Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/26491/2013
IA/26524/2013
IA/26529/2013
IA/26536/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 April 2014	**On 28th April 2014**

Before

MR JUSTICE BEAN
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE MCGEACHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS NI
MR FNB
MISS MRB
MISS SRB
(ANONYMITY ORDER MADE)

Respondents

Representation:

For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondents: Mr A Burrett, Counsel, instructed by Bukhari Chambers Solicitors

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DETERMINATION AND REASONS

1. The four appellants before the First-tier Tribunal in this case are a married couple and their two children. In view of the involvement of the children we consider that it is a proper case for anonymity. We shall refer to them as the appellants although this is the Secretary of State's appeal.

2. The appeal is brought from the determination of Immigration Judge Samimi sitting in the First-tier Tribunal. The determination followed a hearing at Hatton Cross on 20 January 2014 and was promulgated on 20 February. The appellants had applied for variation of their leave to remain in order to enable them all to remain in the UK rather than being returned to Pakistan. For reasons which were given in the refusal letter from the UK Border Agency dated 10 June 2013 they did not have any right to remain under the Rules. The decision sets out the requirements for obtaining leave to remain under what is briefly referred to as the partner route and the parent route and also dealt with paragraph 276ADE of the Immigration Rules under the heading "Decision under Private Life". Even under that last heading the appellants did not meet the requirements of the Rules at the date of application.

3. At paragraph 8 of his determination Judge Samimi noted that Mr Richardson, Counsel for the appellants before the First-tier Tribunal, accepted that the appellants could not meet the Immigration Rules in this case at the date of application and the only outstanding issue in the proceedings before the First-tier Tribunal related to the appellants' Article 8 rights. The judge referred to the observation of this Tribunal in **Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC)** that "the uniform application of the Immigration Rules is not a legitimate aim in itself justifying interference with Article 8 rights" and that "therefore the fact that a person cannot meet the requirements for leave under HC 914 dos not mean that the Secretary of State can for that reason alone demonstrate a proportionate and justified interference to prevent disorder".

4. The judge went on to make findings of fact which are not challenged on appeal, as follows:

> "The appellants are a Christian family who have adapted to life in this country and whose children have settled both at school as well as in terms of their activities with the church. The appellants have resided in the United Kingdom for nine years, we add in the case of the adult appellants, which is a consideration period having regard to the fact that the children were born and raised here. The elder child has been born and living here for the last seven years. The appellants have complied with the Immigration Rules at all times and for the majority of the nine years have been here with lawful leave. I accept that the appellants have a supportive network of family and friends and have

financially supported themselves since their arrival in the United Kingdom. The appellant has clearly contributed to the economic wellbeing of the country."

5. The judge said that in the circumstances of this case he found that the principal appellant's removal from the UK would constitute an interference with her family and private life. He found that such interference was disproportionate to the interests of immigration control. He found, and again this is not challenged, that the appellants' children in particular have been brought up to speak only English which would clearly cause difficulties if they are uprooted to Pakistan in order to resume their education and that the family's religious life would be adversely affected because of the increasing level of discrimination against Christians as set out in the Country of Origin Information Report on Pakistan. The judge referred to the decision of the House of Lords in **Razgar** and the five well-known questions formulated by Lord Bingham of Cornhill which we need not repeat in this judgment. He continued with further findings in paragraph 11 as follows:

> "In carrying out the balancing exercise, I have regard to the fact that the appellants have established a private and family life over the course of the last nine years, which does amount to a substantial period of time during which the appellant and her husband have had two children who have in their own right not only strengthened the appellant's ties to the community and family members but have developed their own routes and connections. Although I find that the children are young enough to adjust to a new life in Pakistan, I find on the totality of the circumstances in this case that there are factors that cumulatively do render the respondent's decision a disproportionate interference with the appellant and her family's private life. These include the fact that the appellant's elder child has spent seven years of her life in the UK and both children are well-settled in school. They have been christened at the Church of England Church and have been actively involved in church activities. The family attend church on a regular basis. The appellant has studied and worked in the UK and has contributed to the economic wellbeing of this country. I do find that the removal of the appellants and her children would cause a disproportionate interference to the strong family ties that the appellants have built."

There then follows paragraph 12 which, with respect, contains one error of wording and one reference to the case of **EB (Kosovo) [2008] UKHL 41,** which seems to us to be irrelevant, but this paragraph is not material to the decision.

6. At paragraph 13 the judge continued:

> "I find there are reasons to believe that the removal of the appellants would cause an adverse effect on the wellbeing of the appellants and in particular the life of the two children of the family. I find that in the

circumstances of this case it is unreasonable to expect the appellants and their two children to continue their family and private life in Pakistan where the family and in particular the children have no social, cultural or religious links. There are factors that would undermine the ability of the appellants to resume their life and care of their children in Pakistan. I have regard to **EA (Article 8 – best interests of child) Nigeria [2011] UKUT 00315 (IAC)**."

7. The judge then went on to refer as this Tribunal did in the case of **EA,** to the leading case of **ZH (Tanzania)** and the emphasis placed by Baroness Hale on the best interests of the child – see paragraph 29 of her judgment in that case. The judge's conclusion was that there were factors as set out above that render removal "unjustifiably harsh in this case as set out in **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)**".

8. The grounds of appeal lodged by the Secretary of State and the basis on which permission was given to her to appeal to this Tribunal was that although the judge in the very last paragraph of the judgment made brief reference to **Gulshan**, the judgment did not follow the guidance given in **Gulshan** as to a structured approach to a decision in a case of this type, namely to consider first whether there are or are arguably good grounds for granting leave to remain outside the Rules and then to go on to consider whether there are compelling circumstances not sufficiently recognised under the Rules.

9. We note that this Tribunal in **Gulshan**, having set out the proper approach, went on to say about the case before them that "on the judge's own findings this was a very run of the mill case with no compelling circumstances" and set out the facts which led them to that conclusion. This Tribunal found there were no insurmountable obstacles to family life in Pakistan and no unjustifiably harsh results from removal.

10. Mr Walker realistically accepts before us that it is not the case that, where a judge has omitted to structure his or her determination in the way which this Tribunal in **Gulshan** said it should be structured before deciding in an appellant's favour on Article 8 grounds the determination must automatically be set aside. In our judgement it depends on the facts and in particular whether the failure to follow the structured approach was material to the outcome. The real question in the present case was whether it was open to the judge to conclude that removal of this family to Pakistan would be unjustifiably harsh and amount to a disproportionate interference with the private lives of the four members of the family bearing in mind his findings, in particular that the children were born and raised here and the elder child has now lived here for seven years. They have been brought up to speak only English, are well-settled at school and have no cultural or religious links with Pakistan. They are Christians, regular churchgoers and involved in church activities and as the judge noted, there is evidence of increasing difficulties faced by Christians in

Pakistan and the family have strong community ties here and have led law-abiding lives.

11. In **Mukarkar v Secretary of State for the Home Department [2006] EWCA Civ 1045** Lord Justice Carnwath as he then was with whom Lord Justices Auld and Sedley said:

> "Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis. It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case. The mere fact that one Tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new. Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future."

12. We are grateful to Mr Walker for his responsible stance upon this appeal. We consider that on the facts of this case the judge's failure to follow the guidance in **Gulshan** did not amount to a material error of law vitiating his conclusion. Although the judge's conclusion as to proportionality may be regarded by some as generous it was not so generous as to amount to an error of law. By way of footnote we would add that we are fortified in our view of the judge's conclusion as to proportionality by the fact that the elder child has now lived in the UK continuously for seven years and that accordingly, if a fresh application were to be made, the family's prospects of making a successful application within the Rules would be greatly improved. Be that as it may, for the reasons we have given, we dismiss the appeal.

Signed Date

For and on behalf of the Honourable
Mr Justice Bean sitting as a Judge of the Upper Tribunal