



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/50321/2013
IA/50327/2013
IA/50338/2013
IA/50331/2013

THE IMMIGRATION ACTS

Heard at Birmingham

On 12th August 2014

**Determination
Promulgated**

On 22nd August 2014

Before

UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M G K

A M K

G R K

A R K

(ANONYMITY DIRECTIONS MADE)

Claimants/Respondents

Representation:

For the Appellant: Mr Richards, Home Office Presenting Officer

For the Claimants/Respondents: Mr Khan, Counsel, instructed by Bukhari Chambers

DETERMINATION AND REASONS

1. The claimants are nationals of Pakistan. The first is the wife of the second. There are two sons born on 28th December 2004 and 13th December 2009 respectively. None have any settled status in the United Kingdom.

2. The first claimant came to the United Kingdom on 7th January 2007 as a student and subsequently the other members of the family came to join her, with the exception of the fourth claimant, who was born in the United Kingdom.
3. The claimants applied for discretionary leave to remain in the United Kingdom on 7th March 2014. Their applications were refused on the basis that they could not meet the requirements of the Immigration Rules and that their situation was not exceptional.
4. The claimants sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Flower on 28th February 2014.
5. The appeals were allowed.
6. The central basis of the claim as presented before the First-tier Tribunal Judge was the very complex medical needs of the fourth claimant and how those needs could not reasonably be effectively met if returned to Pakistan. It was also said of the third claimant that he had spent much of his time in the United Kingdom and that removal would be a significant disruption to his studies and his life. Clearly it would not be reasonable to expect the first and the second claimants to leave the United Kingdom without their children.
7. Although it is not entirely clear from the findings of the Judge, it is apparent from reading the determination as a whole, that the Judge considered that the circumstances of the fourth claimant were so compelling as to make it unreasonable and disproportionate to remove him from the jurisdiction. She also found that requiring the third claimant to return to Pakistan at this stage would be disproportionate. Clearly therefore all appeals were allowed in line one with the other.
8. The Secretary of State for the Home Department seeks to appeal against that decision to argue that the Judge failed to follow the guidelines in **Gulshan** and in any event made an inconsistent finding at paragraph 44 with that at 45.
9. Leave to appeal was granted on that basis.
10. It is to be noted in fairness to the Secretary of State for the Home Department, that the inconsistency was not part of the original grounds of appeal but seems to have been a matter which was considered in the grant of permission. It seems to me that that is a matter that really is entirely attributable to a typographical error. It is entirely understandable, when reading paragraphs 1 to 43 what it is that the Judge is seeking to say. The conclusions in paragraph 43 entirely reflect the considerations that precede it. Those conclusions in 43 being as follows:-

“43. In light of my considerations and findings, I conclude that the immigration decisions are not proportionate. The circumstances that would face the appellants should they return to Pakistan would be unjustifiably harsh. Moving the fourth appellant could be damaging to his health, and on the medical evidence provided to me today it could be potentially life-threatening. The physical integrity of such a small, sick and vulnerable child far outweighs the need to maintain immigration control.

44. “As the appellants have not succeeded in showing that the immigration decisions are contrary to the Immigration Rules or the Human Rights Convention the appeals fail.”

45. The appeals of all four appellants are allowed.”

11. It is far from clear to me what paragraph 44 means but it is entirely clear that it is quite inconsistent with the previous reasoning. It may be that the Judge was merely recognising that the appellants did not meet the Immigration Rules, which was accepted in any event.
12. There is considerable Judicial discussion around the decisions in **Gulshan** and **Nagre** as can be seen from the decision of the Court of Appeal in **MM (Lebanon) [2014] EWCA Civ 985**.
13. The general jurisprudence, however, would seem to be relatively clearly established, namely that if the appellants cannot meet the Immigration Rules it will only be in compelling circumstances that they would be able to show that removal was disproportionate in terms of Article 8 of the ECHR.
14. What is entirely clear from the determination is that the Judge had formed the assessment, for very good reasons on the medical evidence that has been presented and which is set out in detail in the determination that the complex medical needs of the fourth claimant took this case out of the normal and that such was a compelling circumstance which rendered his removal disproportionate.. Indeed whether it is compelling, exceptional or unduly harsh perhaps matters little in terms of expression, given the way in which the Judge has expressed the matter in paragraph 43 which I have set out.
15. Mr Richards noted my concerns but invited me to find that nevertheless there was a material error of law in the approach taken by the Judge. For my part I find the grounds to be wholly unrealistic when they contend that the Immigration Judge has not given any consideration as to whether there are case-specific good grounds for granting leave outside the Rules in compelling circumstances not recognised under the Rules. The Judge has done precisely that and has been careful in the analysis both of the factual basis of that concern and of the applicability of the law.

16. It is entirely open to the Judge to have found, in the circumstances of this case that the medical condition of the fourth claimant was of such complexity and of life-threatening nature that his removal from the United Kingdom would present a very real threat to his health and life such that the decision to do so was disproportionate. Given those findings it is also entirely understandable why it would not be proportionate to expect the other family members to return.
17. I expressed some concern to Mr Richards as to whether the third claimant standing by himself should succeed under the current jurisprudence but that is perhaps largely academic given the sustainable findings made as to the fourth claimant.
18. In the circumstances therefore the Secretary of State's appeal before the Upper Tribunal is dismissed. The decision of the First-tier Tribunal is upheld, namely that it would be disproportionate to remove the claimants from the jurisdiction, certainly until the health of the fourth claimant would safely permit such removal.
19. Mr Khan, who represents the claimants, invited me to indicate a period of time in which removal should not take place. It seems to me that that is not my function. Had I been dealing with the matter as the Judge hearing the merits then it is clearly open to me to specify a minimum period. It would be open, however, to the representatives acting on behalf of the claimants to raise those matters directly with the Secretary of State for the Home Department if a reasonable period of leave can be granted in the initial stages. I indicated that perhaps a medical report indicating a prognosis of improvement would be a helpful document to obtain before any request is made as that may helpfully inform what would be a reasonable period of leave to be granted at least initially.

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 claimants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the claimants and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Upper Tribunal Judge King TD

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