



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

Appeal Number: IA/14707/2013
IA/14713/2013
IA/14717/2013

THE IMMIGRATION ACTS

**Heard at Newport
on 27th February 2014**

**Determination
Promulgated
On 8th April 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MOHAMMED SIFUL HAQUE SUJAN
SHAYMA AKTER
AMANUL HAQUE
(Anonymity order not made)**

Respondents

Representation:

For the Appellant: Mr Richards – Senior Home Office Presenting Officer
For the Respondent: Mrs Sinha of Chetna & Co Solicitors.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge L Murray promulgated on 6th November 2013 in which she dismissed the appeal under the Immigration Rules but allowed it under Article 8 ECHR. This is a challenge by the Secretary of State in relation to which permission was granted by Upper Tribunal Judge P Lane on 9th December 2013 on the basis that the grounds are clearly arguable

and that apart from anything else Article 8 does not confer a discrete right to work in a place of one's choice.

Background

2. Mr Sujan is a national of Bangladesh born on 3rd October 1984. The other two named Respondent's are his wife who was born on 1st July 1987 and their son born on 26th June 2011, both of whom are dependent upon Mr Sujan succeeding with his claim.
3. On 26th August 2003 Mr Sujan was granted leave to enter the United Kingdom as a student with leave valid until the 31st October 2004. His leave to remain as a student was varied until 31st October 2009 and thereafter he was granted leave to remain as a Tier 4 (General) Student until 2nd October 2012. On 1st October 2012 he made a combined application for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant under the Points Based System and for a Biometric Residence Permit which was refused by the Secretary of State on 25th April 2013.
4. Mrs Akter was granted leave to enter the United Kingdom as a spouse on 27th June 2005 which was varied in line with that of her husband until 2nd October 2012. On 1st October 2012 she made an application for leave to remain as a partner of a Tier 1 Migrant which was refused in line with that of her husband on 25th April 2013. Their son, who was born in the United Kingdom on the above stated date, is dependent upon his parent's claims.
5. Having considered the available material Judge Murray dismissed the appeal under the Rules. She states in paragraph 28 of the determination:

28. The requirements of 41SD are clearly set out and the Appellant has failed to meet them. The Appellant will only be considered to have access to funds if he provides the specified documents. He has not done so. In the circumstances he has not demonstrated he has access to the funds and cannot be awarded the points for Attributes.

6. The finding Mr Sujan and his family are unable to satisfy the relevant requirements of the Immigration Rules is not contested and there is no cross-appeal. Having made the above finding Judge Murray states in paragraph 29 of her determination:

29. The Appellant states that he has been in the UK since August 2003. His immigration history summarised at page 1 of the RFLR appears to confirm this. I accept that in this time he has established private life in the UK. It is clear

however that he cannot meet the requirements of paragraph 276 ADE of the Rules.

7. In paragraph 30 Judge Murray then states "I have therefore considered the Appellants case under Article 8 ECHR", and then proceeded to undertake what can be described as an "old style" freestanding Article 8 ECHR assessment before concluding, in paragraph 41, that "Clearly, the nature of the non-compliance is relevant to the proportionality of removal. The nature of the non-compliance in this case is the failure to meet strict evidential requirements as to the form of documentation. In view of the Appellant's long residence, excellent immigration history, the fact that the money is I accept available to him I consider that the weight to be attached in this case to the interests of immigration control has been outweighed by the material disruption to the Appellant's private life in removing them."

8. I find that in proceeding as she did, Judge Murray has made a legal error. It appears that one aspect she considered relevant to the decision to allow the appeal on Article 8 ECHR grounds is based upon the near miss principal which does not exist. This has been confirmed by the Supreme Court in the case of Patel [2013] UKSC 72 at paragraph 56:

56. Although the context of the rules may be relevant to the consideration of proportionality, I agree with Burnton LJ that this cannot be equated with a formalised "near-miss" or "sliding scale" principle, as argued for by Mr Malik. That approach is unsupported by Strasbourg authority, or by a proper reading of Lord Bingham's words. Mrs Huang's case for favourable treatment outside the rules did not turn on how close she had come to compliance with rule 317, but on the application of the family values which underlie that rule and are at the heart also of article 8. Conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit.

9. I find Judge Murray also fell into legal error in her approach to the Article 8 assessment. Having concluded, quite properly, that Mr Sujan was unable to succeed under the Immigration Rules the Judge proceeded to undertake an old-style Article 8 ECHR assessment which is structurally and legally wrong. It was necessary for Judge Murray to consider the merits of the case in accordance with the approach set out by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192, the High Court in Nagre [2013] EWHC 720 (Admin) and by the Upper Tribunal in Gulshan [2013] UKUT 640, as confirmed by [Shahzad \(Art 8: legitimate aim\) \[2014\] UKUT 00085 \(IAC\)](#). These judgments have made it clear that the question of proportionality must be looked at in the context of the Immigration Rules with no need to go on to a specific assessment under Article 8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring that course to be taken. That approach is consistent with

what the Court of Appeal said in MF (Nigeria) and with the approach of the House of Lords, particularly in cases such as Huang [2007] UKHL 11 and Razgar [2004] UKHL 27. In Shahzad it was found that where an area of the Rules does not have such an express mechanism such as that found in the deportation provisions, the approach in Nagre ([29]-[31] in particular) and Gulshan 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.

10. The starting position for the Judge was to look at the Rules and see whether Mr Sujan was able to meet their requirements, which she did. He could not, and so the next question to arise is whether the decision would lead to a breach of Article 8 but in the context of whether there are factors not covered by the Rules which give rise to the need to consider Article 8 further. The Secretary of State is of the view that having considered the merits of the case outside the Rules it should have been found there was no reason established to warrant a grant of leave on this basis. In light of the material the Judge was asked to consider it has not been arguably made out that the decision will result in compelling circumstances giving rise to unjustifiably harsh consequences for Mr Sujan or any family member, such as to establish an arguable case at this time.
11. I find Judge Murray made a legal error material to her decision to allow the appeal and, as a result, set aside the determination. The factual findings relating to the inability of Mr Sujan to succeed under the Rules and the existence of private and family life shall be preserved findings.

Discussion

12. This case involves an individual of considerable ability who has pioneered an on-line ordering system which may be of considerable benefit to business within the United Kingdom and elsewhere. The fact Mr Sujan appears to have such abilities in the field of engineering does not, however, enable him to remain in the United Kingdom per se, as it is clearly the Secretary of State's position that unless an individual can satisfy the requirements of Immigration Rules, or establish a case warranting a grant of discretionary leave outside the rules, they will not be allowed to remain in the United Kingdom. The Secretary of State's position is that on the facts neither of the above conditions were satisfied.
13. As stated, it is not disputed that Mr Sujan is unable to succeed under the Rules leaving him with no option other than to pursue the appeal under Article 8.

14. The family life elements of the case do not afford him an opportunity to remain as the family life he has with his wife and child will, as they will be removed as a family unit, continue in their home state. There is no evidence to show that the Secretary of State's decision will cause any material disruption to the core elements of their family life.
15. Judge Murray found that Mr Sujan has been in the United Kingdom for ten years during which the family have established a strong private life and ties to the United Kingdom. This finding is based upon the strength and nature of the family life, including duration. It was also found that any interference would result in consequences of sufficient gravity so as to engage Article 8 but this is an element which should have been considered by reference to the fact that the Immigration Rules provide that the minimum period of residence to enable an individual to succeed under paragraph 276ADE is 20 years.
16. The 20 year period is not an inflexible period as the Rules also provided for an individual who may not have 20 years stay in the United Kingdom to succeed if they can satisfy the requirements of 276ADE (vi). This element was not relied upon by Mr Sujan and the finding that he is unable to succeed under the Rules is a preserved finding in any event.
17. The focus of the current approach to Article 8, in light of the above case-law, must be upon the effect and consequence of the removal decision upon the individual. Upper Tribunal Judge P Lane is correct in noting that Article 8 does not give an individual a right to work or even live in a place of his or her choice. That is established jurisprudence. In this case Mr Sujan and his family wish to remain in the United Kingdom to enable him to continue his work and the life they have established. It is based upon the desire to preserve the status quo when that status quo is based upon period's of temporary admission with no arguable legitimate expectation that a right to remain permanently would be conferred upon this family. In considering whether the decision will lead to a breach of Article 8 it has not been established that there are factors not covered by the Rules which give rise to the need to consider Article 8 further, unless the economic benefits to the United Kingdom that Mr Sujan's continued presence could be said to fall within such category, which I find is debatable. Having considered the merits of the case outside the Rules I find there is no reason established to warrant a grant of leave on this basis. In light of the available material it has not been arguably made out that the Secretary of State's decision will result in compelling circumstances giving rise to unjustifiably harsh consequences for Mr Sujan or any family member, such as to establish an arguable case at this time. It has not been shown that the family cannot return to their home state and continue with their family and economic life there. No adverse consequences have been proved to follow from the decision such as to warrant a grant of leave on this basis.

Decision

18. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. These appeals are dismissed.**

Anonymity.

19. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make not such order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as no justification for making such an order has been established on the facts.

Fee Award.

Note: this is **not** part of the determination.

20. In the light of my decision to re-make the decision in the appeal by dismissing it, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeals have been dismissed on the facts.

Signed.....
Upper Tribunal Judge Hanson

Dated the 6th April 2014