Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27199/2013
IA/27202/2013
IA/27005/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 13th May 2014	**On 30th May 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) MR MUHAMMAD AJMAL HAMID

(2) MRS MIRA NAEEM

(3) MR MASEEHUDDIN AHMED GIYASUDDIN AHMED

(ANONYMITY NOT DIRECTED)

Respondents

DETERMINATION AND REASONS

1. The Secretary of State appeals, with permission, against the decision of the First-tier Tribunal (Judge Mensah) to allow the respondents' appeals against the refusal of their applications (in the case of the first and third appellants) for leave to remain as Tier 1 (Entrepreneur) Migrants under the Points Based System and (in the case of the second appellant) as the dependent of the first appellant.

2. The first and second respondents are citizens of Pakistan. They have two young children who are under 4 years of age and who were born in the United Kingdom. The third respondent is a single man who is a citizen of India. The first and third respondents are business partners in the United Kingdom and it was upon this basis that they applied for leave to remain as Tier 1 (Entrepreneur) Migrants. It was common ground in the First-tier Tribunal that those applications could not succeed on the basis of the documents that were before the decision-maker. The respondents nevertheless submitted fresh documentation to the Tribunal which, had they been before the decision-maker, would likely have resulted in their applications being granted. However, the Tribunal was precluded allowing their appeals on this basis as a result of the restrictions on the admission of fresh evidence imposed by Section 85 of the Nationality, Immigration and Asylum Act 2002 (as amended). The Tribunal therefore allowed the appeals on the ground that the respondents' removal from the United Kingdom would be incompatible with their right to respect for private life, as guaranteed by Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. The grounds of appeal against that decision are that the Tribunal (1) took account of an immaterial matter, namely, the fact that the first and third respondents would likely succeed in a fresh application for leave to remain as Tier 1 (Entrepreneur) Migrants, and (2) failed to direct itself in relation to the need to identify exceptional or compelling circumstances which fell outside the scope of paragraph 276ADE of the Immigration Rules (the requirements for leave to remain on the basis of private life) and which might therefore justify a grant of discretionary leave to remain outside the Rules.

3. Under the heading 'Findings', the judge began her consideration of the appeal by citing the case of Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640. It was said in that case that, after applying the requirements of the rules, it was only if there may arguably be good grounds for granting leave to remain outside them that it would be necessary, for Article 8 purposes, to go on to consider whether there were compelling circumstances not sufficiently recognised under them. The judge then cited passages from the judgement of Lord Carnwath in Patel and others [2013] UKUT 640, in which it was said that a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit. The judge thereafter continued as follows:

> 19. I am therefore of the view that the term "compelling" in the case of Gulshan is saying no more than that the consideration outside the rules is only relevant were (sic) there are private and family life considerations which are strong enough to reach the high Article 8 threshold and which tip the 'Huang' test on proportionality in favour of the appellants so as to make refusing their appeal a disproportionate response in all the circumstances.

4. The judge thereafter noted the lack of evidence that any of the respondents had developed social ties to the United Kingdom beyond those that they had established with each other. She was nevertheless "just persuaded" that Article 8 would be

engaged by the appellants' removal. She reached that conclusion on the basis of the length of time that the appellants had been studying and working in the United Kingdom.

5. The judge then turned to consider the public interest in their removal. In doing so, she noted that it was in the interests of the economic well-being of the country for those who reside in the United Kingdom to be able to meet the financial requirements of the Immigration Rules. It was in this context that, at paragraph 21, she made the following observation:

> It appears the appellants have access to funds which appear to support them showing that it is not against the economic interest of the country for them to remain. In fact they have sufficient funds to set up a business in the UK which would of course contribute economically to the UK through taxes. I am of the view this balances in favour of the appellants. In terms of immigration control they could be forced to make a new application with the new documents and they would show that they have a joint bank account with £50,000 available.

6. The judge expressed her conclusions at paragraph 22:

> Does the failure to submit the correct documents tip the balance against the appellants? I have carefully considered the fact that they now have the evidence and therefore could today meet the rules. If the maintenance of immigration control is simply to force legitimate appellants to apply twice then I cannot see how that benefits immigration control and it seems to be it would simply contribute to clogging up the immigration system and cause cost and delay to both the public purse and the appellants. They have always lived lawfully in the UK and as far as I can see they simply misunderstood what evidence they needed to produce.

7. I am satisfied that the Tribunal's legal analysis of these appeals was flawed in several respects.

8. The judge's summary of the principles in Gulshan was, in my judgement, very-far from accurate.. For instance, it is unclear why (at paragraph 19) the judge considered that the threshold for engagement of Article 8 was a high one. In fact, the reverse is the case. Moreover, the judge's flawed analysis of the principles in Gulshan caused her to move directly to an assessment of Article 8, outside the Rules, without first considering whether (and, if so, why) the appellants were unable to meet the requirements for leave to remain on the basis of private life under paragraph 276ADE of the Rules. Whilst acknowledging that this was the first step in the Gulshan approach, Mr Richardson argued that the judge's failure to take that it was immaterial because she had in any event carefully weighed all the factors that were relevant to the Article 8 assessment, whether that be within or outside the context of the Rules. I disagree with that submission for a number of reasons.

9. Had the judge given any consideration at all to paragraph 276ADE, she would have been bound to conclude that not only did the respondents' residence in the United Kingdom fall considerably short of the minimum 20-year period that is required as a basis for settlement, but also that they had failed to meet the alternative basis for settlement under that paragraph; namely, that they were without social, cultural or family ties to their respective countries of origin. This in turn would have reminded her, when considering whether there were compelling circumstances outside the Rules, that it is necessary not only to consider the strength of a claimant's ties to the host country (which appears to have been the sole focus of the judge's analysis of the appellants' private life) but also to consider the existence and strength of his or her ties to the country of origin.

10. I am also satisfied that the judge conducted a legally flawed analysis of the public interest that lay in the respondents' removal.

11. Firstly, it is not legally correct to say that the fact that the respondents were financially self-sufficient was a matter that balanced in their favour. The correct legal position was stated in Nasim and others (Article 8) [2014] UKUT 00025 (IAC):

> A person's human rights are not enhanced by not committing criminal offences or not relying on public funds. The only significance of such matters in cases concerning proposed or hypothetical removal from the United Kingdom is to preclude the Secretary of State from pointing to any public interest justifying removal over and above the basic importance of maintaining a firm and coherent system of immigration control.

Insofar as the operation of businesses by foreign nationals might be said to benefit the United Kingdom economy, this is a public policy consideration that it is for the Secretary of State to determine and implement through the operation of immigration rules, and not one for individual assessment by the Tribunal. The respondents' financial situation was thus a neutral rather than a positive factor.

12. Secondly, whilst formally disavowing the 'near-miss' approach to the assessment under Article 8, the judge's reasoning in the relation to the likelihood that the first and third respondents would succeed in a fresh application for leave to remain as Tier 1 (Entrepreneur) Migrants came perilously close to adopting that very approach

13. Thirdly, in assessing whether the respondents' proposed removal would be incompatible with their rights under Article 8, the Tribunal was required to consider the circumstances that appertained at the date of the hearing of the appeal. Those circumstances did not include a further application by the respondents for leave to remain. Thus, far from the public interest 'requiring' the respondents to make a second in-country application for leave to remain, the circumstances that the Tribunal was required to consider (that is to say, the hypothetical removal of the respondents at the date of the hearing) precluded consideration of any such possibility.

14. The judge was thus, in reality, utilising Article 8 in order to provide the respondents with a second-chance of meeting the requirements for leave to remain as Tier 1 (Entrepreneur) Migrants, they having failed to do so in the application that was the subject-matter of the appeal. As stated in the grounds of appeal, that was not an approach that was legally open to the Tribunal. Indeed, it was the very thing that Parliament had intended to prevent through its amendments to Section 85 of the Nationality, Immigration and Asylum Act 2003

15. I therefore conclude that the First-tier Tribunal's legal analysis of these appeals was so fundamentally flawed that its decision cannot be permitted to stand and must be set aside. Having informed the representatives that I had arrived at this conclusion, I heard their submissions upon the substantive merits of the appeal. These have greatly assisted me in re-making the decision. I have based my decision entirely upon the evidence that was before the First-tier Tribunal, together with the primary findings of fact that it found and which I have preserved.

16. The first respondent is a Pakistani national. He arrived in the United Kingdom in January 2007, aged 33 years. He has thus resided continuously in the United Kingdom for a period of over 7 years. The second respondent joined him in December 2010, aged 24 years. She has thus resided continuously in the United Kingdom for a period of 3 years and 4 months. They have two children, the eldest of which is aged 3 years. Although they were born in the United Kingdom, neither of them is a British citizen. Their best interests are thus served by them remaining with their parents. The third respondent is an Indian national. He arrived in the United Kingdom in February 2008, aged 25 years. He has thus continuously resided in the United Kingdom for a period of over 6 years. Although each of the respondents had leave to remain throughout their respective periods of residence in the United Kingdom, such leave was always of limited duration. They can thus have had no legitimate expectation that they would be permitted to remain after their leave had expired. There is no evidence as to whether the respondents have continuing family, social or cultural ties to their respective countries of origin. However, as they bear the legal burden of proof, the absence of evidence means that the respondents must be presumed to have such ties. As neither of the first two respondents nor their children has settled status in the United Kingdom, it follows that they are unable to meet the eligibility requirements for leave to remain under Appendix FM of the Immigration Rules. As none of the respondents have resided continuously in the United Kingdom for a period of 20 years, or are without remaining social, cultural or family ties to their respective countries of origin, it follows that they are unable to meet the requirements for leave to remain on the basis of their private lives under paragraph 276ADE of the Immigration Rules. The evidence does not, in my judgement, reveal any compelling circumstances that would render the respondents' removal unjustifiably harsh (or disproportionate) in furtherance of the legitimate aim of maintaining the economic well being of the country through the consistent application of immigration controls. There is thus no basis for granting them discretionary leave to remain outside the Immigration Rules.

Decision

17. The appeal by the Secretary of State is allowed.

18. The decision of the First-tier Tribunal to allow the appeals against refusal of leave to remain and removal of the respondents from the United Kingdom is set aside and is substituted by a decision to dismiss those appeals.

Anonymity is not directed.

Signed Date

Judge of the First-tier Tribunal