



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

Appeal Number: IA/06719/2014

THE IMMIGRATION ACTS

**Heard at: Columbus
Newport**

House,

Determination Promulgated

On: 3 February 2015

On 23 February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LOPETI TAUWELAGI FAHA

(anonymity direction not made)

Respondent

Representation

For the Appellant: Mr I Richards, Home Office Presenting Officer

For the Respondent: Ms R Harrington, Counsel instructed by Ahmed Rahman Carr

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the determination of First-tier Tribunal Judge Holder in which he allowed the appeal of Mr Faha, a citizen of Fiji, against the Secretary of State's decision to refuse to vary leave to remain. I shall refer to Mr Faha as the Applicant, although he was the Appellant in the proceedings below.
2. The application under appeal was made on 3 October 2011 and was refused by reference to paragraph 322(1) of the Immigration Rules

(HC395) on 20 January 2014. The Applicant exercised his right of appeal to the First-tier Tribunal. This is the appeal which came before Judge Holder on 6 August 2014 and was dismissed under the Immigration Rules but allowed by virtue of Article 8 ECHR. The Secretary of State applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge P J M Hollingworth on 4 November 2014 in the following terms

An arguable error of law has arisen in relation to the need to apply the criteria in Gulshan.

3. At the hearing before me Mr Richards appeared to represent the Secretary of State and Ms Harrington represented the Applicant. Ms Harrington submitted a written skeleton argument and a copy of the Upper Tribunal decision in the remitted case of Haleemudeen (IA/24252/2012).

Background

4. The history of this appeal is detailed above. The facts, not challenged, are that the Applicant was born in Fiji on 23 October 1984. He came to the United Kingdom with leave to enter as a visitor on 26 April 2011. His intention was to join the Royal Navy. His application to join the Navy was not accepted and on 3 October 2011, prior to the expiry of his leave to remain, he applied to vary leave to enable him to enlist in another branch of HM Forces. The Respondent took until 23 January 2014 to refuse this application on the basis that it was made for a purpose not covered by the Immigration Rules. In the period whilst the application was under consideration the Appellant met and formed a relationship with a British Citizen, began cohabiting with her in April 2012 and formed a parental relationship with her son. The Appellant and his partner married on 5 July 2014.
5. At the appeal hearing on 6 August 2014 the Appellant accepted that he did not meet the requirements of the Immigration Rules. It was submitted on his behalf that his application, having been made prior to the change in the Immigration Rules in 2012, fell to be considered under the regime in force at the time of his application and that, although he did not meet the requirements of the Rules, there was no requirement to consider his Article 8 appeal through the prism of the revised rules. The Judge accepted this argument (see para 20) and considered Article 8 using the jurisprudence applicable at the time of the application and, as he was required to do, taking into account section 117A and 117B of the Nationality Immigration and Asylum act 2002.

Submissions

6. On behalf the Secretary of State Mr Richards relied on the grounds of appeal to the Upper Tribunal. He said that the issue was Gulshan [2013] UKUT 00640 (IAC) although he recognised that Gulshan was no longer universally approved. He was instructed to rely on Gulshan and Nagre

[2013] EWHC 720 (Admin). The Judge had failed to give adequate reasons why the Applicant's circumstances were either compelling or exceptional and had not adequately reasoned why the appeal should be allowed by reference to Article 8.

7. For the Applicant Ms Harrington referred to her skeleton argument and said that Gulshan does not apply. The application was made at a time prior to the change in the Immigration Rules. In any event ample reasons are set out showing clearly why the Judge allowed this appeal. There is no challenge to the factual findings. There is no public interest in the Applicant's removal. This is clearly demonstrated by reference to section 117B. The Applicant has a subsisting parental relationship with a qualifying child. On this basis the Applicant is bound to succeed whether or not the Gulshan threshold test is followed.

Error of law

8. In my judgement the decision of the First-tier Tribunal does not disclose a material error of law. The facts are simple and are not disputed. The Applicant is, and at all times has been, lawfully present in the United Kingdom. He made his application for variation of leave to remain in October 2011 prior to the introduction of paragraph 276ADE and Appendix FM to the Immigration Rules. Whilst the Secretary of State was considering his application he formed a relationship with a British citizen that, by the time the Secretary of State reached her decision, was well established and which has since resulted in marriage. The Applicant's relationship with his partner involved the formation of a parental relationship with her son who, the First-tier Tribunal accepted, suffered from certain emotional difficulties and the positive relationship between the Applicant and the child contributed to an apparent improvement in the child's mental health.
9. It was accepted at the outset of the First-tier Tribunal hearing that neither the Immigration Rules in force at the time of the application nor those in force at the time of the Secretary of State's decision were met and that the appeal fell to be considered only by reference to Article 8 ECHR. Ms Harrington submits succinctly in her skeleton argument that the authorities of MF Nigeria [2013] EWCA Civ 1192 and Gulshan apply only to applications where Appendix FM and paragraph 276ADE apply. Mr Richards did not seek to engage with this argument. In my judgment and following Edgehill and another [2014] EWCA Civ 402 it is clear that the application under appeal having been made before the entry into force of the new rules it is the regime pertaining at that time that must apply to the decision made by the Secretary of State on 20 January 2014. However there is no suggestion that facts relied upon by the Applicant in respect of his Article 8 appeal (and this was only ever an Article 8 appeal) were put to the Secretary of State prior to the decision on 20 January 2014. These factors were raised for the first time in the Notice of Appeal lodged by the Applicant on 3 February 2014 well after the new Rules came into effect.

10. In any event with it being accepted, even taking into account his current circumstances, that the Applicant could not meet the requirements of the Rules either as they stood at the date of his application or at the date of the Respondent's decision it is unnecessary to decide whether the old Rules or the new Rules would have applied. I agree with Ms Harrington's submission that even if the developing regime following the change in the rules applied it would still have been inevitable that the Applicant's appeal would be allowed.
11. The grounds of appeal to the Upper Tribunal, referring to Gulshan, submit that an Article 8 assessment should only be carried out where there are compelling circumstances not recognised by the rules and that as no such compelling circumstances are identified the findings made are unsustainable. The developing case law shows that this approach is flawed. Compelling or exceptional circumstances can only be identified by considering the Article 8 assessment. There is no threshold to cross prior to such consideration because it is only by making such consideration that compelling or exceptional circumstances can be identified. In Aliyu v SSHD [2014] EWHC 3919 (Admin) Judge A Grubb sitting as a Deputy High Court Judge found at paragraph 59

In my judgment, the Secretary of State (apart from 'complete code' situations) always has a discretion to grant leave outside the Rules. That discretion must be exercised on the basis of Article 8 considerations, in particular assessing all relevant factors in determining whether a decision is proportionate under Article 8.2. There is, in principle, no "threshold" criterion of "arguability". I respectfully agree with what Aikens LJ said in this regard in MM (at [128]). However that factor, taken together with other factors such as the extent to which the Rules have taken into account an individual's circumstances relevant to Article 8, will condition the nature and extent of the consideration required as a matter of law by the Secretary of State of an individual's claim under Article 8 outside the Rules. If there is no arguable case, it will suffice for the Secretary of State simply briefly to say so giving adequate reasons for that conclusion. At the other extreme, where there are arguable good grounds that the Rules do not adequately deal with an individual's circumstances relevant in assessing Article 8, the Secretary of State must consider those circumstances and identifiably carry out the balancing exercise required by proportionality in determining whether there are "exceptional circumstances" requiring the grant of leave outside the Rules under Article 8.

12. In the present case having identified at the outset (paragraphs 19 and 20) that neither the old nor the new Rules apply the Judge quite correctly considers the situation outside the Rules by reference to Article 8. In doing so he very carefully and correctly self-directs by reference to Razgar and section 117A and section 117B of the 2002 Act. Thereafter he examines each of the Razgar criteria against the accepted facts and having found that a proportionality balancing exercise is required he takes into account the public interest question by reference, inter alia, to particular factors required to be addressed by the 2002 Act (as amended by the Immigration Act 2014). Having found that it was not disputed that the Applicant spoke English, that he was financially independent (his wife being in full time professional employment in the NHS) and that he has parental

responsibility for a 15 year old child and it would not be reasonable to expect that child to leave the United Kingdom the result, as submitted by Ms Harrington, was inevitable. Primary legislation makes it clear that in the circumstances of the Applicant there is no public interest in removal.

13. My conclusion from all of the above is that the decision of the First-tier Tribunal contains no error of law material to the decision to allow the appeal by reference to Article 8 ECHR. The appeal of the Secretary of State is therefore dismissed.

Summary

14. The decision of the First-tier Tribunal did not involve the making of a material error of law. I dismiss the Secretary of State's appeal.

Signed:

Date: 23 February 2015

**J F W Phillips
Deputy Judge of the Upper Tribunal**