalf and had attached too much weight to the importance of immigration control. In particular, she failed to attach sufficient weight to the level of dependency the appellant had on his family and the fact he would be

returned to Mauritius at a time when his whole family were still living in the United Kingdom.

8. Mr Saunders submitted the FtTJ had effectively overlooked the dictum of Gulshan and had immediately gone on to consider the appellant's claim under article 8 ECHR. Mrs Heybrook's arguments on "exceptionality" were irrelevant in this appeal because the FtTJ had considered the appellant's appeal in light of Razgar [2004] UKHL 00027. At paragraph [34] the FtTJ accepted the appellant had family life and that removal would interfere with that right. At paragraph [36] the FtTJ considered "legitimate purpose" and identified the public interest. At paragraphs [37] and [38] he considered proportionality and rejected the appellant's claim. The appellant's argument today is that his mother has leave to remain as Tier 2 migrant until September 2014 and insufficient weight has been attached to that fact. The FtTJ clearly considered this issue and found that as she only had limited leave to remain and she was a Mauritian national she could return to Mauritius with him if she wanted to. The appellant's father has no leave and whilst he had an appeal listed on Monday at Taylor House Hearing Centre this was a fact known to the FtTJ when the appeal was originally considered. The appeal should be dismissed.

ERROR OF LAW FINDING

9. The appellant's immigration history is long and has involved a number of applications. All those applications failed and on February 4, 2011 the First-tier Tribunal rejected his appeal under the Immigration Rules and human rights. Permission to appeal was refused.
10. The appellant then submitted an application to remain on private life grounds. The application was submitted after the Immigration Rule changes in 2012 and the respondent considered the appeal under paragraph 276ADE on July 19, 2013. Initially, no right of appeal was offered but following further submissions the respondent reviewed the matter and found there were no exceptional circumstances meriting consideration of the claim outside of the Immigration Rules be that Appendix FM or paragraph 276ADE.
11. The FtTJ considered the case on the basis the appellant wished to remain in the United Kingdom to be with his mother and girlfriend and because he had been here for almost 8 ½ years. In considering the submissions the FtTJ was aware of the following factors:
 - a. The appellant claimed his ties to his parents were closer than normal emotional ties.

- b. He intended to marry his girlfriend in the “not too distant future” and if he was removed his girlfriend believed their relationship would break down.
- c. His mother had leave to remain until September 2014 and his father had an appeal in June 2014. His mother supported him both financially and emotionally.
- d. He had been here 8 ½ years.
- e. Reasonable likelihood his family would have to return to Mauritius in the not too distant future. This was a more reasonable solution to the appellant’s situation.
- f. Unclear what his living conditions would be in Mauritius.

12. The FtTJ made a number of significant findings-

- a. Between paragraphs [21] and [33] the FtTJ considered the facts of the case.
- b. She noted in paragraph [22] that the appellant had know his immigration status had been precarious since June 30, 2009 (19 years old) and since April 14, 2011 (20 ¾ year old) he knew he had no right to remain and was expected to leave.
- c. At paragraph [23] the FtTJ noted how long he had lived both here and in Mauritius and that he had enjoyed a good education and had been able to work for three years in the United Kingdom.
- d. At paragraph [25] she noted he was in good health and she concluded there was no evidence he was incapable of living independently.
- e. At paragraph [26] she accepted the appellant was close to his mother and was financially dependent on her but she was satisfied his financial dependency, in particular, was because of his immigration status.
- f. At paragraph [27] she found there was no such dependency on his father.
- g. At paragraphs [28] and [29] she made negative findings regarding the truthfulness of both the appellant’s mother and the appellant.
- h. At paragraph [30] the FtTJ assessed the appellant’s relationship with his girlfriend and she concluded they had not established family life.
- i. At paragraph [31] she found there was nothing adverse about his character, conduct or associations for the purposes of paragraph 353B HC 395.

13. I am satisfied the FtTJ carried out a full assessment of the evidence before her and made findings open to her. The FtTJ did not consider the appellant’s appeal under either Appendix FM or paragraph 276ADE. Mrs Heybrook made it clear that she was not suggesting the appellant could satisfy either Rule. In giving permission to appeal Judge of the

First-tier Tribunal questioned whether the FtTJ should have considered whether the appellant's ties to Mauritius had been severed because under paragraph 276ADE (1)(vi) he could be granted permission to stay if "has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."

14. Mrs Heybrook did not seek to persuade me that this was the case and it therefore follows from that the appellant could not demonstrate this.
15. Mrs Heybrook agreed that as she was not seeking to argue he met paragraph 276ADE then the only basis of challenge was the FtTJ's approach to article 8 ECHR and in particular proportionality.
16. For the avoidance of doubt I find the FtTJ did follow the Razgar approach and I therefore need only now consider whether the FtTJ erred in her approach to proportionality.
17. As stated above the FtTJ made findings that were clearly open to her between paragraphs [21] and [33]. Her assessment under article 8 should only have taken place if there was something exceptional about the case. The FtTJ jumped straight to her article 8 assessment without considering what the Tribunal said in Gulshan. For the sake of completeness I remind the parties what the Tribunal has recently stated about the approach.
18. The Tribunal in Gulshan at paragraph [24]-

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

(a) ... ;

(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."

19. The Tribunal stated in Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC) at paragraph [31] :

“Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular and Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. 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.”

20. I do not revisit whether the FtTJ was correct to find the circumstances exceptional because the challenge now is whether having reached the stage she did she erred in her proportionality assessment. There was no cross appeal about her approach in any event.
21. Against this background the FtTJ considered the article 8 claim and made findings between paragraphs [34] and [38]. These findings have to be read alongside the earlier findings she made. She made findings on the proportionality of removal that were clearly open to her based on her own findings. In particular, she had regard to what would happen if he were returned and she considered the financial and emotional ties. She did not find these ties sufficient to show “dependency” for article 8 purposes.
22. The appellant, like his father, wishes to remain in the United Kingdom. His mother has leave until September 2014 and that may or may not be extended. His father’s appeal may succeed. These are factors that would be relevant to the appellant’s future position but based on the evidence presented I am satisfied the FtTJ did not materially err.

DECISION



23. There was no material error of law. The original decision stands.
24. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I make no fee award.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis

A handwritten signature in black ink, appearing to read 'SPAL' with a flourish underneath.