Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/25534/2013
IA/25535/2013
IA/25533/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9th June 2014	**On 16th June 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VEESANJALEE MOTHOORA
MAHESH MOTHOORA
A Y M

Respondents

Representation:

For the Appellant: Mr P Deller, Senior Presenting Officer
For the Respondents: Mr D Ahie, Solicitor on behalf of Wisestep Solicitors

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal (Judge Rastogi) who in a determination promulgated on 3rd April 2014 allowed the appeals against the decision of the Respondent to refuse to vary their leave to remain in the United Kingdom on the grounds of their family and private life.

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2. Whilst this is an appeal by the Secretary of State, for convenience I will refer to the parties in the determination as they appeared before the First-tier Tribunal.

3. The history of the appeal is as follows. The Appellants are citizens of Mauritius aged 37, 42, and 6 respectively and form a family unit. The first Appellant, her husband and daughter arrived in the United Kingdom in 2004 under a student and dependant visa respectively. The Appellant and her family members have lived in the United Kingdom since arrival, her daughter, the third Appellant, being born whilst resident in the United Kingdom. They applied to vary their leave to remain in the United Kingdom on the grounds of their family and private life. The applications were made on 20th April 2012 and accompanied by a letter from Talk Visa Immigration Specialists setting out the basis of their applications for further leave to remain in the United Kingdom.

4. On 4th July 2013 the Respondent refused the application, pursuant to Appendix FM and paragraph 276ADE of the Immigration Rules HC 395 (as amended) on the grounds that the Respondent was not satisfied that the Appellants were able to meet any of the Appendix FM requirements, as neither of the parents were either British citizens or present and settled in the United Kingdom; the residence was not of sufficient length, they had not lost all their ties to Mauritius, and there were no exceptional circumstances justifying their application being granted and that there was no breach of their Article 8 rights. It recorded in the decision that the Appellants had no right of appeal against the refusal decision as their applications were made when they had no valid leave to remain in the United Kingdom.

5. The Appellants appealed that decision and the matter came before the First-tier Tribunal (Judge Rastogi) on 21 March 2014 at Hatton Cross. The judge had the opportunity of hearing the oral evidence of the parties and also other witnesses including the Appellant's family members [see 29] and the character referees attended the hearing but were not the subject of cross-examination at the hearing their evidence being agreed [32].

6. In a determination promulgated on 3 April 2014 the First-tier Tribunal allowed the appeal on Article 8 grounds.

7. The findings of fact are set out in the determination at [37] to [60]. The judge recorded at [37] that it was not disputed that family life existed between the various Appellants but that there was a dispute as to whether or not family life for Article 8 purposes existed between the Appellants and Ms Verasamy and/or Miss Thlamany, other family members. The judge observed that with the exception of the third Appellant, the remaining family members were all adults and the judge directed himself to the appropriate authorities dealing with family life between adults at [39]. The judge considered the credibility of the witnesses and the Appellants and observed that the Respondent had not challenged their credibility and reached the conclusion at [42] having considered the evidence before the

First-tier Tribunal that the evidence demonstrated family life not only between the Appellants themselves but also between Ms Verasamy and Miss Thlamany.

8. At paragraph [43] dealing with the issue of private life, the judge found that the Appellants had developed a private life since their arrival in 2004 and the third Appellant's birth in 2007 outside the scope of their family life. The judge recorded that the first Appellant had studied for a number of years but had not done so since 2008 and had worked prior to that time. Evidence had been given concerning her involvement with her daughter's education and that the second Appellant was in employment as a bus driver. The judge recorded evidence given by Ms Henry, a family friend relating to a friendship that had been established in the United Kingdom. Other witnesses were referred to at [43] whose evidence was accepted by the judge.

9. As to the circumstances of the third appellant, a minor child, the judge dealt with that separately later on in the determination at [49] onwards. The judge had regard to the third Appellant's age, namely, that she was about to attain the age of 7 in a few weeks, that she was born in the United Kingdom and had lived here throughout her life but also observed that she was not a British national. She had lived with her parents, grandmother and maternal aunt and had done so throughout her life. The judge applied the decision of **Azimi-Moayed** at [49]. In reaching the decision as to her best interests, the judge considered that it was in her best interests to remain with both her parents and gave consideration to the effect upon the third Appellant if separated from her grandmother and her aunt with whom it was said she had a very close bond. The judge considered the evidence as to the impact the separation would have upon the child concerned and the judge found at [53] that she inferred from the evidence the importance that her grandmother and aunt attach to the third Appellant in their lives and that she received from them a high degree of

> "love, support and companionship. I have no reason to believe for a child of her age that the affection is not reciprocated. I find that she has been used to being an integral part of this extended family throughout her life to date. Whilst I do not place significant weight upon, I noted during the hearing that the moment her grandmother concluded her evidence the third Appellant moved immediately from the seat next to her father to her grandmother's lap in what seemed a perfectly spontaneous and sincere move."

The judge considered the evidence in relation to Mauritius at [54]. At [55] the judge gave further consideration to the third Appellant's young age and that in general terms "most children that age are adaptable and if they remain in their parents' care they will continue to thrive." However the judge found at that paragraph from the evidence that he was satisfied that the third Appellant's best interests are

> "served by remaining within the extended family in which she has lived throughout her life. I am satisfied that removing her from the wider family with whom I accept that was such a strength of bond is likely to cause her such disruption and emotional harm that it would be contrary to her best interests. Whether she remains with them in the United Kingdom or in Mauritius I do not feel it is a matter which is decisive (albeit it is relevant to note the inevitable disruption to her education and her own ties here outside of the family) as I find that providing she remains in that loving and nurturing environment her welfare is protected."

10. The proportionality balance was considered by the judge at [56]-[60]. The judge found that the "legitimate aim being pursued in the case to be the need for effective immigration control" and noted that the Appellants had no other lawful basis for remaining in the United Kingdom and did not claim to be able to meet the requirements of the Rules in force at the date of the application. The judge took into account that their family lives have developed whilst their stay was a temporary one although the judge agreed with submissions made on behalf of the Appellants that there existed family life between the first Appellant, her mother and sister prior to her moving to the United Kingdom. The judge noted that the extent of contact between them whilst family life existed over a distance was considerable and this had been developed since her arrival in 2004 at a time when she only had temporary permission to stay in the United Kingdom thus the judge placed weight on this factor in the Respondent's favour.

11. The judge had regard at [57] that the application was made prior to the introduction of Appendix FM (the application being made before 9th July 2012) and noted that "the significance of this is that Article 8 considerations did not inform the drafting of the Rules in force at the time the applications were made."

12. At [58] the judge placed significant weight on the fact that were the Appellants to be removed, in order to maintain their family lives with Ms Verasamy and Ms Thlamany, it would require two British citizens to leave the United Kingdom and maintain their family life in Mauritius. The judge considered their circumstances including the length of residence of 25 years for Ms Verasamy, her British citizenship, her contributions to the British economy and also her fragile mental state. The judge found as a fact that he was satisfied that her family life with the Appellants is a factor which stabilises her mental health and would be concerned of the impact separation would have upon her. The judge considered the alternative of uprooting her from her home in the United Kingdom for 25 years of which she was a national and found that the factors outlined at [58] are ones that the judge accepted as "genuinely held" and as of "sufficient significance"and that if the Appellants were to return to Mauritius she would face "an unenviable choice of separating from those whose presence is integral to her life and wellbeing and leaving her home with

the consequences I have referred to and the likely impact of that upon her mental health."

13. At [59] the judge found the above factors with the third Appellant's best interests, the extent of ties the first and the second Appellant had [see paragraph 43] and observed that those facts were not weakened by a poor immigration history or a criminal record, the judge took into account that there was a pre-existing family life between the first Appellant, her mother and sister before arriving in the United Kingdom, the inevitable disruption to the third Appellant's education and the beginnings of her independent roots within the community.

14. The judge concluded therefore that those factors, taken together outweighed the importance to be attached to the justification of immigration control and thus allowed the appeals.

15. It is plain from the determination that a decision as to the validity of the appeal had been made by Immigration Judge Burrell before the matter came before the First-tier Tribunal. That decision had not been challenged before the First-tier Tribunal and as noted at [17] the judge treated the appeal as being a valid appeal.

16. The second issue that is plain from the determination is that the applications were made before the change in the Immigration Rules on 9th July 2012 and the judge applying the Statement of Changes HC 194 which were the transitional provisions required the judge to consider the appeals pursuant to the Rules in force at the date of the application. That was conceded by the Respondent at the hearing [see paragraph 9] and therefore whilst there had been reference in the refusal letter to Appendix FM and paragraph 276ADE, the judge considered the appeal on the "classic "Article 8 basis.

17. The Respondent sought permission to appeal that decision and it is important to set out the grounds given for seeking permission. I quote them in full;-

> "The Immigration Judge allowed the appeal on the basis of Article 8 outside the Immigration Rules in relation to all the Appellants. The Immigration Judge notes [paragraph 44] that the Appellants cannot satisfy the requirements of the Immigration Rules. This case concerned the Immigration Rules prior to the implementation of HC 194 Statement of Changes on 9th July 2012.
>
> The Immigration Judge has not considered the guidance in the case of **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)** namely if there are arguably good grounds for granting leave to remain outside the Immigration Rules is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the Rules.

The Immigration Judge has not identified any case specific arguably good grounds for granting leave outside of the Rules and compelling circumstances not recognised under the Rules, per **Gulshan**. The Immigration Judge simply undertook a freestanding Article 8 assessment (45 onwards).

It is submitted without making findings as to arguably good grounds and compelling circumstances not recognised under the Rules, an Immigration Judge cannot undertake a freestanding Article 8 assessment. Permission is sought on the basis the Immigration Judge has not considered the case specific guidance on departing from the Immigration Rules and further considering Article 8."

18. Permission was granted by Judge of the First-tier Tribunal on 23rd April 2004 solely on the basis that "it is arguable that, in not considering **Gulshan [2013] UKUT 640 (IAC)** there was a material error of law."

19. Thus the appeal came before the Upper Tribunal. At the outset of his submissions, Mr Deller conceded that the grounds as they were drafted were in his description "bare" and that the only challenge made to the determination of the First-tier Tribunal was that the judge failed to have regard to the new Rules in considering Article 8 and did not apply the guidance in **Gulshan**. However he pointed to the concession made by the Presenting Officer at [9] that this was a case in which the applications were made before the change in the Rules on 9th July 2012 and that the transitional provisions of HC 194 required the judge to consider the appeals pursuant to the Rules in force at the date of the application.

20. An issue that was not set out in the permission to appeal the decision of the First-tier Tribunal related to jurisdiction, and that had there been a decision for removal, the Appellants would have a right of appeal exercisable in country but it appeared that an earlier decision had been made as to the validity of the appeal, namely the decision of Immigration Judge Burrell, which had put the decision before the First-tier Tribunal and that no issue had been taken with that at the hearing but furthermore and importantly whilst it was not pursued at the hearing by the Presenting Officer, it was not raised as a ground of challenge against the decision of the First-tier Tribunal and there has been no application to amend those grounds and thus the sole ground remains as drafted.

21. Mr Deller further conceded that the application was made before 9th July 2012, he did not seek to go behind the concession at paragraph [9] of the determination in which it was accepted by the Respondent that the transitional provisions applied and that the Rules in force at the date of the application were the relevant criteria.

22. In summary then the grounds as drafted did not seek to resile from the concession at [9] nor was there any ground raised or challenge to the jurisdiction of the Tribunal either before the First-tier Tribunal or in the grounds which left the only ground relating to the decision of **Gulshan**

which in the light of the concession at [9] did not mean that the judge was not entitled to consider the case on the classic Article 8 principles. Thus he submitted that unless there was anything obvious or manifestly wrong in terms of the judge's approach to proportionality that it was difficult to see what challenge the Secretary of State could mount against the decision in the light of the way the grounds had been drafted.

23. Mr Aihe submitted that the decision was one that was sound and safe and that the concession given at [9] remained and that Mr Deller on behalf of the Secretary of State did not seek to resile from that concession and that the judge considered all the factors in the proportionality balance under those circumstances the grounds are specifically drafted did not demonstrate an error of law in the judge's decision. In terms of the validity argument, it had been found by Immigration Judge Burrell that there was a right of appeal and thus the matter had come before the First-tier Tribunal and that the issue of validity, as stated by Mr Deller had not been challenged before the First-tier Tribunal nor had it been challenged in the grounds. Looking at the history of the application originally an application had been made during the time they had leave but there was an issue relating to the application having been made and it was returned which he described as an "**Basnet**" issue. The grant of permission did not engage with the determination and thus it had not been demonstrated in any error of law.

24. I have set out earlier in this determination the findings of fact made by the judge. None of those findings of fact have been challenged by the Secretary of State in the grounds for permission to appeal the decision of the First-tier Tribunal. Indeed as fairly observed by Mr Deller, the grounds upon which permission are sought relate to a specific point only on the basis that the judge did not consider the guidance in **Gulshan** (as cited) and that the judge undertook a freestanding Article 8 assessment rather than considering whether there were arguably good grounds for granting leave outside of the Rules. As Mr Deller observed also, it was conceded by the Secretary of State before the First-tier Tribunal at [9] that as the applications were made before the changes in the Rules on 9th July 2012, the Statement of Changes HC 194 which were the transitional provisions required the judge to consider the appeals pursuant to the Rules in force at the date of the application. Mr Deller did not seek to resile from that concession made by the Secretary of State and it is consistent with the decision of **Edgehill v SSHD [2004] EWCA Civ 402** as per Jackson LJ at part 3 of his judgment. Therefore as Mr Deller fairly accepts, it cannot be said that the judge was wrong to consider the appeals on the basis of a freestanding Article 8 as the grounds submit because that was conceded by the Secretary of State at [9].

25. No other issue has been identified in the grounds. There has been no amendment sought at any time before the Upper Tribunal to amend the grounds of permission and as Mr Deller observed the issue of jurisdiction of the appeal had not been challenged before the First-tier Tribunal nor

has it been challenged by way of an application for permission before the Upper Tribunal.

26. There has been no amendment either in relation to the grounds to deal with any points raised from the decision in **Edgehill**.

27. The only point raised by Mr Deller is that as the judge was therefore entitled on the concession of the Respondent at [9] to carry out what can be described as an “classic” Article 8 assessment, was whether the judge correctly carried out a proportionality balance.

28. There has been no challenge in the grounds to the findings of fact made and it is plain from the determination at paragraphs [56] to [60] that the judge, drawing together all of the issues, carried out a careful proportionality balance and gave appropriate weight to the balance on the side of the Respondent where the judge took into account that they had no other lawful basis for remaining in the United Kingdom (other than their claim to Article 8 grounds), that their private and family lives have been developed whilst their stay was temporary and placed weight upon the legitimate aim being pursued by the respondent. On the other side of the balance, the judge identified at [59] taking into account the best interests of the child, the extent of ties that the first and second Appellant had in the United Kingdom, the fact that the positive factors in the balance were not weakened by a poor immigration history, or criminal record, taking into account there was a pre-existing family life between the first Appellant, her mother and sister before arriving in the United Kingdom, taking into account the inevitable disruption to the third Appellant’s education and the beginnings of her independent roots within the community. Thus it is demonstrated that the judge carried out a proportionality balance taking into account all relevant factors and therefore it was open to the judge when conducting such a balance to reach the conclusion as the judge did at [60] that a decision of the Respondent was disproportionate.

29. For those reasons, it has not been demonstrated on the grounds as presented by the Secretary of State that there is an error of law in the decision of the First-tier Tribunal. The First-tier Tribunal decision therefore stands.

Signed Date

Upper Tribunal Judge Reeds