Upper Tribunal
(Immigration and Asylum Chamber)

Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 October 2013	
	…………………………………

Before

MR JUSTICE CRANSTON
UPPER TRIBUNAL JUDGE TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GULSHAN

Respondent

Representation:

For the Appellant: Ms H Horsley, Senior Home Office Presenting Officer
For the Respondent: Ms G Peterson, Counsel, instructed by VMD Solicitors

On the current state of the authorities:

(a) the maintenance requirements of E-LTRP.3.1-3.2 stand, although Blake J in R (on the application of MM) v Secretary of State for the Home Department [2013] EWHC 1900 (Admin) said that they could constitute an unjustified and disproportionate interference with the ability of spouses to live together; he suggested that an appropriate figure may be around

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£13,400, and highlighted the position of young people and low wage earners caught by the higher figure in the rules;

(b) *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: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);*

(c) *the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.*

The Secretary of State addressed the Article 8 family aspects of the respondent's position through the Rules, in particular EX1, and the private life aspects through paragraph 276ADE. The judge should have done likewise, also paying attention to the Guidance. Thus the judge should have considered the Secretary of State's conclusion under EX.1 that there were no insurmountable obstacles preventing the continuation of the family life outside the UK. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for him for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.

DETERMINATION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against a decision of Judge SJ Pacey, promulgated on 12 August 2013, which allowed the respondent's appeal and held that it was disproportionate and unlawful under Article 8 of the European Convention on Human Rights to remove her to Pakistan.

Background

2. Mrs Gulshan, the respondent to this appeal, was born in 1953 in Karachi, Pakistan and married her husband (Noor Ali Nazar Ali, the sponsor) in 1975. They have two daughters, who live with their husbands in Pakistan. There is a son, nearly 30 years old, who apparently has been in this country for some 8 years. It seems that the husband, now aged 67, came to the United Kingdom at some point in the early 1990s. Since details of his immigration status were unclear from the papers we asked Ms Peterson, representing the respondent, to take instructions. The husband was present in court. It seems that the husband had entered the country as a visitor but had overstayed. In late 2002 he had been granted indefinite leave to remain and in 2006 became a British citizen. On instructions Ms Peterson informed us that he started to work in 2003. He has now retired.

3. The respondent does not work and has no income. The husband is now in receipt of a state pension and with pension credit that totals £7,420.40 per annum. He seems to have received tax credits since 2006. He rents a council property in Hackney, London. He pays £67.08 rent per month, but receives housing benefit and council tax benefit. The respondent has had an account with the Pak Fidai General Co-Operative Society Ltd for 3 years. There are savings of £28,996.70 in that account.

4. The respondent has visited her husband in the United Kingdom a large number of times – we were told on some 19 occasions – on visitors' visas. Her application for leave to remain in January 2006 was refused. In 2007 she was granted multi visit entry clearance until 7 September 2012. Since arriving on her last visit in March 2012, she has remained here with her husband. On 5 September 2012 she made an application for leave to remain as a spouse of a person present and settled here.

5. On 5 March 2013 the Secretary of State refused the respondent's application. The refusal letter gave a number of reasons. First, the respondent did not have the requisite immigration status. Second, she did not meet the minimum income requirements of paragraph E-LTRP. 3.2 of Appendix FM of the Immigration Rules, since she had not provided wage slips covering the requisite period. It was said, thirdly, that she had failed to provide an English language certificate. It is now accepted that she has good English. Referring to her family life under Article 8 ECHR the letter invoked the requirements of Section EX: Exception of Appendix FM of the Immigration Rules and concluded that the respondent had not demonstrated any insurmountable obstacles which would prevent her from continuing her family life outside the United Kingdom. The letter finally considered whether removal would breach her rights to private life under Article 8 of ECHR. By reference to paragraph 276ADE of the Immigration Rules the letter said that the respondent could not show that she had no social or cultural ties with her home country.

<u>The judge's decision</u>

6. The respondent appealed on various grounds. She was married to a British citizen and the Secretary of State had not considered the evidence submitted in support of her application. Nor had the Secretary of State addressed the long relationship with her husband in the United Kingdom. The Secretary of State "has not considered the [respondent's] rights under Article 8 of ECHR as a wife of her husband who is settled in the United Kingdom".

7. Before Judge Pacey counsel for the respondent conceded that she could not succeed under the Immigration Rules. The judge accepted that that concession was rightly made. The respondent's counsel invoked the then recent decision of <u>R (on the application of MM) v Secretary of State for the Home Department</u> [2013] EWHC 1900 (Admin) for the contention that the interference with the respondent's family life under Article 8 was disproportionate. The respondent's evidence before the Tribunal was that her husband was 67 years old and she herself was now in her old age. She could no longer continue as a frequent traveller to the United Kingdom because of her age. She needed to be with her husband to provide care and emotional support. There was medical evidence relating to the husband before the

Tribunal. The judge concluded that it did not indicate that the husband had any material care needs. In cross-examination the respondent accepted that she had not applied earlier to remain as a spouse because her two daughters were then unmarried in Pakistan. She told the judge that since her husband has been here for over 20 years he could not live in Pakistan anymore.

8. In her reasons the judge said that she readily accepted that both the respondent and her husband were no longer young. Perfectly naturally and reasonably they wished to be together. The judge also accepted that it would cause considerable cost and inconvenience for the respondent to travel to and from Pakistan to see him. Referring to MM the judge stated that the central question was whether the minimum income provisions in the Immigration Rules were a disproportionate interference with the right to respect for family life. Among reasons for refusal was the minimum income requirement. The findings in MM relating to the financial criteria had an inescapable relevance to the circumstances of the appeal. The presenting officer had submitted that the proper course of action would be for the respondent to have returned to Pakistan and make the application for entry clearance there, but "to require the appellant to return and make an application … would, in my judgment, be disproportionate and bearing in mind her age and the inconvenience and cost involved". On the basis of her consideration of these various factors the judge concluded that the decision under appeal was disproportionate and unlawful under Article 8. On that basis she dismissed the appeal under the Immigration Rules but allowed it on human rights grounds.

The law

(a) The July 2012 Immigration Rules

9. There were major changes in July 2012 in the Immigration Rules covering applications for entry clearance and leave to remain as a family member. Appendix FM is the route for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection. The purpose is made plain at the outset (GEN.1.1).

> "It sets out the requirements to be met and, in considering applications under this route, it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others. It also takes into account the need to safeguard and promote the welfare of children in the UK."

10. Section R-LTRP. 1.1 of Appendix FM contains the requirements for limited leave to remain as a partner, which are that the applicant and their partner must be in the United Kingdom; the applicant must have made a valid application for limited or indefinite leave to remain as a partner; the applicant satisfies the suitability requirements; and either the applicant meets all of the requirements of Section E-

LTRP, or the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12. and E-LTRP.2.1 and paragraph EX.1 applies.

11. Section E-LTRP of Appendix FM of the Immigration Rules contains relationship requirements in E-LTRP.1.2-1.12. Then there are immigration status requirements: in broad terms one must not be in the United Kingdom as a visitor, with valid leave less than 6 months, or on temporary admission/release: E-LTRP.2.1-2.2. The financial requirements (as relevant) are as follows:

    "Financial requirements

    E-LTRP.3.1 The applicant must provide specified evidence, from the sources listed in paragraph E-LTRP.3.2., of-

    (a) a specified gross annual income of at least-

        (i) £18,600;

        …alone or in combination with

    (b) specified savings of-

        (i) £16,000; and

        (ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph E-LTRP.3.2.(a)-(f) and the total amount required under paragraph E-LTRP.3.1.(a); or

    (c) the requirements in paragraph E-LTRP.3.3.being met, unless paragraph EX.1. applies.

    …

    E-LTRP.3.2. When determining whether the financial requirement in paragraph ELTRP. 3.1. is met only the following sources may be taken into account-

    …

    (c) specified pension income of the applicant and partner;

    …

    (g) specified savings of the applicant…"

    The English language requirements are in E-LTRP.4.1. If applicants do not satisfy the financial requirements and/or English language in E-LTRP.3.4, they may qualify under Section EX:Exception. The relevant part of this reads:

    "EX.1. This paragraph applies if

    …

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK."

12. Section FM 1.0 of the October 2013 Immigration Directorate Instructions ("Partner and ECHR Article 8 guidance") is about family members applying after 9 July 2012 under Chapter 8 Appendix FM of the Immigration Rules. It sets out the guidance for caseworkers in their approach to decision-making under the new rules. The Guidance states that it:

    "reflects a two-stage approach to considering applications under the family and private life rules in Appendix FM and paragraph 276ADE-DH. First, caseworkers must consider whether the applicant meets the requirements of the rules, and if they do, leave under the rules should be granted. If the applicant does not meet the requirements of the rules, the caseworker must move on to a second stage: whether, based on an overall consideration of the facts of the case, there are exceptional circumstances which mean refusal of the application would result in unjustifiably harsh consequences for the individual or their family such that refusal would not be proportionate under Article 8. If there are such exceptional circumstances, leave outside the rules should be granted. If not, the application should be refused".

13. "Insurmountable obstacles" are dealt with in paragraph 3.2.7c of the Guidance. This states that the decision-maker should consider the seriousness of the difficulties which the applicant and their partner would face in continuing their family life outside the United Kingdom, and whether they entail something that could not (or could not be expected to) be overcome, even with a degree of hardship for one or more of the individuals concerned. It is said to be a different and more stringent assessment than whether it would be "reasonable to expect" the applicant's partner to join them overseas. For example, a British Citizen partner who has lived in the UK all their life and speaks only English may not wish to uproot and relocate halfway across the world, "but a significant degree of hardship or inconvenience does not amount to an insurmountable obstacle". The decision-maker is advised to look at whether there is an inability to live in the country concerned. The focus should also be on the family life which would be enjoyed in the country to which the applicant would be returned, not a comparison to the life they would enjoy were they to remain here. As to cultural barriers, the guidance explains that these might be relevant in situations where the partner would be so disadvantaged that they could not be expected to live in that country. "It must be a barrier which either cannot be overcome or would present a very high degree of hardship to the partner such that it amounts to an insurmountable obstacle."

14. Paragraph 3.2.8 of the Guidance covers "Exceptional circumstances", where an applicant does not meet the requirements of the rules under Appendix FM. If that is the case refusal of the application will normally be appropriate, but leave can be granted outside the rules where exceptional circumstances apply.

"Where an applicant fails to meet the requirements of the rules, caseworkers must go on to consider whether there are exceptional circumstances."

15. The Guidance continues that exceptional does not mean unusual or unique. While all cases are to some extent unique, those unique factors do not generally render them exceptional. A case is not exceptional just because the criteria set out in EX.1 of Appendix FM have been missed by a small margin. Rather, the Guidance reads, exceptional "means circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate. That is likely to be the case only very rarely." The paragraph continues that in determining whether there are exceptional circumstances, the decision-maker must consider all relevant factors, such as:

> "a) The circumstances around the applicant's entry to the UK and the proportion of the time they have been in the UK legally as opposed to illegally. Did they form their relationship with their partner at a time when they had no immigration status or this was precarious? Family life which involves the applicant putting down roots in the UK in the full knowledge that their stay here is unlawful or precarious, should be given less weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK.
> b) Cumulative factors should be considered. For example, where the applicant has family members in the UK but their family life does not provide a basis for stay and they have a significant private life in the UK. Although under the rules family life and private life are considered separately, when considering whether there are exceptional circumstances private and family life can be taken into account."

16. This all concerns family life. The requirements to be met by an applicant for leave to remain on the grounds of private life are set out in paragraph 276ADE of the Immigration Rules. The applicant must satisfy the suitability requirements and make a valid application. As well, the requirements are that at the date of the application an applicant, *inter alia*,

> "(vi) is aged 18 years or above, 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".

(b) The case-law

17. The case law on Article 8 is vast. With the daily burden of deciding cases Tribunal judges face an unenviable task of keeping track of its frequent twists and turns. We do not intend to add to the problem. We need cite only three cases which concern the status of the 2012 Immigration Rules and the role of Article 8 of the Convention.

18. <u>MM v Secretary of State for the Home Department</u> [2013] EWHC 1900 (Admin) was the case referred to by the judge below. It involved a direct attack on paragraph E-LTRP.3.1 of the Immigration Rules concerning the maintenance requirements for the admission of partners to the United Kingdom, including the minimum income level of £18,600. In a judgment evidencing great learning, Blake J held that, while the maintenance requirements had a legitimate aim, they could be so onerous in their

effect as to be an unjustified and disproportionate interference with Article 8 ECHR rights. However, he concluded that since the requirements of the rules in this respect could be Article 8 compliant they should neither be quashed nor made the subject of a declaration, but that "claims of individual violations should be examined in the context of an application when the relevant facts can be established and the factors weighed in the balance": [120].

19. In the course of his judgment Blake J concluded that the Secretary of State was entitled to conclude that a somewhat higher level was required than the bare subsistence level set under previous interpretations of the Rules. The Secretary of State had considered matters such as the interests of promoting the economic and social welfare of the whole community, giving the foreign partner sufficient resource to develop skills and community ties, and combating a negative view of family migration based on densely occupied extended family homes operating at a very basic level of economic sustainability: [89]-[90], [110]. Blake J referred to the £13400 gross annual wage identified by the Migration Advisory Committee, which was close to the adult minimum wage for a 40 hour week. To set a higher figure, he said, effectively denied many young people and low-wage earners the ability to be joined by foreign spouses, which frustrated the right of British citizens and refugees to live with their chosen partner unless they had substantial savings: [126], [147]-[148].

20. More generally, Blake J said that an applicant had to be able to raise an Article 8 case separately from the Immigration Rules: [152]-[153]. That was partly because he was not persuaded that the exceptional circumstances route was sufficient to render the decision-making process as a whole lawful and compatible with the Convention. The court had also to examine whether the rules were Convention compatible and reflected the appropriate balance as to Article 8 rights, rather than leaving the issue to the exiguous discretion to depart from the rules. Further, where the terms of the policy were themselves so severe and inflexible as to be a disproportionate interference with an important right, the existence of an imprecise residual discretion to depart from them would not suffice to achieve Convention compatibility.

21. In the course of his judgment in MM, Blake J made passing reference to R (on the application of Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin). There Sales J considered the relationship between the 2012 Immigration Rules in relation to claims for leave to remain and Article 8. In a careful judgment, Sales J said that since the new Guidance recognised a discretion to grant leave to remain outside the rules, the new rules contemplated that there would be cases falling outside them in which a right to remain could be established: [28].

> "[29] Nonetheless, the new rules do provide better explicit coverage of the factors identified in case-law as relevant to analysis of claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision-makers applying the new rules. It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave."

Thus the rules were lawful: [35]-[36]. On a thorough review of the Strasbourg guidance, Sales J concluded that in a precarious family life case only in exceptional circumstances would removal of the non-national family member constitute a violation of Article 8. To show that, despite the absence of insurmountable obstacles to removal, it would nonetheless be disproportionate, it would be necessary to show other non-standard and particular features of the case of a compelling nature demonstrating that removal would be unjustifiably harsh: [42].

22. Thus Sales J held that the gap between the test for leave to remain under EX.1(b) and the result one would arrive at by direct consideration of Strasbourg case-law in the precarious family life class of case was likely to be small: [43]. In the majority of such cases, where the Secretary of State concluded that the family member applying for leave to remain could not satisfy the test in Section EX.1(b) (insurmountable obstacles) in the new rules, it was unlikely that there would be a good arguable case, let alone a case ultimately found to be established, that Article 8 would require that leave to remain should be granted outside the Immigration Rules: [48] In particular Sales J held that Section EX.1 was not unlawful: [36]. Thus the Secretary of State was entitled to refuse Nagre (an overstayer) leave to remain as the unmarried partner of a British citizen under EX.1 without going outside the rules: [[50].

23. Our third case is MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192, where the Court of Appeal held that the Immigration Rules of 2012, as they apply to a foreign national criminal, are a complete code: [44]. Paragraph 398 of the rules provides that if the specific conditions of paragraphs 399 or 399A do not apply in relation to a foreign national criminal, in exceptional circumstances the public interest in deportation may be outweighed by other factors. "Exceptional" used in the context of foreign prisoners was a recognition that very compelling reasons would be required to outweigh the public interest in deportation: [40]-[43]. Sales J's analysis in Nagre of the concept of exceptionality was approved. In obiter remarks the court said that if "insurmountable" obstacles were literally obstacles which it is impossible to surmount, their scope was very limited indeed and that, for the reasons stated by the Upper Tribunal (Blake J, Lord Bannantyne and UT Judge Storey) in Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC), [53]-[59], such a stringent approach would be contrary to Article 8: [49]. On the facts of the appeal, the Upper Tribunal's careful weighing of factors and decision against deportation in that case was upheld: [50].

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

(a) the maintenance requirements of E-LTRP.3.1-3.2 stand, although Blake J in MM (now under appeal) said that they could constitute an unjustified and disproportionate interference with the ability of spouses to live together; he suggested that an appropriate figure may be around £13,400, and highlighted the position of young people and low-wage earners caught by the higher figure in the rules;

(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.

The appeal

25. In seeking to uphold the First-tier Tribunal's decision, Ms Peterson for the respondent submitted that there was no need for the respondent to establish that her case was exceptional. The test was whether it was reasonable. The judge was correct in undertaking an Article 8 analysis. The finding that the Secretary of State's decision was disproportionate should be respected. The case fell into the category of case in MM, in that the impact of the maintenance criteria was disproportionate, irrational and unjustifiable. The issue is not whether the respondent is in the same position as any other person who cannot meet the requirements of the Rules and thus not exceptional, but whether it is reasonable in all the circumstances for her to return to Pakistan to apply for entry clearance. It was not acceptable that a British pensioner should not live here without his wife. As the judge stated, the Secretary of State has not been able to show that the respondent would not meet any of conditions of the rules apart from the maintenance requirements. The judge's findings were open to him and should not be set aside.

26. In our respectful view the judge was in error in his analysis. Certainly it was accepted that the respondent did not qualify under the Immigration Rules. But that did not mean that they could be passed over without analysis. The rules should have been the starting point, not least because the Secretary of State rested her decision - the decision the respondent was appealing - on the rules. Important in our view is that the respondent not only fell short of the rules, but fell short by a very considerable margin. Indeed, the income figure did not even approach the £13,400 income per annum level which Blake J had identified in MM as a more acceptable starting point, and which he had highlighted because of the position of young people and low-wage earners. Here the pension income of the husband is £7,420.40, the respondent's savings are relatively modest and neither the respondent nor he works. The respondent will qualify for pension credits if she settles here but this will boost that figure only slightly.

27. The judge then embarked on a free-wheeling Article 8 analysis, unencumbered by the rules. That is not the correct approach. The Secretary of State had addressed the Article 8 family aspects of the respondent's position through the rules, in particular EX.1, and the private life aspects through paragraph 276ADE. The judge should have done likewise, also paying attention to the Guidance. Thus the judge should have considered the Secretary of State's conclusion under EX.1 that there were no

insurmountable obstacles preventing the continuation of family life outside the United Kingdom. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for him for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the rules (see paragraph 24(b) above).

28. On the judge's own findings this was a very run of the mill case with no compelling circumstances. The respondent applied when a visitor so fell outside Appendix FM. She has long been married to someone who relatively recently became a British citizen. There was the claim that the husband needed the respondent to care for him but the judge did not accept that the medical evidence supported this. The reality in our view is that it was convenient for many years for the husband to come to the United Kingdom to remain unlawfully, and for the respondent to be with her daughters in Pakistan. That was the choice this couple made. The daughters are now married and off the respondent's hands with their own husbands in Pakistan. Obviously the constant travel back and forth is expensive and probably more tiring as the respondent gets older. But the husband is now settled here and can himself travel back and forth to Pakistan. He has the advantage here of a state pension, pension credits, housing benefit, and council tax benefit. Of course some of that would not be transferable to Pakistan were he to return there permanently. The respondent's suggestion that the husband could not live in Pakistan because he has been here for some decades – on our calculation less than a third of his life – is unsustainable. For our part we cannot see any insurmountable obstacles to family life in Pakistan or unjustifiably harsh results.

29. The determination of the First-tier Tribunal is set aside. We re-make the decision as follows: the appeal against the Secretary of State's refusal to vary leave to remain is dismissed.

Signed Date

Mr Justice Cranston
(sitting as) Judge of the Upper Tribunal