Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43446/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 30 June 2014	**On 31 July 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FAWAD AHMED

Respondent

Representation:

For the Appellant: Mr M Diwnycz, a Senior Home Office Presenting Officer
For the Respondent: Mr S Saleem, Halliday Reeves, Solicitors

DETERMINATION AND REASONS

1. The respondent, Fawad Ahmed, was born on 16 April 1984 and is a male citizen of Pakistan. I shall hereafter refer to the respondent as the appellant and to the Secretary of State for the Home Department as the respondent (as they were respectively before the First-tier Tribunal).

2. The appellant entered the United Kingdom on 13 February 2011 with entry clearance as a Tier 4 Student. His leave was extended on application until 13 February 2013. The appellant then applied for leave to remain under Appendix FM of the Immigration Rules and Article 8 ECHR on the basis of his relationship by marriage to a British citizen (Melanie Booth). Ms Booth has two children by a previous relationship who are aged 17 and 13 years respectively. She and the appellant were married in an Islamic ceremony in October 2012 and by way of a civil ceremony at Doncaster Register Office on 30 January 2013.

3. By a decision dated 4 October 2013, the respondent refused the appellant's application. The appellant appealed to the First-tier Tribunal (Judge Robson) which, in a determination promulgated on 14 March 2014, dismissed the appeal under the Immigration Rules and allowed the appeal on human rights grounds (Article 8 ECHR). The respondent now appeals, with permission, to the Upper Tribunal.

4. The respondent submits that the judge failed to follow the guidance of *Gulshan (Article 8 – new Rules – correct approach)* [2013] UKUT 640. At [59], having found the appellant did not qualify under the Immigration Rules for a grant of leave stated:

> I now consider the position of the appellant under Article 8 of the European Convention on Human Rights particularly in the context of *Razgar* and the five step approach in this matter.

5. The grounds assert that the determination "fails to establish an arguably good basis for departing from those findings made under the Rules and the circumstances subsequently outlined (and summarised in [62]) do not disclose insurmountable obstacles".

6. The judge was clearly aware of *Gulshan* because he mentions the case at [33] when recounting the submissions made by the Presenting Officer. It is, however, unclear why the judge then set out on a "freewheeling" assessment of Article 8 outside the Rules. The appellant did not meet the Immigration Rules (which now provide a complete code as regards Article 8 – see *MF (Nigeria) [2013] EWCA Civ 1192*). The appellant had not lived continuously in the United Kingdom for at least twenty years whilst the sponsor and the appellant are unable to meet the financial requirements (the sponsor earns about £15,874 gross per annum). There is no suggestion in the determination that the judge has considered whether compelling or unusual circumstances were present in this case; he has simply dismissed the Immigration Rules appeal and has then, acting as if he were required to do so, he has considered the appeal on Article 8 ECHR grounds outside the Rules. The consequence of his adopting this approach is that he has ignored the failure of the appellant to satisfy the Immigration Rules and has not taken that failure (and the reasons for it) as a starting point for deciding whether to consider Article 8 outside the Rules at all.

7. I find the judge's Article 8 assessment is, in any event, flawed. The judge found that the appellant, Ms Booth and the children had formed a family unit and that the "younger child treats [the appellant] as a father figure so as to maintain family life". The judge did not consider it a "realistic or practical proposal" for family life to be continued in Pakistan. At [67], the judge found that,

> the longer the relationship continued (between the appellant and Ms Booth] particularly with the children the more unrealistic it became for the parties to contemplate the removal of the whole family to Pakistan on the one hand or of the appellant returning on his own and seeking to reapply an application (sic) which would take a considerable period of time and is not necessarily guaranteed.

8. One can only assume that the judge has proceeded from his dismissal of the Immigration Rules appeal to considering Article 8 outside the Rules because the appellant happens to be in a relationship with a woman who has two children. Can that properly be said to be a circumstance not anticipated by the Immigration Rules? I think not. The circumstances of the appellant are hardly unusual. Further, the judge has attached too much weight to the wishes of the appellant, Ms Booth and the children; it is not clear to me why weight should be attached to the fact, as found by the judge, that, as time passed, it became "more unrealistic ... for the parties to contemplate removal of the family to Pakistan ..." There was also no evidence at all before the judge that it would "take a considerable period of time" for the appellant to make an out of country application for entry clearance. Likewise, the fact that the outcome of that application was "not necessarily guaranteed" is an inadequate reason, in the absence of any compelling circumstances, for allowing an in-country appeal on Article 8 ECHR grounds.

9. In the light of these observations, I set aside the determination and remake the decision.

10. I have returned to the agreed position that the appellant fails to satisfy the Immigration Rules. For the reasons which I have examined above, whilst I have no doubt that the appellant, Ms Booth and her children are engaged in a genuine relationship, their circumstances are neither unusual nor compelling nor can they be said to fall outside the detailed provisions of the Rules. There is, in my opinion, no need for the Tribunal to go on to consider Article 8 outside the Rules in this instance. Accordingly, the appeal against the immigration decision is dismissed.

DECISION

11. The determination of the First-tier Tribunal which was promulgated on 14 March 2014 is set aside. I have remade the decision. This appeal is dismissed under the Immigration Rules.

Signed Date 25 July 2014

Upper Tribunal Judge Clive Lane