



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal nos: OA 08644, 46-13

**THE IMMIGRATION ACTS**

At **Field House**  
on **31.03.2014**

Decision signed: **31.03.2014**  
sent out: **02.04.2014**

Before:

Upper Tribunal Judge  
**John FREEMAN**

Between:

**PERENBANAYAGAM SELVANAYAGAM & another**

appellants

and

**Secretary of State for the Home Department**

respondent

Representation:

For the appellants: *Ripon Akhter* (counsel instructed by Jeya & Co)  
For the respondent: Mr D Mills

**DETERMINATION AND REASONS**

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge William Miles), sitting at Hatton Cross on 15 January, to dismiss dependent relative/article 8 appeals by citizens of Sri Lanka, born 18 June 1937 (the sponsor's father) and 16 July 1943 (her mother).

2. The judge did not refer to any of the recent authorities of the Court of Appeal, the Administrative Court, or this Tribunal about cases of this kind: of course there is nothing wrong with that, so long as he made it clear that he was following the principles laid down in them. Those authorities start, in order of importance, with *MF (Nigeria)* [2013] EWCA Civ 1192, where the Court of Appeal considered the meaning of 'exceptional circumstances' in paragraphs 399 and 399A of the 'new Rules' (in force from 9 July 2012)

made it necessary for cases which did not satisfy them to be ‘exceptional’, applying expressly only to deportation cases. There had already been *Nagre* [2013] EWHC 720 (Admin), and *Gulshan* (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC) was to come. However, the parties before me did not find it necessary to refer in detail to any decision, apart from *MF (Nigeria)* itself, and to *Shahzad* (Art 8: legitimate aim) Pakistan [2014] UKUT 85 (IAC).

3. The relevant part of the judicial head-note in *Shahzad* is this:

- (iv) *MF (Nigeria)* [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.
- (v) It follows from this that any other rule which has a similar provision will also constitute a complete code;
- (vi) 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.

4. In plain language, the process to be followed by judges in cases of the present kind is this:

- (a) first decide whether the application satisfies the requirements of the Rules; if so, allow the appeal on that basis, but if not, then
- (b) consider whether “there may be arguably good grounds for granting leave to remain outside them”; if not, dismiss the appeal, but if so, then
- (c) “go on to consider whether there are compelling circumstances not sufficiently recognised under them”; if not, dismiss the appeal, but if so, then
- (d) decide it on the result of the conventional article 8 balancing exercise.

5. Miss Akhter sought to argue on the basis of *MF (Nigeria)* that there was no ‘exceptionality requirement’ involved: this was based on what the Court of Appeal said at paragraph 41

In view of the strictures contained at para 20 of *Huang*, it would have been surprising if the Secretary of State had intended to reintroduce an exceptionality test, thereby flouting the Strasbourg jurisprudence. At first sight, the choice of the phrase “in exceptional circumstances” might suggest that this is what she purported to do.

6. However the Court went on to refer with approval to what Sales J had said in *Nagre* , and, at paragraph 42, to what he had described as:

... a statement in the case law that, in “precarious” cases, “it is likely to be only in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of art 8”. This has been repeated and adopted by the ECtHR in near identical terms in many cases. At paras 41 and 42, he said that in a “precarious” family life case, it is only in “exceptional” or “the most exceptional circumstances” that removal of the non-national family

member will constitute a violation of article 8. In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal.

7. This passage fully showed that, at least in a deportation case, something 'exceptional' was required, before the case could be decided on a free-standing balancing exercise under article 8: there was clearly no difference for the Court of Appeal between 'exceptional' and 'compelling'. This approach was applied in the other cases referred to, and especially in *Shahzad*, relating to decisions not involving deportation. Certainly, as made clear in *Shahzad*, consideration of whether the necessary 'exceptional' or 'compelling' features are to be found in a case will itself involve carrying out some kind of article 8 balancing exercise.
8. The point is that, unless that exercise ends with 'exceptional' or 'compelling' features being found, it will not decide the case; so judges should not go on to a free-standing article 8 analysis without first being satisfied of that. The judge in the present case referred to no requirement for 'exceptional' or 'compelling' features at all, and went on to say at paragraph 32 that, after considering all the effects on their family here referred to at paragraph 31 "together with the ages and medical history of each appellant I find, *just [my emphasis]*, that refusing entry clearance to them would amount to a disproportionate interference with their right to a family life under article 8".
9. Clearly on that conclusion there was no room for any finding of 'exceptional' or 'compelling' circumstances: while I had taken the view in the course of the hearing that the decision would need to be re-made, starting with a finding on that point, I am quite satisfied, on further reflection, that, if the judge had properly considered the question of 'exceptional' or 'compelling' circumstances in terms of *Shahzad*, then he would have been bound on his own view of the facts to decide that there were none, and so to dismiss these appeals. It follows that his decision is reversed on that basis.

**Home Office appeal allowed**  
**Appellants' appeals dismissed**

A handwritten signature in black ink, appearing to be 'JLR', written in a cursive style.

(a judge of the Upper Tribunal)