



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

Appeal Numbers: OA/15988/2013
OA/15990/2013
OA/15989/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 1 August 2014**

**Determination
Promulgated
On 18 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

**MRS MAHIDEEN FAREENA KAREEM ILYAS (1)
MR NAJAH HASSAN KAREEM ILYAS (2)
MISS NAJEELA HASMIN KAREEM ILYAS (3)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Burrett of Counsel
For the Respondent: Mr S Whitwell, a Home Office Presenting Officer

DETERMINATION AND REASONS FOR FINDING AN ERROR OF LAW

Introduction

1. This is an appeal by the above-named respondent against the decision of the First-tier Tribunal to allow the appellants' appeals against her decision to refuse to grant them entry clearance. I will refer to the respondent by

her designation before the First-tier Tribunal notwithstanding that she is in fact the appellant before this Tribunal. The appellants will also be referred to by their designation before the First-tier Tribunal.

2. The appellants are all Sri Lankan nationals related to the sponsor as follows:
 - The first appellant (“Mrs Ilyas” (also known as “Ilias”) is the mother of the second and third appellants (“Najah”, her son, and “Najeela”, her daughter) and the wife of the sponsor;
 - The sponsor is Kareem Ilyas, a British citizen who permanently resides in the UK, who is the first appellant’s husband.
3. The appellants appealed against the decision of the Entry Clearance Officer Chennai (“ECO”) to refuse entry clearance to the appellants as, respectively, the spouse and the dependent children of the sponsor.
4. That appeal came before Judge of First-tier Tribunal Eban (“the Immigration Judge”) sitting at Richmond Magistrates’ Court on 16 May 2014. Having considered the evidence the Immigration Judge concluded that the appellants’ appeals succeeded under Article 8 of the European Convention on Human Rights (“ECHR”) notwithstanding their failure to meet all the requirements of the Immigration Rules.
5. It is against that decision that the respondent subsequently appealed.

The Appeal Before the Upper Tribunal

6. By her notice of appeal, dated 28 May 2014, the respondent sought permission to appeal to the Upper Tribunal on the grounds that the First-tier Tribunal had made a material error of law in its determination. The grounds state that Mrs Ilyas had previously applied for visit visas using a false identity on no less than six occasions which severely damaged her credibility and character. The deceit had the potential of damaging respect for the Immigration Rules. Secondly, there was nothing compelling or exceptional about the circumstances the appellants found themselves in. They could maintain their relationship with the Sponsor by staying in regular contact with him by any one of the modern means of communication available. There were no compelling circumstances not recognised by the Immigration Rules for allowing the appellants entry to the UK under Article 8 of the ECHR. The First-tier Tribunal had not followed the correct approach as set out in recent case law, namely, **Gulshan [2013] UKUT 00640 (IAC)** and **Nagre [2013] EWHC 720 (Admin)**. Additionally, the respondent was entitled to make a decision in the economic interests of the country and the appeal ought to have been dismissed in the interests of justice and fairness.
7. The application for permission to appeal was considered by Judge of First-tier Tribunal P J G White who found an arguable error in the decision of the

First-tier Tribunal on 6 June 2014. Judge White was satisfied that the Immigration Judge had arguably failed to properly consider the guidance in the case of **Gulshan**, to which no reference had been made in the determination. He was satisfied that all grounds were arguable.

The Hearing before the Upper Tribunal

8. At the hearing I heard submissions by both representatives. Mr Whitwell explained that Article 8 was covered by the Rules and the Immigration Judge had demonstrated at paragraph 20 of his determination that he was “alive” to that issue. He explained that exceptional circumstances allowed the respondent to exercise her discretion in favour of the applicants where the Rules or the guidance were satisfied. However, recent case law made it clear that a proportionality appraisal is to be conducted within the framework of the Rules because they had been drafted to reflect the obligations on the respondent including those under Article 8. Mr Whitwell went on to explain that there may be circumstances not recognised by the Rules but those circumstances would be likely to be exceptional. In the present case there was no suitable finding in the Immigration Judge’s determination which enabled the reader to identify what those exceptional circumstances were. It was a serious misdirection on the law to go beyond the requirements of the Rules and make a “free-wheeling” Article 8 assessment without adequate justification. In Mr Whitwell’s submission the circumstances of the present case did not justify such an assessment. Secondly, it was argued by Mr Whitwell that the public interest was ignored by the Immigration Judge. It was the Sponsor’s choice to come to the UK and there were a number of negative factors impacting on the assessment in the case of Mrs Ilyas. These factors tended to suggest that in any event the respondent’s decision was proportionate in all the circumstances.
9. Mr Burrett on the other hand considered **Gulshan** to be of limited application. That case was decided on its own facts and did not represent guidance for other cases. It was submitted that the Rules may constitute a complete code in an appropriate case, such as a deportation appeal. However, this was not a deportation case. I was referred to the case of **MM [2014] EWCA Civ 985** but not provided with a copy. In particular, I was referred to paragraphs 128 and 129 of that case, which, after the hearing, I was able to refer to. According to those paragraphs, in deportation cases the new Rules represented a “comprehensive code” as to the criteria to apply where a foreign criminal seeks to remain in the UK on the grounds that his Article 8 rights would be infringed, but in other cases it is primarily for the fact-finder to determine whether there are grounds for granting leave to remain outside the Rules. I note that the cases referred to there are leave to remain cases, rather than entry clearance cases, but I will consider whether that is important later in this determination. The case of **Nagre** was thought not to add anything to the debate, save for the statement that if a particular person is outside the Rules and he has to demonstrate, as a preliminary to a consideration

outside the Rules, that he has an arguable case that there may be good grounds for granting leave to remain on that basis.

10. The Immigration Judge had fully considered Article 8 and found a family life to have been established. The sponsor had children (Najah born on 31st May 1994 and Najeelah born on 4th August 1997). The parties had met and Mrs Ilyas and her children had been maintained by the Sponsor. There were false documents referred to by the ECO but the judge weighing all factors together concluded that these were not important. The thrust of the submission on behalf of the respondent before the Upper Tribunal was that the decision of the First tier Tribunal was not contrary to the reasoning in **MM**, which in any event was largely irrelevant to the facts of this case. The judge, having considered the Rules in the context of the appellants' individual circumstances, had concluded that Article 8 was met. This was a decision he was entitled to come to in all the circumstances.
11. Mr Whitwell relied on a case called **Halamudeen** but was unable to provide a copy. The Immigration Rules were, in his submission, the end point for consideration of applications such as these.
12. At the end of the hearing I reserved my decision which I will give after the discussion below.

Discussion

13. Article 8 has been at the centre of a number of recent cases before the Upper Tribunal and Court of Appeal. Mr Burrett relied on the case of **MM**. In that case Blake J was found by the Court of Appeal to have been wrong to decide that the maintenance requirements set by the new Immigration Rules were too high so as to amount to a breach of the various appellants' Article 8 rights. The Secretary of State had introduced the new Rules in good faith under parliamentary power. They had been implemented in a non-discriminatory way and it was a proper executive decision to set the appropriate level for maintenance requirements. The new Immigration Rules represented a comprehensive code in relation to the matter before the court. It was only in a case where the Immigration Rules did not represent a composite code that it was appropriate for a court or Tribunal to embark on a free-standing proportionality assessment.
14. Although Mr Burrett criticised the frequent reference to the case of **Gulshan** by representatives for the respondent, it was a decision of Cranston J and Upper Tribunal Judge Taylor to which weight ought to be attached. In that case the Tribunal decided that the Immigration Rules ought to be the starting point. They were critical of the approach of the First-tier Tribunal in that the judge had embarked on a "free-wheeling" Article 8 analysis without finding first that the family life aspect of the claim was not adequately reflected in the Immigration Rules. In that case, it had been the respondent's conclusion that there were no

insurmountable obstacles to private or family life continuing even if further leave to remain was refused. There was nothing in the circumstances of the case which were compelling or insufficiently recognised by those Rules. The case was described as a “run of the mill case”. It is noteworthy that Mrs Gulshan was in the UK, albeit that she had family members in Pakistan. The Sponsor had come to the UK as a visitor but overstayed. He had subsequently applied for indefinite leave to remain and finally became a British citizen. The family visits had to come to an end because the appellant reached the upper age limit that was allowed by the Immigration Rules. There was, in the view of the Upper Tribunal, nothing to prevent the Sponsor returning to Pakistan for visits and although that was inconvenient it was not in any way disproportionate for the respondent to decide the case on that basis. The submission that the question was merely one of “reasonableness” was rejected. This was not the correct starting position.

15. In **MF Nigeria** the Court of Appeal dealt with the new Rules as they applied to foreign criminals and pointed out that a two stage approach was required. The Immigration Judge in that case was found to have departed from the two stage approach and exceptional circumstances were required with unjustifiably harsh consequences before it was possible to depart from the requirements of the Rules.
16. Finally, **Shahzad [2014] UKUT 00085** concerned the new Rules balanced against the public interest, including the economic well-being of the UK. The post-July 2012 Rules were found to be a complete code and the lack of strong or compelling circumstances on the facts of that case did not justify departure from their requirements.
17. Turning to the appeal in hand, Mrs Ilyas was found to have deliberately used deception in support of her applications for entry to the UK for family visits. The persistent use of a false name to facilitate entry to the UK was described by the Immigration Judge as an “aggravating circumstance” envisaged by paragraph 320(11) of the Immigration Rules so as to justify refusal. Plainly, she did not meet the requirements of the Rules therefore.
18. The Immigration Judge then went on to embark on a “proportionality” assessment but that should have been carried out within the framework of the new Rules. A number of the factors he refers to are of questionable relevance, such as the fact that the sponsor desired the appellants to have the “same opportunities in the UK that he had enjoyed” (paragraph 23(15) of the determination). With respect, it was not open to the appellants to choose which country to exercise their family life in, a point the Immigration Judge himself made at paragraph 23 of his determination. The decision as to whether they met the requirements of the Immigration Rules was the respondent’s and the weight to be attached to such matters as the desirability of the appellants being afforded better opportunities in life was limited.

19. Having found that the appellant had exercised deception it is difficult to think of a case in which the right to respect for the Immigration Rules was more likely to be diminished if the appellant succeeded solely on Article 8 grounds. It was a consequence of Mrs Ilyas's conduct that family visits were no longer able to take place and that should have been a factor carrying a great deal of weight. I find it inappropriate in the circumstances of this case for the Immigration Judge to have embarked on a free-standing Article 8 analysis without any regard to the reason why the Rules were there and why they needed to be respected. There is an inadequate recognition in the determination of the respondent's need to enforce effective immigration control into the UK. In circumstances where clear deception had been used it appears to this Tribunal to be a case strongly justifying refusal of entry clearance.
20. The Immigration Judge did not refer expressly to **Gulshan** and furthermore appears not to have adequately summarised recent case law. The true test is effectively whether there were exceptional circumstances justifying a departure from the requirements of the Rules. There appear to have been no such exceptional circumstances here.

My Decision

The decision of the First-tier Tribunal contains a material error of law such that the decision requires to be set aside. I substitute the decision of this Tribunal which is to dismiss the appeal against the refusal of entry clearance.

Signed

Date

Deputy Upper Tribunal Judge Hanbury