IAC-AH-DH-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38120/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 16 July 2014	**On 21st Oct 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

P M R
(ANONYMITY ORDER MADE)
Respondent

Representation:

For the Appellant: Mrs Pettersen, a Senior Home Office Presenting Officer
For the Respondent: Ms Hitchens, Ryedale Citizens Advice Bureau

DETERMINATION AND REASONS

1. The respondent, P M R, is a citizen of the United States of America. He has appealed against the decision of the Secretary of State dated 3 September 2013 to refuse his application for leave to remain in the United Kingdom. His appeal was allowed by the First-tier Tribunal (Judge Malik) in a

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determination promulgated on 4 February 2014. The Secretary of State now appeals, with permission, to the Upper Tribunal. I shall hereafter refer to the appellant as the respondent and the respondent as the appellant (as they respectively appeared before the First-tier Tribunal).

2. Both parties agree that the appellant's application could not succeed under the Immigration Rules because it failed to meet the requirements of E-LTRP2.1. In addition, the appellant failed to meet the requirements of paragraph 276ADE because he had been in the United Kingdom for less than twenty years and was over the age of 18 years. The issue in the appeal is whether the judge from the First-tier Tribunal should have left matters at that point and whether he was right to (a) go on to consider the appeal on Article 8 ECHR grounds and (b) to allow the appeal on that ground.

3. The grounds complain that the judge failed to follow the decision of the Upper Tribunal in **Gulshan [2013] UKUT 00640 (IAC)**. The judge failed to identify compelling or exceptional circumstances in the case which would justify an Article 8 ECHR analysis. The grounds assert that the appellant's spouse had been able to cope for the majority of her life without the appellant's presence with her in the United Kingdom and had assistance from social services and other agencies.

4. The appellant is married to a British citizen (TR), having met her online in March 2011. He came to visit her in the United Kingdom in August 2012 and remained for five months before returning to the USA. A week later, TR travelled to the USA and the parties were married. Both the appellant and his wife travelled to the United Kingdom together, the appellant on a visit visa. During the currency of that visa, he applied for further leave to remain. TR suffers from severe mental health problems including severe bulimia and major depressive illness with suicidal tendencies. The judge had before him a number of items of medical evidence which indicated that TR was at possible risk of committing suicide if her husband returned to the USA which indicated that the appellant's presence in the United Kingdom was "very positive" for TR.

5. Having found that the appeal should be dismissed under the Immigration Rules, Judge Malik wrote at [10],

> Whilst the appellant does not meet the requirements under the Rules, I have gone on to consider his family and private life under Article 8 of the ECHR.

6. Mrs Pettersen, for the Secretary of State, submitted that the judge had failed to identify any compelling circumstances which justified considering the matter under Article 8.

7. Dealing first with the question whether the judge was right to go on to consider Article 8, I acknowledge that the decisions in **Gulshan** and also **Nagre [2013] EWHC 720 (Admin)** certainly appear to impose an intermediary test, between the dismissal of an Immigration Rules appeal and the possible consideration of Article 8 ECHR, which the judge in this

instance has not conducted. However, whether that constitutes an error of law such that the determination should be set aside is a different matter. In **MM [2014] EWCA Civ 985** the Court of Appeal recently considered the various authorities observing as follows at [129]:

> Sales J's decision therefore follows the logic of Laws LJ's statements in [38]-[39] of ***AM(Ethiopia),*** analysed above. However, there is a difference in that in ***Nagre*** the new rules were themselves attempting to cover, generally, circumstances where an individual should be allowed to remain in the UK on ***Article 8*** grounds; whereas in ***AM(Ethiopia)*** and in the present appeals the rule challenged stipulates a particular requirement that has to be fulfilled before the applicant will be allowed to enter or remain. The argument in each case is that it is that specific requirement that offends ***Article 8. Nagre*** does not add anything to the debate, save for the statement that if a particular person is outside the rule then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is or there is not a further ***Article 8*** claim. That will have to be determined by the relevant decision-maker.

8. Applying the principle enunciated in **MM** to the current appeal, I find that the judge did not err in law by failing to identify exceptional compelling circumstances before going on to consider Article 8. It is quite clear that the judge considered that the circumstances in this appeal were so compelling that he needed to consider them to complete his determination on all the relevant grounds of appeal. As regards the analysis itself, I do not identify any error of law. The judge has set out the jurisprudence accurately and has applied it to the facts as he found them. He identified the negative impact which would be caused to TR and also TR's daughter by requiring the appellant to return to the USA to make an out of country application for entry clearance. He found that TR's ill health precluded her from joining the appellant in the USA, even in the short term. Medical evidence before the judge (which he accepted in its entirety) paints a very alarming picture of the possible impact which the appellant's removal would have upon TR. In the circumstances, I find that the judge reached a conclusion which was open to him on the facts and which he has supported by adequate reasoning. Accordingly, this appeal is dismissed.

DECISION

9. This appeal is dismissed.

Direction Regarding Anonymity – Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant

and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 20 September 2014

Upper Tribunal Judge Clive Lane