



IAC-AH-KEW-V1

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

Appeal Number: IA/52701/2013

THE IMMIGRATION ACTS

Heard at Bradford

On 2 July 2014

Determination

Promulgated

On 7 November 2014

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HAJI MUHAMMAD DAUD

Respondent

Representation:

For the Appellant: Mrs R Pettersen, a Senior Home Office Presenting Officer

For the Respondent: Mr T Hussain, instructed by Hussain Immigration Law Ltd

DETERMINATION AND REASONS

1. The respondent, Haji Muhammad Daud, was born on 20 April 1954 and is a male citizen of Pakistan. I shall hereafter refer to the respondent as the appellant and to the Secretary of State as the respondent (as they were respectively before the First-tier Tribunal).

2. The appellant appealed to the First-tier Tribunal (Judge Henderson) against a decision of the respondent dated 25 November 2013 refusing leave to remain and to give directions for his removal under paragraph 10A of Schedule 2 of the Immigration Act 1971. The First-tier Tribunal allowed his appeal on human rights grounds (Article 8 ECHR). The Secretary of State now appeals, with permission, to the Upper Tribunal.
3. The appellant's application was considered under the Immigration Rules, in particular Appendix FM and paragraph 276ADE. The appellant had previously appealed against a decision of the respondent to refuse him further leave to remain and he had been found by an Immigration Judge to be a British citizen. That error (as both parties accept it was) was "later rectified." As Judge Henderson notes [2], the appellant being notified by the UK Visa Immigration and Nationality Department that he was not entitled to British citizenship. At that time, as now, the appellant's wife (Zojan) settled in the United Kingdom.
4. Judge Henderson noted that the appellant and his wife are the sole carers of their British grandchild, MU who was aged 17 years at the date of the First-tier Tribunal hearing. MU has severe mental health difficulties and has an educational age of approximately 5 years. His mother has (as Judge Henderson noted) "abdicated responsibility and gone to Spain to start a new life with her current husband." The appellant and his wife have lived with their grandchild for a little less than four years.
5. Having dismissed the appeal under the Immigration Rules, the judge proceeded to consider Article 8 ECHR and allowed the appeal. It is the taking of that step in the proceedings which the grounds of appeal now challenge. The sole ground of appeal reads as follows:

"At paragraph 40 of the determination, the judge concluded the appellant did not qualify for leave under the Immigration Rules and went on to consider the appellant's family and private life under Article 8 ECHR. This approach is wrong in law. Only if there is an arguable case that there are good grounds for granting leave to remain outside the Rules is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the Rules to require the grant of such leave (*Gulshan (Article 8-new rules-correct approach) [2013] UKUT 640 (IAC)*) whilst the judge referred to *Gulshan* he (*sic*) did not adopt the correct approach as set out in that case."

6. It is indeed the case that the judge referred to *Gulshan* and a number of other items of jurisprudence at [40]. She noted that,

"The final cases [including *Gulshan* and *Nagre [2013] EWHC 720*] confirm the approach of the Upper Tribunal but with the modification that if after fully considering family or private life under the Rules and finding that a claim fails then it would be sufficient to say that and it would not be necessary to have to go on and consider the case separately from the Rules."

At [41], and without making any formal reference to compelling or exceptional circumstances, Judge Henderson proceeded to consider “the appellant’s family life outside the Immigration Rules ...” [At 44], she

“considered that the facts of this case are highly unusual and exceptional. The primary reason for the appellant wishing to remain here is to be with his wife and his grandson. ... if I was simply considering the couple as a unit then it is clear that removal would be proportionate.”

She found, however, that MU had “physical and emotional needs which cannot be satisfied by ‘quick fix’ alternatives such as living with his uncle.” She also found MU to be a vulnerable adult whose best interests needed be considered [46]. “It was down to the appellant and his wife to provide a secure and stable home life for MU, an adult who cannot support himself.” MU himself told Judge Henderson that he was frightened and worried about his grandparents having to return to Pakistan. The judge considered that the appellant and his wife met the physical and daily care needs of MU but also provided him with “emotional security.” The judge also considered factors which were not favourable to the appellant’s appeal; she did not accept that there was an absence of ties to Pakistan [50] and also that the appellant’s son had the means to support them in Pakistan, if that were necessary. She concluded that,

“[MU] has a stable family and private life here in spite of his history and has made the decision to go and live in Spain. In conclusion I find that there are a range of unusual and compelling circumstances which make removal of the appellant unjustifiably harsh.”

7. Care should be exercised in applying the principles enunciated in *Gulshan*. *Gulshan* does not provide a bright line “test” which appellants must pass before the possibility of the appeal being allowed under Article 8 ECHR becomes available to them. The central point established by *Gulshan* is that the Immigration Rules now achieve in the great majority of cases, a paradigm for the proper assessment of Article 8 taking into account the public interest and Strassburg and domestic jurisprudence. If the facts of an appeal fall squarely within the circumstances anticipated by the Immigration Rules, nothing can be achieved by, in addition, carrying out an Article 8 ECHR assessment outside the Rules; such an assessment would be nugatory. The problem for the respondent is that the grounds of appeal do nothing more than assert that the judge has erred in law such that her determination should be set aside because she has not found, as part of the application of some *Gulshan* “test,” that there were especially compelling circumstances in the case. In the passages of the determination which I have quoted above, it is abundantly clear that the judge did find that there were “highly unusual and exceptional” circumstances. In the light of those very clear findings, it is frankly not conceivable that, even if she had been obliged to consider a *Gulshan* “test,” she would have found that no such circumstances existed justifying an Article 8 ECHR assessment. I am satisfied that she was fully aware of

the ratio in *Gulshan*; indeed, at [40] she summarises it in her own words. And whilst it would have been helpful if she had said in terms that there were compelling and exceptional circumstances justifying an Article 8 assessment, her failure to do so is not fatal to her determination. That may not, however, have been the case had she found that the circumstances of this appellant fell firmly and exclusively within the provisions of the Immigration Rules. However, she did not do so. She clearly believed that MU's needs and rights were such that Article 8 was engaged. I find that she did not err in law by proceeding with the Article 8 ECHR analysis.

8. Having reached that finding, there is nothing left in the grounds of appeal which justifies further consideration. The grounds do not assert that there is anything wrong with the judge's assessment of Article 8 outside the Rules nor, indeed, is it even asserted that the judge should not have found the facts of this appeal to be exceptional. I have to say that I cannot fault the judge's detailed and even-handed assessment of the evidence and can find no reason whatsoever to interfere with her conclusion that was clearly available to her upon the evidence. I find that the judge did not err in law such that her determination falls to be set aside.

DECISION

9. This appeal is dismissed.

Signed

Date 31 July 2014

Upper Tribunal Judge Clive Lane