Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23667/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Determination**
On 2nd December 2014	**Promulgated**
	On 18th December 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MAJID ALI KHAN

Respondent

Representation:
For the Appellant: Mrs R Pettersen, Senior Home Office Presenting Officer
For the Respondent: Mr A Khan, Legal Representative

DECISION AND REASONS

Introduction

1. The Secretary of State appeals (with permission) against the decision of First-tier Tribunal Judge Henderson who, in a determination promulgated on the 28th August 2014, allowed the respondent's appeal against her decision to refuse his application for further leave to remain and to remove him from the United Kingdom.

Background

2. The respondent is citizen of Pakistan who was born on the 23rd June 1978. He first entered the United Kingdom, on the 18th September 2003, with leave to remain for the purpose of study. He was joined by his wife and daughter on the 21st February 2009. The leave to remain that had been granted by the Secretary of State expired on the 4th March 2012. The appellant's leave was nevertheless extended under Section 3C of the Immigration Act 1971 pending an appeal against the Secretary of State's decision, made on the 13th July 2012, to refuse his application for further leave to remain for the purpose of post-graduate study at the University of York. On advice, he withdrew that appeal once he had made a further application for leave to remain. That was in October 2012. Since that time, he has been in the United Kingdom without any form of leave to remain. The Secretary of State, however, rejected his most recent application on the ground that it was impermissible to lodge an application for leave to remain whilst there was a pending appeal against an earlier decision. There then followed correspondence between the respondent's representatives and the Secretary of State, in which the representatives blamed his former advisers for incorrectly advising him that he should make his application before withdrawing his appeal, rather than the other way around. The Secretary of State eventually relented and agreed to reconsider the appellant's application for further leave to remain on the basis of his private and family life in the United Kingdom. It is the Secretary of State's substantive decision to refuse that application, made on the 7th May 2014, which is the subject-matter of the instant appeal.

Analysis

3. In consider the appellant's case under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Judge Henderson directed herself in accordance with the approach outlined in Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC). This in essence requires the Tribunal to consider the case in three stages. Firstly to consider whether the appellant is able to meet the requirements for leave to remain under paragraph 276ADE or Appendix FM of the Immigration Rules. If he is not able to do so, the Tribunal is then required to consider whether there is a good arguable case for leave to remain outside the Rules on the basis of exceptional circumstances that are not sufficiently contemplated by the Rules. This is sometimes referred to as 'the intermediate stage'. Whether it is remains necessary for the Tribunal to pass through this stage in cases where the relevant Immigration Rules do not purport to provide a complete code for the Article 8 assessment is now questionable in the light of the observations made by the Court of Appeal in MM & Ors, R (On the Application Of) v Secretary of State for the Home Department (Rev 1) [2014] EWCA Civ 985. For present purposes, however, I shall assume that it is. Once the Tribunal is satisfied that there are "exceptional circumstances" (that is to say, circumstances which are over

and above those contemplated by Immigration Rules) it is then necessary to consider whether the decision is proportionate in seeking to further one of the legitimate aims that are exhaustively listed in Article 8(2). Save in the case of a decision to deport a foreign criminal, the legitimate aim will usually be the maintenance of the economic well being of the country through the consistent application of immigration controls. At that stage, the Tribunal is bound to have regard to the statutory factors that are contained within Section 117B of the Nationality, Immigration and Asylum Act 2002.

4. It is first worth noting that the Secretary of State's grounds are predicated upon an error of law of their own. That error is contained within the statement that, "**MF Nigeria [2013] EWCA Civ 1192** confirms that the Immigration Rules are a complete code, that form the starting point for the decision-maker". That decision is in fact authority only for the proposition that Part 13 of the Immigration Rules provide a complete code for assessing the question of whether deportation of a foreign criminal would be compatible with his Article 8 rights. However, as I have previously noted, cases involving the deportation of foreign criminals were distinguished by the Court of Appeal from those in the present category, where it was said that the assessment under Article 8 was "more at large" [see paragraph 135 of MM & Ors, above]. Nevertheless, as I have also previously stated, I am prepared to proceed upon the basis that it was still necessary for the Tribunal to pass through the 'intermediate stage' postulated in Gulshan when considering Article 8 in the present case.

5. It is not the Secretary of State's case that Judge Henderson failed to direct herself in accordance with the three-stage approach that I described at paragraph 3 (above). Rather, as has become familiar in appeals of this kind, the Secretary of State's complaint is that the judge "failed to provide adequate reasons" for finding that the appellant's circumstances crossed the threshold of the 'intermediate stage', and that it was therefore wrong for her to conclude that it qualified for a full Article 8 assessment.

6. Inadequate reasoning is pre-eminently a basis for challenging a finding of fact rather than an exercise of judgement. In the former case, the Upper Tribunal will readily intervene where the First-tier Tribunal has failed to explain - by reference to the evidence that was before it – how it had reached a particular factual conclusion. Such a failure may truly be said to be one of 'inadequate reasoning'. In the latter case, however, the Upper Tribunal will only interfere if the First-tier Tribunal has exercised its judgement irrationally. Irrationality may include failing to take account of matters that were plainly material or taking into account matters that were plainly immaterial. Thus, where the Secretary of State's challenge is to a decision that is the product of an exercise of judgement, it is necessary to scrutinise whether an assertion of 'inadequate reasoning' is simply a cloak for what is in reality nothing more than an expression of disagreement with a decision of that was reasonably open to the Tribunal on the facts. I now turn to consider whether this is such a case.

7. Paragraph 3 of the application for permission to appeal, upon which Mrs Pettersen helpfully elaborated, essentially puts forward the arguments for holding that there are no exceptional or compelling circumstances in this particular case. It is pointed out that the appellant has known that his immigration status was precarious since his leave to remain expired, in March 2012. It is also argued that it would be open to the appellant to continue his studies in Pakistan or to seek entry clearance from abroad. No doubt these arguments were also advanced before Judge Henderson, for it is clear that she took them into account. Thus, at paragraphs 37 and 38 of her determination, she makes specific reference to the fact that the appellant's private life has latterly been established at a time when his status in the United Kingdom was precarious. In relation to the possibility that the appellant could complete his studies in Pakistan, however, she reached the entirely rational conclusion that this was not feasible. She also concluded, for good and sufficient reasons, that it would be positively harmful to the public interest if the appellant was prevented from completing his academic research within the United Kingdom. Thus, she noted that Professor Brown had emphasised the importance to the University that the appellant be allowed to complete his research and that the University had invested significant resources in the appellant on the basis that he would be allowed to do so [paragraphs 37 to 39]. She also noted that the appellant had never been a charge upon the public purse [paragraph 36] and the period for which he required further leave to remain in order to complete his research was only 17 months [paragraph 37]. She reminded herself that Article 8 is primarily concerned with the protection of a person's moral and physical integrity and that it does not provide a general dispensing power for promising students [paragraph 40]. She noted the distinction between students who have completed their most recent course and those whose course of study has not yet ended [paragraphs 40 and 41] and thereafter concluded that the circumstances of this case were sufficiently exceptional and compelling to merit leave to remain outside the Immigration Rules [paragraph 42]. That may be a conclusion with which the Secretary of State disagrees, but it is not one that has been shown to be based upon immaterial considerations or to be otherwise irrational. On the contrary, it is a conclusion that was reasonably open to the Tribunal upon the particular facts of this appeal.

Notice of Decision

8. The appeal is dismissed.

Anonymity is not ordered

Signed Date **18th December 2014**

Judge Kelly
Deputy Judge of the Upper Tribunal