IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22315/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 October 2014	**On 24 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR RAYMOND CLINT ARRINDELL
(NO ANONYMITY ORDER MADE)

Claimant

Representation:

For the Appellant: Mr S Kandola (Senior Home Office Presenting Officer)
For the Claimant: Mr G Lee (Counsel instructed by First Law Partnership Ltd)

DECISION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law disclosed in the determination before the First-tier Tribunal (Judge Rose) promulgated on 4 August 2014. The Tribunal allowed the appeal against a decision refusing to vary leave to remain in the UK on human rights grounds under Article 8.

2. For convenience I shall refer to the parties as follows; to the appellant in these proceedings as the Secretary of State and to Mr Raymond Arrindell as "the claimant"; he is the respondent in these proceedings.

3. The claimant whose date of birth is 2 May 1972 and is a citizen of St Vincent and the Grenadines.

4. The claimant entered the UK as a visitor on 29 October 2013 and was granted six months leave to enter which expired on 29 April 2014. His application for limited leave to remain as a spouse of a person present and settled in the UK was rejected as he failed to meet the requirements of Appendix FM. The claimant did not qualify for leave to enter by virtue of E-LTRP2.1 because of his entry as a visitor. Having failed the mandatory requirements for "eligibility" he could not therefore benefit from the criteria set out in EX.1. Private life was considered under paragraph 276ADE and refused.

5. In a determination the Tribunal confirmed that the claimant did not meet the requirements of the Immigration Rules having regard to eligibility and as a consequence his application could not be considered under paragraph EX.1. It was conceded that the financial requirements and the English language requirements under the immigration rules were met.

6. The Tribunal went on to consider Article 8 ECHR having regard to the step-by-step approach in **Razgar** and taking into consideration public interest as provided in Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 (as amended)(2002 Act as amended).

7. The Tribunal placed weight on the fact that the sponsor was pregnant and due to give birth on 25 November 2014. She has three children aged between 6 and 12 , who are British citizens and moving even temporarily from the UK would be disruptive to the three children. At [25] the Tribunal found it was not plausible that the sponsor would not be supported by her family and friends in the absence of the claimant, but that they could not provide the level of support expected from him as her husband. It was found to be in the best interests of the sponsor's three children if the claimant remained living with them as their stepfather and that a period of eighteen weeks separation would not be insignificant. The relationships would be damaged in the short term. The Tribunal placed weight on the fact that the claimant was a non-visa national and did not require a visa to visit the UK . Further it was accepted that he did not appreciate that he would have to apply for entry clearance as a spouse. Relying on **Sabir (Appendix FM – EX.1 not freestanding) Pakistan [2014] UKUT 63 (IAC)** the Tribunal considered whether there were exceptional circumstances that meant the refusal would result in unjustifiably harsh consequences for the individual or their family. The Tribunal also had regard to sub-Section 117B(1) (2002 Act as amended) as regards the public interest.

Grounds for Permission

7. The Secretary of State maintained that the claimant could not satisfy the requirements under the Immigration Rules at Appendix FM. The Tribunal did not consider the guidance in **Gulshan (Article 8 - new Rules – correct approach) [2013] UKUT 640 (IAC)**. The Tribunal made no case specific findings as to arguably goods grounds and compelling circumstances, and proceeded to undertake a freestanding Article 8 assessment.

Permission to Appeal

8. First-tier Tribunal Judge Clayton granted permission on 27 August 2014 in the following terms:

> "I find the judge considered the facts with care, concluding the appellant's removal would have unjustifiably harsh consequences for him, his pregnant wife and children. However, it is arguable that he failed to consider the guidance laid down in **Gulshan**. He made no findings specific to the appellant as to whether there were compelling circumstances not sufficiently recognised under the Rules.
>
> The judge arguably failed to make adequate findings as to arguably good grounds and compelling circumstances not recognised by the Rules. There was therefore an arguable error of law in undertaking a freestanding Article 8 assessment."

Error of law Hearing

Submissions

9. Mr Kandola amplified the arguments made in the grounds of appeal. The Tribunal failed to follow the law in **Gulshan**, there was no reference made to the necessary steps. The Tribunal's considerations failed to have regard to material matters. In any event the evidence would not meet the **Gulshan** gateway.

10. Mr Lee submitted that **Gulshan** was no longer good authority following the Court of Appeal judgment in **MM & Others v Secretary of State [2014] EWCA CIV 985**, which was premised on a wide and detailed analysis of the new Immigration Rules and Article 8. The comments re **Gulshan** were not obiter but logical conclusions reached in the decision. **MM** is binding on the Upper Tribunal.

11. There was no challenge to the Tribunal's conclusions that there were unjustifiably harsh consequences for the claimant and his family. The lack of support for the sponsor during pregnancy was not a trivial factor. Reliance was placed on **Chikwamba** and **Hayat**. The appellant did not

require a visa for entry to the UK and did not know that he was required to apply for leave to remain as a spouse, therefore **Chikwamba** principles were applicable.

12. Alternatively Mr Lee submitted that if **Gulshan** were to apply the Tribunal had done all that was necessary save for actually citing the case. Even if it failed to explicitly follow the **Gulshan** test, the Tribunal identified compelling and exceptional circumstances and took into account Section 117B as regards the public interest.

Discussion and Decision

14. I have decided that there is no material error of law in the determination which shall stand. The main issue raised in the grounds of appeal is the failure on the part of the Tribunal to follow or even refer to the recent Upper Tribunal determination of **Gulshan** (cited above). The Tribunal correctly established that the claimant was unable to meet the mandatory requirements of the Immigration Rules under Appendix FM on the grounds that he was not eligible. The Tribunal then went on to make an assessment under Article 8 ECHR without reference to **Gulshan** guidance. At this point I observe that the Court of Appeal judgment in **MM & Others**(cited above) was delivered on 11th July 2014 and at that date **Gulshan** was not regarded as good law. The First-tier determination was heard and promulgated after that date.

15. I accept the submission made by Mr Lee that the main issue in the grounds of appeal is the **Gulshan** point. There was no challenge is made to the actual finding or assessment that Article 8 was engaged nor any challenge to the findings that the removal would be unjustifiably harsh.

16. In that context I am not satisfied that any material error is disclosed in the determination. Whether or not **Gulshan** is or is not good law is currently under some debate by the Secretary of State. The Secretary of State argues that the **Gulshan** gateway remains a necessary step before considering Article 8. The Tribunal did not make specific reference to **Gulshan,** however, I am satisfied that it made case specific findings as to factors in existence on which to conclude would result in "unjustifiably harsh consequences for him and for his wife and stepchildren such that the refusal of his application is not proportionate" [30]. In short I am satisfied that notwithstanding any failure to apply **Gulshan**, the outcome would have been the same. The determination is clear in terms of findings of fact and the weight placed on issues of significance and the public interest has been fully taken into account. There were no economic or language concerns and the relationship was established while the claimant was in the UK lawfully. The failure to meet the mandatory requirements of the rules was mitigated by the fact that the claimant was a non visa national and as a consequence his lack of knowledge as to the need to apply for a spousal visa was found to be reasonable in the circumstances [26-28]. The sponsor's imminent confinement was of significance as was

the risk that the claimant would not be present for the birth [22 & 23]. The Tribunal also found that the best interests of the three British citizen children lay in the claimant being present to look after them in the short and long term and that it would not be reasonable to expect them to relocate to St Vincent and the Grenadines. [26]. In terms of materiality therefore the grounds of appeal are not sustainable.

Notice of Decision

I find no error of law in the determination.

The determination shall stand.

No anonymity order made nor requested

Signed Date 22.10.2014

Deputy Upper Tribunal Judge G A Black

The First–tier Tribunal made no order for a fee award.

Signed Date 22.10.2014

Deputy Upper Tribunal Judge G A Black