Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/00034/2014
IA/00035/2014
IA/00036/2014
IA/00037/2014

THE IMMIGRATION ACTS

Heard at: Manchester	**Determination Promulgated**
On: 13th November 2014	**On: 5th January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Amna Maqsood
Imran Maqsood
Master Muhammad Ryan Maqsood
Miss Rohma Maqsood
(no anonymity direction made)

Respondents

For the Appellant: Mr Smart, Senior Home Office Presenting Officer
For the Respondent: Ms Patel, Counsel instructed by Amjad Malik Solicitors

DECISION AND REASONS

1. The Respondents are all nationals of Pakistan. They are respectively a mother, father and their two minor children. On the 29th April 2014 the First-tier Tribunal (Judge OR Williams) allowed their linked appeals against decisions to refuse to vary their leave to remain and to remove them from the UK under s47

of the Immigration Asylum and Nationality Act 2006. The Secretary of State now has permission to appeal against the Tribunal's decision.

2. The background to these appeals was that the first appellant before the First-tier Tribunal, Ms Imran had been in the United Kingdom since September 2008 when she entered as a student. Her family had joined her in April 2009 as her dependents. In November 2013 she had made an application for further leave to remain as a Tier 1 (Entrepeneur), her husband and children making applications in line as her dependents. At the time that they made those applications they had leave to remain as Tier 1 (Post Study Work) Migrants.

3. The applications were refused for various reasons, all of which related to the specified evidence that Tier 1 (Entrepeneurs) are expected to produce. The refusal letters stated that if any of the applicants wished to remain in the UK on human rights grounds they had to make an application to that effect.

Determination of the First-tier Tribunal

4. The First-tier Tribunal found as fact that the appellants before it had produced the specified evidence showing Ms Imran to be in possession of £50,000 to invest in the UK, to have registered as self-employed with HMRC and to have the requisite level of funds for maintenance and accommodation. All of these matters in issue were resolved in Ms Imran's favour. It was further found that she had produced properly audited accounts. Her appeal under the Rules was nevertheless dismissed, since the latter item had only been produced post-decision; the Tribunal was precluded by s85A of the Nationality, Immigration and Asylum Act 2002 from taking that evidence into account.

5. At paragraph 5 the determination notes that the legal framework on the day was agreed between the parties. Issues (a)-(d) all concerned the matters in issue under the Rules and item (e) reads "Article 8 (outside of the Rules only)". It was no doubt with this agreed framework in mind that the Judge proceeded to consider Article 8 outside of the Rules. Paragraph 23 of the determination notes the suggestion that Gulshan [2013] UKUT 00640 (IAC) is authority for the proposition that the Tribunal is somehow prevented from going on to consider human rights in an appeal unless there are "compelling circumstances" for so doing. Judge Williams did not accept this proposition. He found there to be some inconsistency between that reading of Gulshan and the guidance offered by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192 which specifically approved Izuazu [2013] UKUT 00045 (IAC). He noted that the appellants before him had raised human rights in their grounds of appeal and, in light of the agreed legal framework, went on to apply the framework set down in Razgar [2004] UKHL 2 AC 368. Having found the decision to remove the family would have consequences of sufficient gravity to engage Article 8 he went on to consider proportionality, and resolved this issue in the appellant

family's favour, finding that the Secretary of State had not shown the interference to be, in this case, proportionate.

Grounds of Appeal

6. The Secretary of State now appeals the decision on the ground that the Tribunal erred in failing to identify whether there were "arguably good grounds" for granting leave to remain outside of the Rules. He was wrong to have contrasted the decision in Gulshan with the Court of Appeal decision in MF since the former was promulgated after that judgement and obviously took it into account.

Error of Law

7. I do not find this decision to contain an error such that it should be set aside.

8. Gulshan never purported to introduce an 'intermediary' test, threshold or gateway to consideration of Article 8. All it did was to underline the fact that the Secretary of State has now sought to codify, in the form of the new rules, where, in *most cases,* the balance will be struck between the rights of the migrant and the rights of the state. As paragraph 23 of this determination highlights, the words used in Gulshan do not preclude a Tribunal from considering Article 8 unless some "exceptional" feature is identified. All they do is emphasise that it is only where the Judge considers Article 8 to be engaged – ie there is some compelling circumstance for the applicant- "*is it necessary*" to go on to consider proportionality. The idea that Gulshan and Nagre should be read to impose an initial hurdle has been specifically rejected by the Court of Appeal in MM and Ors v SSHD [2014] EWCA Civ 985: "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" per Aikens LJ at 129.

9. In this case the First-tier Tribunal has here reminded itself repeatedly that the Rules are of great significance in that assessment. In assessing proportionality Judge Williams was careful to measure against the Article 8(1) rights of the appellant family the "significant" weight to be attached to immigration control and the economic well being of the country. He reminded himself that they had not met the requirements of the rules, and that this was important because the rules are an expression of where the Secretary of State believes that the balance should be struck. He found that as an educated and skilled adult Ms Imran would be able to re-establish herself in Pakistan; that as migrants on temporary visas the family had always understood their position to be precarious and that the children were Pakistani nationals who would be able to attend school and be assisted by their parents in their integration into that country. Nonetheless

he was satisfied that the Secretary of State could not, in the particular circumstances of this family, show the decision to remove to be proportionate. The factors that weighed in the family's favour were that the welfare of the children demanded that they be allowed to remain in the UK and not face the disruption to their education; that the family had always been lawfully resident and self sufficient, that Ms Imran had some expectation of being on the 'road to settlement' because she had latterly been a Tier 1 (Post Study Work) Migrant an that she had used her time and money to set up a interior design business which, on the evidence before the Tribunal, had "every chance of success". Further Ms Imran satisfied that the Tribunal that her connection with Pakistan was in fact remote: she had been born and raised in Libya and had only ever spent 5 of her 30 years in Pakistan. Finally the Tribunal noted that the appellant family's solicitors had written to the Respondent as long ago as December 2013 remedying all defects in the original application: the documentation showing that Ms Imran meets the requirements of the Tier 1 Entrepeneur rules was now all available.

10. There was nothing wrong with that proportionality balancing exercise. In fact, the grounds of appeal do not suggest that there was. The complaint made is that there was some failure on the part of the Judge to identify a reason to go on to look at Article 8. It might be said that the fact that the Judge has found the decision to actually *be* disproportionate can be taken as an indication that he considered there to be a good reason to go on to consider Article 8. However as I set out above, I do not agree that this has ever been the correct interpretation of Gulshan and even if it was, that approach has now been specifically disapproved by the Court of Appeal in MM. The Tribunal has given good reasons why it could not find the decision to remove this family to be proportionate, amongst them that the children are in school and have settled private lives, the mother has little or no connection with the country of her proposed return, that they are financially self-sufficient and importantly that they actually *are* entrepeneurs, and have shown themselves to meet all of the requirements for further leave to remain in that category, albeit too late to satisfy the Secretary of State of that at the date of application.

Decision

11. The determination of the First-tier Tribunal does not contain an error of law and it is upheld.

Deputy Upper Tribunal Judge Bruce
19th December 2014