Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **AA 00705-14**

THE IMMIGRATION ACTS

At **Field House** Decision signed: **11.06.2014**
on **09.06.2014** et out: **20.06.2014**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Dritan SHAHINI

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: *Simon Harding* (counsel instructed by Kilby Jones)
For the respondent: Mr Ian Jarvis

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Madeleine Colvin), sitting at Taylor House on 4 March, to allow an appeal on article 8 human rights grounds only by a citizen of Albania, born 9 May 1974. Permission was granted in the First-tier Tribunal, on the basis that the judge had not followed *Gulshan* (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC).

2. The appellant arrived here and claimed asylum in 1997: on 21 October that year his claim was refused because he had not attended an interview on 3 October, of which he says he had been unaware. Eventually his appeal against that decision was listed for hearing on 14 October 1998; but he got lost and went to the wrong court. The appeal was adjourned to 15 December, and he says he relied on his solicitor, who had told him he would attend on his behalf; but later he heard that the appeal had been treated as abandoned.

3. That decision was issued on 18 January 1999. The next heard of the appellant was in a letter from his then solicitors, Howe & Co, dated 8 December that year, in which they said he had attended their office that day "… completely confused and wishes to instruct us once again": apparently they had referred him to the Refugee Legal Centre for representation on his appeal. The letter was sent to the Home Office, the wrong place for the request it made, which was for the decision to be 'repromulgated', apparently so that the appellant could appeal it. It was followed by a reminder on 21 December 1999; but that was all.

4. The appellant said he went to see his solicitors many times to see what was happening; but they said they were waiting for a reply from the Home Office. The judge accepted that he never went 'underground'; but she herself found (see paragraph 23) that he did nothing to get in touch with the Home Office between December 1999 and 2009, when he applied for and received a certificate of approval for his proposed marriage to a Bulgarian citizen, from whom he has since parted company. Then, for some reason best known to the Home Office, they wrote to him in August 2010, to tell him that his asylum claim, which in reality had been refused, and his appeal against refusal treated as abandoned, was being considered under the 'legacy programme'. The result of that consideration came by way of the decision under appeal, on 16 January 2014. Nothing need be said about the asylum part of the decision, since even before the judge the appeal was not pursued on that point, but only on article 8.

5. So far as the 'new Rules' (in force from 9 July 2012) side of article 8 is concerned, the judge found, for reasons she gave, that the appellant did not meet the requirements of paragraph 276ADE. The first paragraph of the Home Office grounds of appeal (they should number them like everyone else) challenges the rest of her decision, in what appear to be standard terms, for failing to follow the guidance in *Nagre* [2013] EWHC 720 (Admin) and *Gulshan*. However this was misconceived; though the judge did not make any reference to these authorities, so well known by now that this was quite unnecessary, she certainly asked herself the question which they appear to pose in what she went on to say:

> It seems to me that there are sufficiently compelling circumstances in this case not recognized in the new Immigration Rule on private life so as to justify a consideration of Article 8 more generally.

6. There are two real issues in this case:

(a) Mr Jarvis's second ground of appeal: apart from a challenge, on the authorities, to the way in which the judge dealt with the question of delay by the Home Office, this amounted to a submission that no reasonable judge, properly directed, could have found that there were "…sufficiently compelling circumstances in this case … to justify a consideration of Article 8 more generally"; and

(b) an argument by Mr Harding to the effect that the judge had asked herself the wrong question after all, and was perfectly entitled to go on to a free-standing consideration of article 8 as a matter of general principle. This should have been put forward by way of a respondent's notice ('r. 24 response'); but, as it involved a pure question of law, governed by recent and well-known authorities, I let him pursue it all the same.

7. It makes sense to deal with (b) first, since, if Mr Harding is right about it, (a) will not arise. His main point was that both *Gulshan* and *Nagre* had been decided on the basis that E-LTRP, the applicable part of appendix FM under the 'new Rules', contained a reference to article 8, and so formed a 'complete code' in the sense given in *MF (Nigeria)* [2013] EWCA Civ 1192. Looking at E-LTRP, it is necessary first to consider GEN. 1.1, which might be called the preamble to FM as a whole:

> This route is 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 (and the applicant cannot seek leave to enter or remain in the UK as their family member under Part 11 of these rules). 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 …

8. Clearly GEN. 1.1 was intended to incorporate article 8 for immigration purposes: the other side of Mr Harding's argument was that this was not the case with 276ADE, so I shall turn to that: it begins simply

> (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application …

While there is no such explicit reference to article 8 as in GEN. 1.1, as I suggested to Mr Harding in the course of argument, it is hard to see what 'private life' could possibly mean in this context, and in the context of the following Rules dealing with leave to remain on that basis, other than the 'private life', the right to which is enshrined in article 8.

9. Though this point may seem clear enough, without further analysis of the Rules, Mr Jarvis referred me to the very recent decision of the Court of Appeal in *Haleemudeen* [2014] EWCA Civ 558, so I shall see whether it sheds any further light on it. The scenario in *Haleemudeen* was as follows: the first-tier judge had allowed his appeal on what I shall call a straight-8 basis. The first question before the Court was whether the deputy Upper Tribunal judge had been correct in ruling that it had been wrong in law to do so. This was answered by Beatson LJ, effectively for the Court, at paragraph 40:

> I, however, consider that the FTT Judge did err in his approach to Article 8. This is because he did not consider Mr. Haleemudeen's case for remaining in the United Kingdom on the basis of his private and family life against the Secretary of State's policy as contained in Appendix FM and Rule 276ADE of the Immigration Rules. These new provisions in the Immigration Rules are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Overall the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it had previously been.

10. In my judgment, that passage, read as a whole, makes the answer to this question crystal clear. The whole of the 'new Rules', or at least, for the purposes of *Haleemudeen*, appendix FM read with paragraph 276ADE, is to be read as a complete code, whose purpose is to clarify the approach to be taken to article 8, so far as immigration cases are concerned.

11. It follows that there is nothing in Mr Harding's argument, and the judge was quite right to ask herself whether there were any 'compelling circumstances' which justified open-ended consideration of article 8. The remaining questions are first, whether she took the right approach on the authorities to the question of Home Office delay; and second, whether, on the correct basis, her answer to the 'compelling circumstances' question was one open to a reasonable judge on the facts before her.

12. The question of Home Office delay was central to the judge's treatment of the 'compelling circumstances' question: at paragraph 26 she said this:

> It is the nature of how the appellant has been treated by the Home Office during his lengthy stay of 17½ years in the UK. … the appellant brought himself to the attention of the Home Office during his long stay in the UK … the Home Office permitted him to marry an EEA national during this period and then later informed him he was being considered under the Legacy programme which took a further 3½ years to resolve. At no time did the respondent attempt to remove the appellant during this period.

13. Mr Jarvis's delay point was based on *AZ (Bangladesh)* [2009] EWCA Civ 158. That appellant claimed to have arrived here in 1995, when he would have been 14½; he did nothing to regularize his position till June 2004, when he asked for leave to remain, which the Home Office eventually refused in April 2007: the remaining 21 months or so were taken up with the appeal process. As Scott Baker LJ pointed out at paragraph 22

> Even if one excludes the first period of approaching nearly three years when he was a minor, there was still a period of six years when he remained in this country with absolutely no right to be here and made no attempt to regularise his position.

14. At 23 Scott Baker LJ went on to refer to the well-known principles in *EB (Kosovo)* [2008] UKHL 41; but he concluded

> The only culpable delay [by] the respondent …, if indeed it can be categorised as culpable delay, is in relation to the three-and-a-half year period [*it was about 2¾ years; but this was an extempore judgment*] that it took the Secretary of State to determine the application. That period is small, and indeed very small compared to the earlier period that had already passed since the appellant arrived in this country. In my judgment this is not a case where anything has happened that has caused the appellant to lose a right during a period of delay by the Secretary of State or whereby his position has been in any way prejudiced by some intervening event.

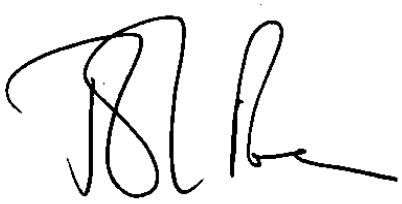
15. There was little Mr Harding could say in answer to that, except to point out the obvious, but in my view less than crucial differences between the facts of this case and AZ's. Reviewing them, this appellant had been grown up when he came here at 23: he did claim asylum then, but, after his appeal against refusal was treated as abandoned, for reasons which may or may not have been his fault or the fault of his solicitors, he had full knowledge of that judicial decision against him from December 1999 at latest. His then solicitors, a well-known experienced specialized firm, then made a request, in the wrong quarter, for it to be 'repromulgated': a mistake for which he cannot be blamed. However, after one reminder later that month, neither they nor he did anything at all towards regularizing his immigration status, till April 2009, over nine years later.

16. In April 2009 the appellant applied under the procedure then in force for a certificate of approval for his forthcoming marriage, which was granted. That at least brought him to the further attention of the Home Office, and may have resulted in their letter of August 2010, telling him he was being considered under the 'legacy programme'. Unaccountable as that step may seem, when there was a judicial decision against him, which had stood for the last ten years; and still more unaccountable the further 3½ years it took for the Home Office to reach their own final decision, nothing in that delay prejudiced this appellant's interests any more than a similar one had done those of AZ. Nor could his own delay in doing anything about his situation between December 1999 and April 2009 be left out of account.

17. The Home Office delay, such as it was, clearly formed, at paragraph 26, the main basis for the judge's decision on the 'compelling circumstances' point; and the way in which she took it into account was clearly wrong in law, for the reasons just given. The judge did consider further points in the appellant's favour at paragraph 27, which she summarized in terms of his having "an extensive and rich private life in the UK". He has worked hard, and is regarded as honest and trustworthy, with many friends, some of whom have helped to support him. He could have applied for a residence card on the basis of his marriage to the Bulgarian lady, while that was still going, but hadn't thought that right for some reason.

18. All of these, apart perhaps from the last, were certainly points more or less in the appellant's favour: Mr Jarvis argued the contrary in the case of the appellant's work record, on the basis of what was said about unlawful working in *ZS (Jamaica)* [2012] EWCA Civ 1639, at paragraph 27. However, whether or not that is taken as a point against the appellant, neither his hard-working nature, nor any of the other points referred to by the judge at paragraph 27 could possibly have been regarded by any reasonable judge as amounting to 'compelling circumstances', without what she said, wrongly as it turns out, about delay at paragraph 26. It follows that her decision as a whole was wrong in law, and, as Mr Harding realistically conceded, the only logical consequence of that in this case is that it must be reversed.

Home Office appeal allowed
Appellant's appeal against removal decision dismissed



(a judge of the Upper Tribunal)