



IAC-AH-CJ-V2

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

Appeal Number: IA/15878/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 24th April 2015**

**Decision & Reasons Promulgated
On 17th July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MRS SUMI BEGUM
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Iqbal, Counsel

For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh born on 1st December 1989. The Appellant entered the United Kingdom on 10th November 2011 and made application thereafter for further leave to remain in the UK on the basis of her relationship with Gousul Mukul. That application was refused by the Secretary of State by Notice of Refusal dated 10th March 2014. In refusing the application the Secretary of State gave consideration to the Appellant's family life under Article 8 which from 9th July 2012 fell under Appendix FM of the Immigration Rules.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Ross sitting at Richmond on 3rd December 2014. In a determination promulgated on 23rd December 2014 the Appellant's appeal was dismissed both under the Immigration Rules and on human rights grounds.
3. On 9th January 2015 the Appellant lodged Grounds of Appeal to the Upper Tribunal. Those grounds argued that the judge had erred in that the Appellant needed to establish that exceptional circumstances existed in order to engage Article 8 of the ECHR. On 14th February 2015 First-tier Tribunal Judge Foudy granted permission to appeal stating that it was arguable that the judge had applied the wrong test within the Article 8 appeal.
4. On 16th March 2015 the Secretary of State responded to the Grounds of Appeal under Rule 24. The Rule 24 response contended that the Appellant's grounds amounted to nothing more than an opportunistic claim advanced in mere disagreement with the negative outcome of the appeal and that it was clear that the Appellant had a precarious immigration status in the UK and that her husband only had limited leave to remain in the UK with discretionary leave. The Rule 24 response set out that the First-tier Tribunal Judge had properly considered the facts and evidence before him and that it was clear that for the Appellant there were simply no compelling circumstances which could possibly outweigh the public interest and it was properly open to the First-tier Tribunal Judge to conclude that the evidence before him did not establish that there would be unjustifiably harsh consequences sufficient to outweigh the public interest. It was contended therein that the First-tier Tribunal Judge had clearly and fully considered the material facts of the appeal before him and that the judge had been entitled to conclude that there were no compelling circumstances to warrant the grant of leave to the Appellant outside the Immigration Rules under Article 8.
5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by her instructed Counsel Mr Iqbal. Mr Iqbal is familiar with this matter having been the author of the Grounds of Appeal. The Secretary of State appears by her Home Office Presenting Officer Ms Everett.

Submissions/Discussions

6. Mr Iqbal submits that the test of exceptionality is wrong on the facts as the Appellant had never had precarious immigration status within the UK. He points out that the Appellant's application for variation of leave had been submitted on 27th December 2013 and that her leave did not expire until 31st January 2013. The judge, he submits, addressed the issue that the application was invalid because it had not been properly completed and that the judge had made findings at paragraph 6 of his determination but the appeal had been determined pursuant to paragraph 3C of the 1971

Immigration Act and the Appellant had leave to remain and that there was consequently a right of appeal. It was on that basis that the judge went on to consider the merits and took into account the historical background that the Appellant had been granted leave to enter the UK in November 2011 as a Tier 4 (General) Student but that she had met her husband on 19th May 2012 and had eventually married her husband on 26th June 2013.

7. He takes issue with regard to the reference to “precarious status” pointing out that there is no definition of “precarious” under the Immigration Rules and that it would not be right to construe the Appellant as having precarious status even if her leave is under the points-based system. He submits that if a precarious test is accepted then exceptionality does not apply and relies on *R (Nagre) v SSHD [2013] EWHC 720 (Admin)*.
8. Secondly Mr Iqbal submits that the judge has not made credible findings against the Sponsor’s evidence and that the contention set out in the Sponsor’s witness statement has not been properly considered by the judge and it is not stated anywhere within the determination whether the learned Judge found the Appellant and/or Sponsor to be credible. He submits that if they are credible then these are relevant factors which warrant consideration of Article 8 even if the judge was correct about imposing the threshold of exceptional circumstances.
9. He also points out to me there have been two changes of circumstances namely that the Appellant has now given birth to a daughter and therefore it is appropriate for considerations to be given to the best interests and welfare of the child and secondly that discretionary leave to enter has been extended to the Sponsor to 2018. He asked that if I accept there is a material error of law that fresh evidence would assist in the remaking of the decision and would ask me to remit the matter to the First-tier Tribunal so a correct credibility finding against the Sponsor could be made.
10. Ms Everett relies on the Rule 24 response and submits there is nothing wrong with the decision. She points out that the Appellant cannot meet the Rules and that the judge is further entitled to look at the test of exceptionality and refers me to the recent authority of *SS (Congo) [2015] EWCA Civ 387*. Ms Everett disagrees with the submissions made on the Appellant’s behalf with regard to the definition of precarious pointing out that it means uncertain and that an incorrect test has not been applied and that this was a view expressed in *Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640* which has been endorsed by the Court of Appeal in *SS (Congo)*.
11. So far as the new evidence is concerned Ms Everett points out this is not the correct time to give any consideration to it and that if there is new evidence and that it is of the nature that the Appellant and her Sponsors seek to rely upon then the correct approach is for her to make a new application and that the judge was aware of the facts at the time that the hearing was made. She urged me to find no material error of law and to dismiss the appeal.

The Law

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Relevant Case Law

14. Reference is made herein to the up-to-date guidance given by relevant case law in particular that of *SS (Congo)*. Paragraph 29 of *SS (Congo)* states:-

"It is clear, therefore, that it cannot be maintained as a general proposition that LTR or LTE outside the Immigration Rules should only be granted in exceptional cases. However, in certain specific contexts, a proper application of Article 8 may itself make it clear that the legal test for grant of LTR or LTE outside the Rules should indeed be a test of exceptionality. This has now been identified to be the case, on the basis of the constant jurisprudence of the ECtHR itself, in relation to applications for LTR outside the Rules on the basis of family life (where no children are involved) established in the United Kingdom at a time when the presence of one or other of the partners was known to be precarious: see *Nagre*, paras. [38]-[43], approved by this court in *MF (Nigeria)* at [41]-[42]."

The Court of Appeal further at paragraph 31 of *SS (Congo)* went on to give additional guidance to the judiciary and to legal practitioners:-

"In other contexts, it cannot simply be assumed that a strict legal test of exceptional circumstances will be applicable when examining the application of Article 8 outside the Immigration Rules (or within the Rules themselves, where particular paragraphs are formulated so as fully to cover the applicability of Article 8, as in paragraphs 399 and 399A as interpreted in *MF (Nigeria)*). The relevant general balance of public interest

considerations and individual interests will vary between different parts of the Rules. It is only if the normal balance of interests relevant to the general area in question is such as to require particularly great weight to be given to the public interest as compared with the individual interests at stake (as in the precarious cases considered in *Nagre* and the foreign criminal deportation cases considered in *MF (Nigeria)*) that a strict test of exceptionality will apply.”

Findings

15. The Appellant cannot succeed under the Immigration Rules and the whole thrust of the Appellant’s submission both at the First-tier and now are that under the Immigration Rules that her circumstances constituted an exceptional case which the judge should have allowed outside the Rules.
16. The judge considered the authority of *Gulshan* and then went on to consider, quite properly, the approach that the Tribunals now need to address as to the proportionality of the approach and to give due consideration in particular to paragraph 117B of the Nationality, Immigration and Asylum Act. Thereafter looking at those factors the judge has made findings of fact which he was entitled to at paragraph 15.
17. I acknowledge that the judge has not set out the full and detailed case law authority that can be traced following the decision in *Gulshan*. However the failure to do so does not constitute a material error of law particularly in circumstances where the authorities can offer little assistance to the Appellant in these circumstances. There is nothing in the early authorities (including *Gulshan*) that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which had not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. The authorities must not be read as seeking to qualify or fetter the assessment of Article 8. There is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule. As was held in *R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin)* there was no prior threshold which dictated whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which were called for were informed by threshold considerations.
18. That approach albeit laid down in authorities that postdate *Gulshan* has been adopted by the judge in this instance and I agree with the submission made both in the Rule 24 response and by Ms Everett that to challenge this in the manner in which has been put forward by the Appellant amounts to little more than disagreement with the decision of the First-tier Tribunal. The judge has applied a proper and well reasoned test of exceptional circumstances and the expansion and guidance given therein in the authority of *SS (Congo)* clearly endorses that and does nothing to show that there is any material error of law in the decision.

19. It is acknowledged by both legal representatives that there has however been a change of circumstances since the decision of the First-tier Tribunal. Those change of circumstances may very well lead (and it is not for this Tribunal to comment) to a different assessment by the Secretary of State. The Appellant has given birth to a child. That child and the whole family position is one that the Secretary of State needs to look at. However it needs to be looked at against the current position of both the Appellant and her Sponsor and I am advised that there has now been a substantial change in the circumstances of the Sponsor in that his discretionary leave to remain in the UK has been extended to 2018. These are factors that were not before the First-tier Tribunal Judge. It is not for this Tribunal to pre-empt what a fresh application would decide but clearly the circumstances are different to that considered in this case by the First-tier Tribunal Judge and whilst I am satisfied that decision does not disclose any material error of law that is not to say that such a decision in any way would preclude the Secretary of State from looking at the matter afresh in view of the new circumstances in the event that the Appellant chose to make a further application.

Notice of Decision

The decision of the First-tier Tribunal discloses no material error of law and the Appellant's appeal both under the Immigration Rules and pursuant to Article 8 of the European Convention of Human Rights is dismissed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT **FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris