Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/24198/2013
IA/24201/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26th June 2013	**On 31st July 2014**
Prepared 3rd July 2014	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR NAJAM MANSOOR
MRS ASFA ABBAS
(NO ANONYMITY ORDERS MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms J. Heybroek of Counsel
For the Respondent: Mr T. Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

The Appellants

1. The Appellants are both citizens of Pakistan and are husband and wife. The first Appellant, who I shall refer to as the Appellant, was born on 25th July 1985. The

second Appellant who I shall refer to as Mrs Abbas was born on 26th August 1989. They appeal against a decision of Judge of the First-tier Tribunal Hamilton sitting at Hatton Cross on 10th February 2013 who dismissed their appeals against decisions of the Respondent dated 30th May 2013. Those decisions were to refuse the Appellant's application for further leave to remain in the United Kingdom as a Tier 1 (General) Migrant and for Mrs Abbas' appeal as his spouse and to remove both Appellants.

2. The Appellant came to the United Kingdom in July 2008 having been granted a student visa valid until September 2010. He was subsequently granted a post-study visa valid until 23rd July 2012 and then granted a Tier 1 (General) visa valid until 18th May 2013. On 3rd April 2013 shortly before that last period of leave was due to expire he applied for further leave to remain as a Tier 1 (General) Migrant, the refusal of which has given rise to these proceedings. Mrs Abbas joined the Appellant in the UK in September 2011 and her leave was extended in line with his until the present refusal.

3. In order to satisfy the number of points required under the points-based system the Appellant needed to be awarded 80 points under Appendix A (Attributes) but was only awarded 55 points. 20 of those points (for previous earnings) were refused. The Appellant claimed to have previous earnings of £35,316.31 and as evidence of that the Appellant provided pay slips and bank statements showing his earnings from a company called Centrica. However the Respondent took the view that the two pieces of evidence supplied did not corroborate each other as the net payments shown on the pay slips were not clearly shown entering the bank account in the statements. The Appellant also claimed points for self-employed earnings of £7,498 from Hallmark Forest Gate and £25,107 from work in the security industry and supplied an accountant's letter and accounts. The Respondent rejected the accountant's letter because the gross and net earnings from self-employment were not stated on the letter and could not be corroborated with the accounts provided. As the Appellant's earnings were not accepted he was not awarded 5 points for UK experience. He was thus refused 25 points and awarded only 55. He was awarded 10 points for English Language and 10 points for Maintenance (Funds).

The Appeal at First Instance

4. The Appellant appealed against that decision arguing that he had provided all supporting documents with his initial application. The accountant's letter clearly mentioned that the total taxable income received by the Appellant was £35,316.31. The grounds of appeal made no mention of any claim under Article 8 but at the first appeal hearing the Appellants raised an additional ground of appeal that requiring them to return to Pakistan would breach their rights and those of members of their family under Article 8 (right to respect for private and family life). The hearing was adjourned for the Appellants to provide evidence in support of this claim and for the Respondent to consider the new grounds of appeal.

5. At the resumed hearing the Judge heard oral evidence from the Appellant, his wife and his father. The Appellant stated that the annual turnover from the family

business, a card shop was about £70,000 with a net profit after tax and expenses of about £7,000 to £8,000. The Appellant also worked as a relief manager for a security company working two days a week for 28 hours. Last year he had made about £25,000 gross. The Appellant assisted his father by taking him to hospital and other health appointments. The Appellant worked in security for two days a week on Friday and Saturday but because of long hours it was more like three days. The Appellant worked in the shop four days a week. The Appellant's wife also was there.

6. The Appellant's father said that if the Appellant had to return to Pakistan the card shop business would be finished. It had not being doing very well when he transferred it but the Appellant had since built it up. He had transferred the card shop into the name of the Appellant because he, the father, was no longer able to cope with it. No one else could run the business. He did not know how much the business was worth.

7. In his determination the Judge indicated he was satisfied that the Appellant had failed to provide Barclays Bank statements showing deposits that matched the amounts on his pay slips from Centrica. Citing **Rodriguez [2014] EWCA Civ 2** the Judge held that the Respondent was under no obligation to ask the Appellant to provide the missing information in order to try to rectify the deficiencies in the documents. The Appellants could not meet the requirements of the family and private life provisions in the Immigration Rules.

8. The Judge considered the Article 8 claim at some length from paragraphs 24 to 29. Although it was accepted that the Appellant had a family life in the United Kingdom with his parents, sisters and brother and had established a strong private life here, the decisions were proportionate to the legitimate aim of immigration control. Article 8 could not be used as a device to circumvent the requirements of the Immigration Rules. While their circumstances might not be optimal when the couple initially return to Pakistan, the Appellant was young, healthy, educated and able to work and had family contacts there. The Appellants' departure would not inevitably lead to the demise of the family business. The Appellant was not running the family card shop business by himself as claimed. The security work took up the best part of three days in the week but there was no adequate independent evidence to show that the business had actually been formally transferred to the Appellant. There was no evidence for example that the lease on the shop had been transferred into his name. The Appellant could not have been working the long hours he claimed and also caring for his father.

9. There was no evidence to show that the Appellant was paying bills, council tax or other family expenses. The Judge did not find that the Appellant's parents were economically dependent on the Appellant. Families did not have an unfettered right to choose where they lived. Although the Appellant's wife was pregnant and the Judge had considered the best interests of her unborn child as a primary consideration, it would not be entitled to UK citizenship and would have no right to

live in the UK. Its needs would be met by living in whichever country its parents were. The removal decision did not breach the family's rights under Article 8.

The Onward Appeal

10. The Appellants appealed against the Judge's decision taking issue with a number of findings made by the Judge. The Judge had found that it was implausible that the Appellant would be able to support the whole family of seven adults on the annual profit from the card shop of £7,000. The grounds pointed out that the Appellant had a second job as a security manager which when taken into account showed the total taxable income was in excess of £35,000. It was thus a material error of law for the Judge to contend that the income from the shop supported the whole family.

11. At paragraph 38 of the determination the Judge had noted regular payments into the Appellant's bank account from what he described as "a relative of the first Appellant with the identifying references mum and dad". The Judge said no explanation was provided for these payments and they seemed inconsistent with the Appellant's claim to be the sole support for the Appellant's parents. However he had asked no questions about that during the hearing and it was not therefore open to him to speculate on what those entries might mean.

12. The Respondent had not challenged the assertion that the card shop business had been transferred into the name of the Appellant and therefore it was not open to the Judge to challenge it. Although the Judge had said at paragraph 41 that he did not hear from the Appellant's wife, he had also noted elsewhere that she had given oral evidence. The grounds described the Appellant's wife's evidence as "lengthy".

13. The Judge had misconstrued the Appellant's family's actual circumstances by stating "it cannot seriously be argued that the Appellant should be allowed to remain in the UK so that his sister can save up for her next marriage". That had never been part of the Appellant's case. The Judge had misapplied the test in the case of **Kugathas**. The family ties must be committed, real and effective and involve a level of support for each other. If the Judge had directed himself correctly on the **Kugathas** test he could not reasonably have come to the conclusion that family life was not engaged between the Appellant and the adult members of his family given that they all lived in the same household and had done for more than five years. The Appellant was at the very least if not the sole provider for the family, certainly the main breadwinner. The level of material financial and emotional support between them went beyond normal emotional ties.

14. The Judge concluded that Article 8 was not engaged for the purposes of family life and had therefore failed to gauge the proportionality of the Respondent's decision. Not only did it affect the Appellant but other close family members too. It was a stark interference with the family's Article 8 rights. Given the Appellant's contribution to the economy, the interference was disproportionate. The Judge had

referred to the family being able to revert to state support if they found themselves in financial difficulties.

15. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal White on 13th May 2014. He was satisfied that the Judge had made an arguable error of law in misdirecting himself and/or making inadequate findings. In granting permission to appeal he gave three examples:

> "(a) At paragraph 37 of the determination in finding that the profit from the shop was inadequate to support the family, the Judge appears to fail to take into account that the first Appellant claimed also to receive an income from working as a security manager (paragraphs 10 and 39).
>
> (b) At paragraph 42 of the determination the Judge states "I did not hear from the [Mrs Abbas] " but the Judge at paragraph 13 of the determination indicates that he did hear oral evidence from [her].
>
> (c) At paragraph 39 the Judge states that he does not find that the Appellant was running the card shop for three years as he claimed yet also records that the Appellant's claim to do so was "not really challenged" by the Respondent."

The Hearing before Me

16. At the hearing before me the issue was whether there was an error of law in the Judge's determination such that it fell to be set aside and the decision remade. If there was not then the decision would stand. It was conceded that the Appellant could not rely on paragraph 245AA of the Immigration Rules (the Respondent's interpretation in the Immigration Rules of the evidential flexibility policy) and therefore it was not submitted that the Appellant met the Immigration Rules. The issue was whether the Judge had erred in his treatment of Article 8. There were a number of errors of fact made by the Judge in his determination. It was noted that the hearing took place at Hatton Cross on 10th February 2014 (there is a typographical error on page 1 of the determination which refers to it as being heard on 10th February 2013, a year earlier) and the date that the determination was signed by the Judge on 30th March 2014, almost seven weeks later. The delay may have led to the Judge misstating the evidence in his determination.

17. I queried with Counsel whether the Appellant was able to explain what the references in the bank account to payments received from "mum and dad" signified. Counsel replied that she had not asked the Appellant about that as this was not the forum to explore the facts.

18. There was clear evidence by way of a deed of transfer in 2011 to show that the Appellant's father transferred the card shop business to him. There was a misconstruction of the evidence to jump to the conclusion that the Appellant could not support the family on £7,000 per annum. That may have arisen because of the

delay in preparing the determination. The Judge could not have come to the conclusion that family life was not engaged if he had had the correct approach in his mind. The family were living together in the same household. There was one further point that was not in Counsel's grounds that the Immigration Rules made no provision for the relationship between adult family members and therefore the claim could only be dealt with under Article 8. The Judge's errors of fact were so egregious because Article 8 must have been engaged that it could not be said the Judge had properly assessed proportionality.

19. In reply the Presenting Officer stated that the Judge was aware the Appellant had two jobs. At paragraph 39 the Judge had remarked that the Appellant's security work took up the best part of three days a week. The point the Judge was making at paragraph 37 was that it was not only the Appellant who was working and earning money. The Judge was well aware that the Appellant's wife had given evidence. He had summarised it at paragraph 13. Her evidence was brief and it was unfair to say that the Judge had got his facts wrong. It was more a case that the Appellant did not like the decision rather than the Judge was significantly wrong. The Appellant and his wife would not be separated as a result of the removal decisions.

20. There was nothing in the evidence to indicate that the relationship between the Appellants and the other adult family members went beyond normal emotional ties. There was no reason why the business would not keep ticking over. Private life was engaged and the Judge carried out a full balancing exercise at paragraph 46 of his determination taking into account the family relationships and made a complete assessment of the circumstances. When one factored in the ratio in the case of **Gulshan [2013] UKUT 640** the instant case did not meet the most exceptional circumstances. It was not said that the Appellant was dependent on his relatives but that they were dependent on him. The Judge's finding was they were all living together. The Appellant did not satisfy the Rules. The Judge clearly had the case of **Gulshan** in mind when referring to the public interest at paragraph 48 of the determination. The passage of time between hearing and determination did not materially affect the matter.

21. Finally in reply Counsel argued that the Judge's comments at paragraph 46 of the determination could not possibly reflect the public interest. In that paragraph the Judge had said the Appellant's departure would not lead to the demise of the family business but even if it did it was a risk the family chose to take when they put the business in the hands of someone with limited leave to remain in the United Kingdom. Even if, which the Judge did not accept, the Appellant's departure would cause the family serious financial difficulties, the family would be entitled to state support if they were unable to manage. Those comments it was argued were entirely the opposite of what the Respondent would contend. Far from being a burden on the state, the Appellant stopped his family from being in that position. Errors of fact made by the Judge amounted to errors of law. The Appellant's sister was working part-time in Asda and was not in a position to contribute to the family finances. She would not be able to support them on the income she had. Although no one was

suggesting that Article 8 was always engaged, it was a low threshold and the family lived together as a unit. It was thus not just a question of the financial dependency. The Judge's decision should be set aside.

Findings

22. The Appellant was not able to meet the Rules because he had not supplied the correct documentation to show his earnings. Had he done so he might very well have been able to satisfy the Rules but there is no such thing as a near miss and it was not in dispute before me that the Appellant was seeking to remain in the country and not be removed with his wife on the basis that their rights under Article 8 would be breached.

23. The burden of showing this rested upon the Appellants which they had to discharge to the standard of the balance of probabilities. The Judge found in relation to family life that the Appellants were living with a number of adult family members, and that as this was a relationship of adults there were no more than normal emotional ties. As a result Article 8 was not engaged at all. In relation to private life, this would be affected by the Appellant's removal but could be re-established in Pakistan. The couple would not be turned out onto the street and the claim that they would be (by the Appellant's father) was an example of the Appellant's father's exaggeration which led the Judge to place little weight on that evidence.

24. Before me the Judge's findings in relation to private life were not seriously disputed. The issue turned on the Judge's treatment of the claim to have an established family life that would be disproportionately interfered with. The argument the Appellant's behalf was that the relationship between the adults did go beyond normal emotional ties thus engaging Article 8(1).

25. The Judge rejected the contention that there was a dependency by the Appellant's parents on the Appellant. He did not accept that the Appellant's departure would lead to the demise of the family business. Even if it did, that was a risk that the family had run in putting the business in the hands of the Appellant. The Judge's reference to the family being entitled to state support does not necessarily mean that the Judge expected that the family would claim income support if the Appellant were to be returned to Pakistan. State support can mean a number of things including for example tax credits which are not taken into account when assessing financial eligibility under the Immigration Rules. However the more important point is that the Judge did not accept that that situation would arise. His finding was that the Appellant's departure would not lead to the demise of the business. It would not cause serious financial difficulties. His comment in the alternative, even if wrong, was therefore irrelevant and little turns on that objection to the determination.

26. In reality the grounds of onward appeal are no more than a disagreement with the result. A number of relatively minor points were taken against the determination but when viewed as a whole it is clear that the Judge gave cogent reasons why he did not

accept the claimed dependency. I consider that there is also little in the argument that due to a seven week delay between hearing the appeal and signing off the determination errors may have crept into the Judge's understanding of the facts.

27. Whilst there does at first sight appear to be an inconsistency between the Judge summarising the evidence of the Appellant's wife and stating later on that he did not hear from her (at paragraph 41) he immediately went on to note that she was pregnant, evidence that she had given to him. He referred to her pregnancy again at paragraph 49. He was therefore clearly aware of her evidence when arriving at his conclusions and based his conclusions on that evidence. Any "slip of the pen" there might have been in stating that he did not hear from her was not of significance to the outcome of the case.

28. The Judge's conclusion that it was implausible that the family could be supported on profits from the shop of £7,000 per annum needs to be seen in context. The Judge was well aware that the Appellant had two jobs. At paragraph 39 he noted that the Appellant's security work took up the best part of three days a week. The point being made by the Judge at paragraph 37 was that the family could not be supported on the proceeds of the card shop business alone. That in turn has to be seen in the context of the Judge's later remarks that if the Appellant were to be returned to Pakistan the effect on the business would not impact significantly on the family's finances as it was not enough by itself to support the whole family. The Judge's concern was that he had not been given an accurate account of what the family's income actually was, hence his concerns about for example what the Appellant's sister was earning in her job.

29. The difficulty for the Appellant's claim was that he was earning a very substantial amount from his weekend work as a security manager but he was unable to prove that to the Respondent because of the failure to comply with the information requirements in the Rules. The position before the Judge was very different to the Appellant's contention that he was the major breadwinner earning substantial amounts of money that were supporting him, his wife and five adults. There was no misunderstanding by the Judge of the dependency claim and it was open to the Judge to dismiss the appeal under Article 8 for the reasons he gave. Without being able to establish dependency of the sort claimed, the Appellants could not show that the decision engaged Article 8(1). The various minor points in the determination mentioned in the grant of permission did not in my view significantly undermine the validity of the determination.

30. In relation to the point that the Immigration Rules do not provide for a relationship between adults, even if that is the case and I have not heard sufficient detailed argument to find that, the jurisprudence on Article 8 particularly the case of **Gulshan** is clear that there must be compelling reasons why someone who cannot meet the Rules should nevertheless be allowed to remain in a country outside the Rules. That would only arise if there was compelling evidence that a relationship between adults should be allowed outside the Rules. This case fell short of that for the reasons given

by the Judge. There was no error of law in the Judge's determination and I therefore uphold his decision to dismiss the Appellants' appeal.

Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellants' appeals.

Appeals dismissed.

I make no anonymity order as there is no public policy reason for so doing.

As I have dismissed the appeal no fee order is payable.

Signed this 29th day of July 2014

…….
Deputy Upper Tribunal Judge Woodcraft