Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/09523/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham	**Determination Promulgated**
On 23 September 2014	**On 30 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MRS PARKASH WATI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Presenting Officer.
For the Respondent: Mr Z Jafferji, Counsel, instructed by Jusmount & Co, Solicitors

DETERMINATION AND REASONS

Claim History

1. The Appellant in this appeal was the Respondent at the First-tier Tribunal hearing on 6 May 2014. However, for ease of reference, the Appellant and

Respondent are hereinafter referred to as they were before the First-tier Tribunal. Therefore Mrs Wati is referred to as the Appellant and the Secretary of State is referred to as the Respondent.

2. The Appellant, a citizen of India, applied for leave to enter the United Kingdom as a dependent relative under Appendix FM of the Immigration Rules. Her application was refused and her appeal against refusal was dismissed by First-tier Tribunal Judge Hubball under the Immigration Rules and allowed under Article 8. He found that the Appellant could not meet the provisions of the Immigration Rules and, following the approach in **Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 640 (IAC)**, it was disproportionate to refuse leave under the Article 8 ECHR.

3. In the grounds of application, the Respondent submits that the Judge noted the guidance in **Gulshan**, that is only "…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 recognised under the Rules…", but failed to make any findings on this and proceeded to undertake a free standing Article 8 assessment. It is submitted that without making findings, the Judge could not undertake a freestanding Article 8 assessment.

4. Permission to appeal was granted on the basis that the grounds were arguable.

5. A Rule 24 response was not submitted by the Appellant.

The Hearing

6. Relying on the grounds of application, Mr Mills submitted that the Judge concluded that despite needing care due to her age and medical conditions, this was available through relatives, neighbours and a maid paid for by her family. The Judge found that the Immigration Rules relating to entry clearance for dependent relatives could not be met.

7. The crux of Mr Mills' submission was that although the Judge referred to **Gulshan** at [152] he ignored the requirement to establish if there are arguably good grounds or compelling circumstances for considering whether a free standing Article 8 assessment should be conducted. The Judge only made one reference to compelling circumstances and this was at [161]. He stated that the Judge was in effect saying, 'the requirements of the Immigration Rules are not met but I have compassion for her and will allow her appeal'. However, the Immigration Rules are a complete code and cover the majority of circumstances. If the Appellant's circumstances changed, she could re-apply.

8. Mr Jafferji submitted that the Judge set out the guidance in **Gulshan** expressly at [152]; he had this in mind when he assessed the Appellant's circumstances. At [77] he refers to the Appellant's emotional state following the deaths of her sisters Santosh and Kuldeep. The Judge noted the very strong emotional ties between the Appellant and her sons in the UK at [153]. At [161] the Judge stated, "I find that there are compelling and

compassionate circumstances in this case; given the Appellant's age, emotional and financial dependency and medical needs." Mr Jafferji submitted that whilst medical and financial needs were considered under the Immigration Rules, emotional needs and dependency was not accounted for. He submitted that whilst the Appellant's physical needs could be met in India, her emotional needs could not be catered for. Furthermore, the rights of other family members were not considered under the Immigration Rules; there was no consideration of the impact on other family members and evidence was provided to the Judge of her sons in the UK providing for her financially and supporting her through visits. This was a feature of the case he took into account under **Beoku-Betts [2008] UKHL 39** [162]; he found that it was not reasonable to expect them to live in India [163 – 164]. The emotional dependency aspect of the appeal was a significant feature and there was no error of law in the determination of the Judge.

Decision and reasons

9. I note that the Judge considered carefully the position of the Appellant under the Immigration Rules at [128] – [151]. It is clear from the determination that he did not accept all the evidence in relation to the Appellant's circumstances in India. He did not accept that her daughter Sudesh Kumari lived in the Philippines rather than in Nakodar in the Punjab [139]. He therefore considered the availability of emotional support in India when assessing the Appellant's circumstances. He did not accept that unpaid help from neighbours was the only assistance the Appellant had in India in relation to her care needs [146]. The findings he has made have not been challenged. Particularly, there was no challenge to the Judge's findings in relation to the emotional dependency between the Appellant and her family in the UK.

10. Having dealt with the position under the Immigration Rules, the Judge then turned to the guidance in **Gulshan**. I accept Mr Jafferji's submission that the Judge, having set out the guidance in **Gulshan** at [152], had this in mind when he considered the circumstances of the Appellant and her family.

11. The Judge reminded himself of the jurisprudence relating to the assessment of circumstances and concluded that there were 'compelling circumstances in this case' [161]. This refers back to the passage in **Gulshan**, at [152], setting out the need to consider whether compelling circumstances have been established. The Judge lists the compelling circumstances at [156], of which the only circumstance not considered under the Immigration Rules was the emotional dependency between the Appellant and her sons in the UK. The Judge was well aware of the legitimate aim under Article 8 (2) as set out at [156]. His finding, on the evidence before him, was that the refusal to grant entry clearance was disproportionate. He concluded that in the particular circumstances of the Appellant's case the decision to refuse was unlawful [164].

12. The challenge appears to be that the Judge did not use the terminology set out in **Gulshan** and **Nagre [2013] EWHC 720 (Admin)** which reflects the

terminology used by the Respondent in the guidance issued to decision-makers in deciding whether to grant leave outside the Immigration Rules. In **Nagre** it is stated:

> "14. The definition of "exceptional circumstances" which is given in this guidance equates such circumstances with there being unjustifiable hardship involved in removal such that it would be disproportionate – i.e. would involve a breach of Article 8."

13. The Judge found that the decision was 'unlawful', which is the same as stating that the outcome is 'unjustifiably harsh'. The failure to use the terminology set out in the guidance is not an error of law in the present case where the Judge considered the circumstances, applied the approach in **Gulshan** and reached a decision on the evidence before him. Another judge may have reached a different decision but the Judge's decision was open to him on the evidence before him and no material errors of law are disclosed.

Decision

14. The determination of Judge Hubball contains no material errors of law and his decision therefore must stand.

15. The Respondent's appeal is dismissed.

16. There was no application for an anonymity order before the First-tier Tribunal or before us. In the circumstances of this case, we see no reason to direct anonymity.

Signed Date

M Robertson
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT

In light of my decision, 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). As the appeal has been dismissed, Judge Hubball's fee award is confirmed.

Signed Dated

M Robertson
Deputy Judge of the Upper Tribunal