



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

PA/09177/2017

THE IMMIGRATION ACTS

Heard at Glasgow
on 7 March 2019

Decision & Reasons Promulgated
On 12 March 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

DANLING ZHANG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr B Murphy, of Katani & Co, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. FtT Judge Boyd dismissed the appellant's appeal on asylum and human rights grounds by a decision promulgated on 20 November 2017.
2. In his application for permission to appeal to the UT, the appellant stated this ground:

"The FtT considered ECHR article 8 at [65]. At no time is any reference made to the provisions of the immigration rules which deal with article 8 ... *Gulshan* [2013] UKUT 640 makes clear that this approach is not lawful, *"The judge then embarked on a free-wheeling*

article 8 analysis, unencumbered by the rules. That is not the correct approach.”

In failing to have regard to the ... rules, failing to identify the ... test ... in appendix FM EX.1, the reader is left in real doubt whether the tribunal followed the correct approach ... laid down by Parliament in the appendix.”

3. Deputy UT Judge Chapman granted permission (on the above ground only) on 11 October 2018, observing:

“... it is arguable that the judge failed to consider paragraph 276ADE(vi) or any material provisions relating to article 8 under the rules and failed to consider whether there were exceptional circumstances justifying consideration of article 8 outside the rules. Whether this would make a material difference ... will be a matter for the hearing.”
4. The respondent says in a response under rule 24:

“... It is difficult to see how formal consideration of 276ADE would have made any difference, when the judge has found no risk on return and no breach of article 3. Further, the judge fully considered the best interests of the children and found it would be reasonable to expect them to leave the UK ... there is no material error.”
5. Mr Murphy submitted that the omissions identified in the grounds and in the grant showed the FtT’s assessment of the case to be inadequate, and that the decision should be set aside, and possibly remitted to the FtT, for a full consideration under reference to the rules, and to statute (section 117B of the 2002 Act).
6. Having considered also the submissions for the respondent, I find that the making of the decision of the FtT did not involve the making of an error on a point of law, such that the UT should set it aside.
7. There is no longer a right of appeal on the grounds that a decision “is not in accordance with the law (including immigration rules)”.
8. Nevertheless, consideration of human rights begins with the terms of the rules, which are framed with the intention of complying with and reflecting article 8. The usual structure of the respondent’s decisions is to go through the provisions of the rules, and then to proceed to whether there is anything exceptional outside the rules. That is often also a useful framework for a tribunal, but it not a straitjacket. The appellant has not shown that on the facts as found by the FtT her case matched the requirements of the rules. She has not shown her complaint to be more than formal.
9. The point in *Gulshan* was that the FtT judge there had not been entitled to embark on a free-wheeling article 8 analysis, unencumbered by the rules, which led to the decision in favour of the appellant being reversed. The

error of which the appellant complains is one which tended in her favour rather than against her.

10. The judge may have made an error of form, but he made no error of substance. If his decision were to be remade within a fuller and more accurate legal framework, the outcome would be the same. No error is asserted in the findings of fact, by which the appeal could only rationally be dismissed. The decision of the First-tier Tribunal shall stand.
11. No anonymity direction has been requested or made.

A handwritten signature in black ink, appearing to read "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial "H".

7 March 2019
UT Judge Macleman