Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46546/2013; IA/46543/2013; IA/46556/2013; IA/46552/2013

THE IMMIGRATION ACTS

Heard at Field House
On 23rd May 2014

Determination Promulgated
On 28th May 2014

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And
MIKHAIL GRES
NATALIA VASYUKOVA
DANIIL GRES
MAXIM GRES

Respondents

Representation:

For the Appellant: Ms A Everett, senior Home Office Presenting Officer
For the Respondents: Mr A Gilbert, counsel, instructed by Elizabeth Millar solicitor.

DETERMINATION AND REASONS

1. The appellant (hereafter the SSHD) appeals a decision of the First-tier Tribunal which allowed an appeal by the respondents (hereafter the claimants) against decisions dated 21st October 2013 of the SSHD to remove them from the UK pursuant to s10 Immigration and Asylum Act 1999.

2. Permission to appeal had been granted on the basis that it was arguable that the judge misdirected himself

> "….as to Article 8 and in particular, failed to have due regard to the decision of Gulshan [2013] UKUT 00640. The grounds argue that the judge failed to consider whether there were insurmountable obstacles to the appellant and her family pursuing their family life together in Russia and misdirected himself as to the best interest of the minor children.
> It is arguable from the determination that the Judge did not properly consider the principles set down in Gulshan and does amount to an arguable error of law. It is also arguable that the judge attached too little weight to Appendix FM…"

Background

3. Mikhail Gres entered the UK as a student on 4th June 2001 and was granted extensions of stay as a student until 9th April 2009; a further application for leave to remain was refused and the appeal dismissed on 23rd March 2010; an application for permission to appeal to the Upper Tribunal was refused on 16th June 2010. His wife, Natalia Vasyukova, arrived in the UK as his dependant in 2006. Their two children were born in the UK on 16th July 2007 and 2nd January 2011. The older child has started school here in the UK. All remained in the UK without leave to remain after June 2010.

4. On 23rd December 2011 the claimants sought leave to remain on the grounds of right to family life and private life under Article 8. That application was refused on 5th January 2013. Following judicial review proceedings, the application was reconsidered by the SSHD and further refused, having considered the application under Appendix FM, paragraph 276ADE and paragraph 353B, on 21st October 2013. Decisions to remove the claimants in accordance with s10 Immigration and Asylum Act 1999 were made the same date and served. The claimants appealed those decisions and thus came before the First-tier Tribunal.

5. The claimants' appealed on the grounds that there had been a failure to properly consider s55 Borders, Citizenship and Immigration Act 2009 and that there had been a failure to properly apply the Strasbourg jurisprudence in relation to Article 8.

6. The First-tier Tribunal set out the claimants background in Russia/Ukraine, the oral evidence heard and the contribution made by the claimants to the UK both economically and socially. The First-tier Tribunal found that the claimants did not meet the requirements of Appendix FM, paragraph 276ADE and that there was nothing unlawful or unreasonable in the consideration by the SSHD of the consideration under paragraph 353B. There was no challenge to those findings before me.

Error of Law

7. The grounds seeking permission to appeal are fourfold. *Ground 1* asserts that the First-tier Tribunal judge has failed to identify "any compelling circumstances

which would render the [claimants'] removal unjustifiably harsh". The First-tier Tribunal in [22] states that in accordance with Gulshan and Nagre [2013] EWHC 720 (Admin), if, after applying the requirements of the Immigration Rules, there may be arguable good grounds for granting leave to remain outside the Rules, then it is necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the Rules. In [23] the First-tier Tribunal agrees with the submission by the claimants that there are such compelling and compassionate reasons and therefore went on to consider the appeal outside the Rules. There is no reasoning for this conclusion but I do not agree with the SSHD's submission that this is an error of law. The oldest child has been in the UK for almost seven years, was born in the UK and has started school here. Mr Gres had been in the UK for over 10 years by the date of the decision to remove him and it is thus plain that there may be factors which require consideration outside the Rules.

8. *Ground 2* submits that the First-tier Tribunal judge erred in law in finding that there would be an interference in family life on removal because the claimants would be removed together, as a family. She further asserts that the First-tier Tribunal judge erred in failing to balance the claimants' failure to adhere to the Immigration Rules against the legitimate aim. The claimant responds that there was an implicit engagement with the SSHD's legitimate aim in paragraph 29 where the judge refers to Mr Gres' lack of right to work alongside his employment, length of residence and the birth of two children.

9. *Ground 3* argues that the judge failed to consider whether there were insurmountable obstacles to the family continuing their private life outside the UK. The ground submits that "insurmountable obstacles"

> ".. constitutes serious difficulties and "entail something that could not be overcome, even with a degree of hardship….It is not something that is merely unreasonable or undesirable….The Rules require an assessment of whether removal is prevented by 'insurmountable obstacles' rather than whether it is 'reasonable to expect' the family to leave together. It is submitted that the changes to the Immigration Rules with the Article 8 provisions introduced in July 2012 clarified an important issue on this point. Prior to that time caselaw listed possible relevant factors but left it to the individual decision maker in an individual case to determine how best to balance the relevant factors, based on that person's perception of public policy considerations. This resulted in divergent outcomes as decision makers had to reach their own view on the public policy imperatives, without a clear statement from the Secretary of State and Parliament on where public interest lies. Since the new Rules came into force decision makers no longer operate in a policy vacuum. It is acknowledged that the facts of each individual case are the starting point when considering proportionality, but they are also the starting point which then has to be balanced against the public interest as reflected in the new Rules. The public interest achieved by applying clear rules must be measured by the effect of the rules across the board, not just in relation to an individual case."

10. *Ground 4* submits that the First-tier Tribunal misdirected itself in the assessment of the best interest of the child, that the Rules make clear that a child with less

than seven years in the UK will not have developed enough private life to outweigh the public interest in immigration control; that the judge failed to weigh in the balance that it would not be unjustifiably harsh to require a child with less than seven years residence to travel to another country; that children whose parents are in the UK on a temporary basis only can reasonable be expected to leave with their parents and that the First-tier Tribunal failed to have regard to these issues in reaching its conclusion. Reference is made to the italicised words in the case of Azimi-Moayed [2013] UKUT 00197 to support this proposition.

11. In essence these latter three grounds amount to the same basic assertion namely that the First-tier Tribunal judge failed to carry out a proper balancing exercise in the assessment of the evidence and failed to weigh in the balance the countervailing factors. The grounds are misleading in that they assert that in some way the assessment of proportionality has in some way changed since the implementation of the changes in the Rules since July 2014. This is not correct. Although the SSHD's position as to the public interest has been clarified and set out in the Rules, the leading cases of the House of Lords and the Supreme Court have not been overturned. There has been no change in the assessment of "insurmountable obstacles" and the Tribunal is still required to consider the proportionality of the proposed removal in accordance with the legitimate aim to be maintained. This does of course mean that the Tribunal must engage with these matters.

12. The First-tier Tribunal judge sets out the five *Razgar* steps and proceeds to consider the evidence before him finding, properly, that the substantive issue is the issue of whether the decision to remove is proportionate to the legitimate aim of maintaining immigration control for the maintenance of the economic well being of the country. In [32] the First-tier Tribunal judge concludes

> "Looking at the evidence in the round of the [claimants'] work and situation in the United Kingdom I find that they have established family and private life here. It follows that the [claimants'] removal does represent an interference with their family and private life, which I find is serious enough to engage the operation of article 8 ECHR in light of the time they have spent here, particularly the third [claimant]. I find that the interference has the legitimate aim of maintaining an effective control for the economic well-being of this country and is in accordance with the law. Nonetheless, in a finely balanced decision, I find that in light of [Mr Gres'] contribution to the economy of the UK and his value to the company he works for their removal is disproportionate to the achievement of that legitimate aim."

13. There are a number of difficulties with this conclusion. Firstly the judge does not identify why removal would be an interference with the claimants' family life – they would be removed together as a family. Secondly, although in general terms finding that the SSHD has a legitimate aim of maintaining immigration control for the well being of the country, the judge does not engage with the specific adverse factors of these claimants namely their residence unlawfully in the UK, that Mr Gres has worked unlawfully, that they had no legitimate expectation of being able to remain in the UK permanently having come to the UK on temporary permits with no such expectation, that they do not meet the

Immigration Rules and that neither child has been in the UK for a period in excess of seven years. Although these matters are referred to by the judge there has been no balancing of these factors with the specifics of the claimants' case in the context of the legitimate aim of the SSHD. Although the judge refers to there being no obligation on a country to respect the choice of country of residence, obstacles to developing family life in the country of origin will be relevant. There is no engagement with the factors of return to their country of origin. Mere reference to the outcome of an appeal being 'finely balanced' is no substitute for close and proper analysis.

14. I am satisfied that the First-tier Tribunal judge erred in law in failing to properly consider the proportionality of the decision to remove.

15. I set aside the decision to be re-made.

Re-making the decision

16. Mr Gilbert submitted that there was a need for further oral evidence if I were to find the First-tier Tribunal judge erred in law such that the decision be set aside. I do not agree. The First-tier Tribunal judge heard oral evidence and made findings of fact on the basis of the documentary and oral evidence before him. There has been no challenge to the recording of that evidence or to the findings made. Although I reserved my decision as to whether there was an error of law, I heard submissions from both parties in the event that I set aside the decision to be remade. In addition to the oral and documentary evidence relied upon, Mr Gilbert also drew attention to the skeleton argument submitted to the First-tier Tribunal and relied upon its contents.

17. In addition to the matters set out in the documentary evidence, the skeleton argument and the submissions, the following findings are relevant:

    a. The claimants have been unlawfully in the UK since the refusal to grant permission to appeal to the Upper Tribunal, namely since June 2010;
    b. Mr Gres has been employed, albeit unlawfully, has paid tax and NI and maintains good balances in his current account;
    c. Mr Gres is considered by his employers to be one of their best employees and has recently been promoted;
    d. The children were both born in the UK and have not travelled outside the UK;
    e. Mr Gres has been in the UK since June 2001;
    f. The adults and the older child speak good English; Mr Gres has maintained and accommodated himself and his family without recourse to public funds;
    g. few of the character witnesses seemed to be aware that the family were in breach of immigration laws; their evidence was "unbalanced";
    h. the third appellant will have spent 7 years in the UK by July 2014 and has begun school;
    i. the asserted inability of the third appellant to go to Russia for schooling or because of language difficulties or educational disruption

was specifically rejected as exaggerated and "not based upon common sense";

j. the third appellant has begun to engage with people outside his home.

18. On service of the decision to refuse him further leave to remain as a student in 2009 Mr Gres would have been told that he no longer had any leave to remain in the UK and would be expected to leave the UK. His leave was extended by virtue of s3C Immigration Act 1971 pending the final outcome of his appeal ie until June 2010. The application for leave to remain on human rights grounds was made prior to the changes in the Immigration Rules in July 2012. At that time, lawful presence in the UK for a period in excess of 10 years would generally lead to indefinite leave to remain. Mr Gres had not had 10 years lawful residence by June 2010 when he ceased to be lawfully resident in the UK.

19. Mr Gilbert drew attention to the fact that Mr Gres had left Chechnya when he was aged about 14/15 and gone to Ukraine. He has spent the vast majority of his life outside Russia and a lengthy portion of that time in the UK. He reiterated that the family were an economic benefit to the UK and that the work that Mr Gres undertook was of high value. He stressed the difficulties the family would have on return to Russia – unfamiliarity with the country, social and employment market and that although they had some savings these were insufficient to provide the required buffer when supporting a young family in an unfamiliar country. Although Mrs Vasyukova had her mother and grandmother in Russia, they shared a 2 bedroom flat with her brother who is an alcoholic and they would be unable to provide the necessary support and assistance on their return as a young family.

20. Ms Everett referred to the lack of specificity of the nature of the engagement of the 6 year old outside the home. Although it was asserted that the family were of economic benefit to the UK, this did not appear to take account of state education or use of the NHS. She asserted that although there was a suggestion that the family might need a permit to return to Russia there was no evidence to that effect and pointed out that he had come to the UK with a visa, he must have or have had a passport and there were in any event family members to return to at least in the short term. She submitted that overall the best interests of the 6 year old although of primary importance, when considered with the other elements of the family circumstances did not lead to a conclusion that removal was disproportionate.

21. I have considered the evidence and submissions before me. This family have been in the UK on temporary visas and there was and is no expectation that this would lead to indefinite leave to remain. Mr Gres application for further leave to remain as a student was refused in April 2009, such refusal being upheld on appeal. In terms of delay the claimants did not make their 'human rights application' until some 18 months after they had been refused permission to appeal to the Upper Tribunal. The SSHD took her decision to refuse that application a year later and then, after a consent order before the high Court reconsidered the decision some two months after that. There has been no unreasonable delay on the part of the SSHD and any such delay as there has

been has been utilised by the claimants to attempt to further enhance their reasons for staying in the UK.

22. Although it appears that the claimants return to Russia will be difficult this is merely one factor amongst the whole of the background factors to be taken into account. That the oldest child has started school, has integrated well and has a full life in the UK, in so far as a 6 year old can given that he remains primarily involved with his close family, does not contradict the findings of the First-tier Tribunal that relocation to Russia would not create educational difficulties as asserted. The children would be returning to their parents' country of origin and there was nothing in the evidence before me to suggest that the parents would be other than supportive and engaged as parents during their re-establishment. His interest and concerns are not of paramount concern but are factors that are of primary assessment.

23. The housing and employment market in Russia is inevitably different to that in the UK and the family will have to adjust. There was nothing in the evidence however to suggest that the conditions on return would be unreasonable or harsh, merely that there would be difficulties that would and could take some time to resolve. That this may and probably would be difficult for the family is one consequence of having spent a lengthy period of time in the UK.

24. During that lengthy period of residence I accept that the eldest child has started school here and knows no other country than the UK, that Mr Gres has been gainfully and productively employed and that he will be a loss to his employers. That the eldest child is integrated in the UK in so far as a 6 year old can be, that there would be difficulties for the family as regards employment and housing in Russia, that Mr Gres is working and the family as a whole are integrated within the UK are not sufficiently compelling reasons to outweigh the interests of the SSHD in removal. The circumstances and consequences of removal will not, on the basis of the evidence before me, result in unjustifiably harsh consequences for the family such as to render removal disproportionate.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision

I re-make the decision in the appeal by allowing the appeal of the SSHD and thus dismissing the claimant's appeal against the decision to remove them from the UK.

Date 27th May 2014

Judge of the Upper Tribunal Coker