**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/24070/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 15th July 2014** | **On 25th July 2014** |

**Before**

**UPPER TRIBUNAL JUDGE MOULDEN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MRS A Y**
**MASTER N A**
**(Anonymity Direction Made)**

Respondents

**Representation:**

For the Appellant: Ms J Isherwood, a Senior Home Office Presenting Officer
For the Respondents: Mr J Collins counsel instructed by J McCarthy Solicitors

**DETERMINATION AND REASONS**

1. The appellant is the Secretary of State for the Home Department. I will refer to her as the Secretary of State. The respondents are citizens of Nigeria and mother and son. The mother was born on 12 October 1985 and her son on 2 December 2008. I will refer to her as the claimant, to him as her/the son and to both of them as the claimants. The claimant appealed against the Secretary of State's decision of 29 May 2013 to refuse to vary her leave to remain in the UK.

The son appealed against the Secretary of State's decision of 31 May 2013 to refuse to vary his leave to remain in the UK as the dependant of the claimant.

2. The claimants appealed and their appeals were heard by First-Tier Tribunal Judge Carroll ("the FTTJ") on 4 April 2014. Both parties were represented and the FTTJ heard evidence from the claimant and her partner (Mr S). The claimant accepted that she had not been in a relationship akin to marriage with her partner for two years prior to her application and that she did not meet the income requirements of the Immigration Rules. The appeals were pursued on Article 8 human rights grounds only.

3. Whilst the FTTJ did not in terms find the claimant and her partner to be credible witnesses it is sufficiently clear that she considered them to be credible and accepted their evidence. She considered the appeal exclusively on Article 8 grounds outside the Immigration Rules, applying Razgar principles (Razgar [2004] UKHL 27), and concluded that the Secretary of State's decisions would involve a disproportionate interference with the Article 8 human rights of both claimants. She allowed their appeals on Article 8 human rights grounds.

4. The Secretary of State applied for permission to appeal, one day out of time. The First-Tier Tribunal Judge who considered the application accepted the explanation for the delay and extended time as well as granting permission to appeal. The grounds argue that the FTTJ erred in law by failing to apply the principles set out in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC).

5. The summary of the provisions of Gulshan, prepared by the author of that determination, Cranston J, states;

> *"On the current state of the authorities:*
>
> *(a) the maintenance requirements of E-LTRP.3.1-3.2 stand, although Blake J in R (on the application of MM) v Secretary of State for the Home Department [2013] EWHC 1900 (Admin) said that they could constitute an unjustified and disproportionate interference with the ability of spouses to live together; he suggested that an appropriate figure may be around £13,400, and highlighted the position of young people and low wage earners caught by the higher figure in the rules;*
> *(b) 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: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);*
> *(c) the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8*

*– new rules) Nigeria [2012] UKUT 393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.*

*The Secretary of State addressed the Article 8 family aspects of the respondent's position through the Rules, in particular EX1, and the private life aspects through paragraph 276ADE. The judge should have done likewise, also paying attention to the Guidance. Thus the judge should have considered the Secretary of State's conclusion under EX.1 that there were no insurmountable obstacles preventing the continuation of the family life outside the UK. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for him for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules."*

6. At the hearing before me Mr Collins conceded that the FTTJ erred in law by failing to refer to or consider Gulshan principles. However, he argued that this was not a material error because, had the Gulshan principles been properly applied, the FTTJ would inevitably have reached the same conclusion. Ms Isherwood agreed that this was the issue at the core of this appeal.

7. Ms Isherwood provided me with the judgement of the Court of Appeal in MM (Lebanon) & Ors, R (on the application of) v Secretary of State for the Home Department & Anor [2014] EWCA Civ 985 (11 July 2014) but, after taking me to various passages, submitted that there was nothing to indicate that Gulshan principles should not continue to be applied. It remained good law. She argued that the findings of the FTTJ did not justify the operation of the first stage trigger in Gulshan or the second stage test of compelling circumstances not sufficiently recognised under the Rules. The claimants could not meet the provisions of the Immigration Rules. In reply to my question, Ms Isherwood accepted that the claimant and her partner had always had regard to and observed the Immigration Rules. They had always been in this country with leave.

8. Ms Isherwood submitted that the FTTJ had failed to consider the economic well-being of this country or to have proper regard to the requirements for Immigration control. However, she accepted that this line of argument was not included in the Secretary of State's grounds of appeal. She confirmed that there was no criticism of the FTTJ's findings of fact. I was asked to find that the determination contained errors of law, to set aside the decision and to re-determine the appeal on the evidence before the FTTJ. Were I to do so she would not wish to make any further submissions.

9. Mr Collins relied on Shahzad (Art 8: legitimate aim) Pakistan [2014] UKUT 85 (IAC) (26 February 2014). Like Ms Isherwood he could find nothing in MM to

indicate that Gulshan principles should not continue to be applied. He submitted that the claimants satisfied both tests in Gulshan. In the reasons for refusal letter dated 29 May 2013 the Secretary of State had not considered the Article 8 grounds except under the provisions of the Immigration Rules. Furthermore, she had not considered whether there were any exceptional circumstances under the provisions of EX1. He was not arguing that this was a "near miss" case and accepted that the claimants could not succeed under the Immigration Rules. The claimant and her partner had impeccable immigration histories and were accepted to be wholly credible. The claimant's partner had to all intents and purposes become her son's father. Her son did not see his natural father. In reply to my question, Mr Collins accepted that the FTTJ had made findings in relation to all essential facts. The best interests of the son were a paramount consideration. The FTTJ had properly concluded that the claimant's partner could not be expected to relocate to Nigeria, a country he had not visited since he was 11 years of age.

10. Mr Collins asked me to find that, whilst there was an error of law, it was not a material error or one which should cause me to set aside the decision. In the alternative, if I concluded that the decision should be set aside, he asked me to remake the decision and allow the appeal outside the Immigration Rules on Article 8 human rights grounds applying Gulshan principles. The claimants did not wish to put forward any further evidence or submissions.

11. I reserved my determination.

12. I find that the FTTJ erred in law. Having concluded that the claimants did not meet the requirements of the Immigration Rules she should have applied Gulshan principles. Firstly, she should have considered whether there were arguably good grounds for granting leave to remain outside the Rules. Secondly, if this question was answered in the affirmative, whether there were compelling circumstances not sufficiently recognised under the Rules. This course was set out in the skeleton argument before her. Instead, the FTTJ moved directly to an assessment of the Article 8 grounds outside the Immigration Rules applying the five stage tests in Razgar.

13. However, I must consider whether the error of law is such that I should set aside the decision or, put another way, whether it is a material error.

14. The FTTJ's findings of fact and assessment are set out in paragraphs 10 to 16 of the determination in which she said;

> "10. It is not in dispute that the appellant does not satisfy the provisions of the Immigration Rule. She was not able to demonstrate that, as at the date of the application, she had been living with Mr S in a relationship akin to marriage for at least two years. It is, however, argued with great force on behalf of the appellant that if it is right that but for the two-year requirement of cohabitation, the appellant satisfies the Immigration Rules then she is placed in a very difficult position. She cannot withdraw her

application and apply now under the Rules as she would lose her leave to remain and her right to work lawfully, by virtue of Section 3C of the Immigration Act 1971. She would be placed in the position of being unable to succeed under the financial requirements of the Immigration Rules and would be an overstayer.

11. In considering the appellant's family and private life by reference to Article 8 I am, of course, guided by the questions articulated by Lord Bingham in ex parte Razgar [2004] UKHL 27. The respondent's decision is made in pursuit of a legitimate aim and the question which falls to be considered is that of proportionality. I must consider Lord Bingham's step-by-step approach and in so doing recognise that at all stages of the Article 8 assessment, when deciding whether there is a family or private life, whether any existing family or private life is the subject of interference having grave consequences and whether any such interference is proportionate to the legitimate public end sought to be achieved, the approach is to take into account a wide range of circumstances including the appellant's previous family and personal circumstances and likely developments in the future. I must also consider the consequences of the respondent's decision upon all members of the appellants' family unit and the best interests of the first appellant's child in the United Kingdom.

12. I have had the benefit of oral evidence from the first appellant and Mr S and am satisfied that the relationship between them is one of great mutual commitment. They intend to marry at some point in the future, when the first appellant's immigration status is resolved. The first appellant, Mr S and (the son) all enjoy a family life together and I am satisfied that Mr S has assumed the role of (the son's) father, since he began to live with both appellants in May 2012. The first appellant says that (her son) believes that Mr S is his biological father and refers to him as "daddy". Mr S has been involved with all aspects of (the son's) day-to-day care since he and the first appellant began living together.

13. It was argued at the hearing that Mr S could relocate to Nigeria to continue his family life there with the first appellant and (the son). He has, however, been living in the United Kingdom for 30 years, having travelled here first when he was 11 for the purposes of his education. He has not since then returned to Nigeria. He is a British national and, as an EU citizen, cannot properly be expected to relocate to Nigeria and lose the benefit of his EU citizenship.

14. The respondent's decision amounts to an interference with the family life of the appellants' family unit. In considering the best interests of (the son), I note he is still comparatively young but all his life has been spent in the United Kingdom where he is now being educated and where all his immediate family and social ties are. Both the first appellant and Mr S have been entirely candid about the presence of family members in

Nigeria where the first appellant's mother continues to live. However, separation of (the son) from the father figure in his life, namely Mr S, would have nothing but an adverse impact upon him.

15. The first appellant has been lawfully present in the United Kingdom since November 2004. She has had various grants of leave to remain as a student and then as a post study worker. For the last five years she has been working for a finance company and her present salary is £21,500 per year (excluding bonuses). The first appellant's sister is present and settled in the United Kingdom. The first appellant has an extensive network of friends in the United Kingdom and is a very committed member of her church (see letter from the church pastor at page 56 of the appellant's bundle).

16.In the light of all the evidence, in particular relating to the strong family life existing between the first appellant, Mr S and (the son), I find that the respondent's decision under appeal prejudices the appellant's family and private life in a manner sufficiently serious to give rise to a breach of the fundamental rights protected by Article 8."

15. The findings of fact contained in these paragraphs are not disputed by the Secretary of State. Mr Collins accepts that all the essential facts are set out.

16. On these facts I find that any judge properly directing himself or herself would have come to the conclusion there were arguably good grounds for granting leave to remain outside the Rules. I note that the test is only that of "arguably good grounds" which is lower than a test of "good grounds".

17. The grounds of appeal do not argue that the FTTJ's assessment of the Article 8 grounds outside the Immigration Rules applying the five stage Razgar tests is intrinsically flawed. The grounds argue that the error was to make a freestanding Article 8 assessment without considering whether there were compelling circumstances not sufficiently recognised under the Rules. I find that any judge properly directing himself or herself would have come to the conclusion that this was a case where there were compelling circumstances not sufficiently recognised under the Rules. These circumstances are contained in the passages in the FTTJ's determination which I have set out but in summary they are as follows. The best interests of the son, which are a primary consideration. It is important that he should able to live with the claimant and Mr S. The son regards Mr S as his father and is settled and doing well at school. Mr S cannot properly (or reasonably) be expected to relocate to Nigeria. The claimant and Mr S are law abiding citizens who have always observed the requirements of the Immigration Rules and remained in this country with leave to be here. This is a factor which impinges on the public interest in the maintenance of effective immigration control which is either an aspect of the prevention of disorder or crime or the economic well-being of the country, or both. Both of them are working and not relying on public support. The claimant and Mr S are in a settled relationship with "great mutual

commitment". The claimant is in the invidious position set out in paragraph 10 of the determination where, if this appeal fails, the Rules will prevent her from attempting to achieve any other lawful way of remaining in this country. Finally, the claimant has an extensive network of friends in this country including those derived from her work and church.

18. Had I reached the conclusion that the was an error of law such that the decision should be set aside I would, in remaking the decision, have found that there were arguably good grounds for granting leave to remain outside the Rules and that there were compelling circumstances not sufficiently recognised under the Rules to allow the appeals on Article 8 human rights grounds outside the Immigration Rules.

19. The FTTJ did not make an anonymity direction but I consider it necessary to do so in order to protect the interests of the son.

20. I make an order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the claimant, her son or any members of their family.

21. I dismiss the Secretary of State's appeal and uphold the decision of the FTTJ.

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Signed Date 16 July 2014
Upper Tribunal Judge Moulden