Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/53213/2013
IA/53216/2013
IA/53235/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5th August 2014	**On 18th August 2014**

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LOMASSDEO SOHODEB (FIRST RESPONDENT)
DEVIKKA RANNI SOHODEB (SECOND RESPONDENT)
VASHISH SOHODEB (THIRD RESPONDENT)

Respondents

Representation:

For the Appellant: Mr G Jack, Senior Home Office Presenting Officer
For the Respondents: Ms Bhatt of Counsel

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal, allowing the appeals of the three Respondents against a decision to refuse to vary their leave to remain in the United Kingdom and to remove them by way of directions.

2. For the purposes of this determination I shall refer to the Secretary of State as "the Respondent" and to the three Respondents as the first, second and third Appellants respectively, reflecting their position as they were, in the appeal before the First-tier Tribunal.

3. The Appellants are citizens of Mauritius born respectively on 18th July 1960, 22nd August 1965 and 15th December 1994.

4. The first Appellant entered the United Kingdom in 2004 with entry clearance as a visitor but was granted leave to remain as a student and then as a Tier 4 (General) Student. His most recent grant of leave to remain was made on 12th June 2012, valid until 20th July 2014. The second and third Appellants entered the UK in 2007 as dependents of the first Appellant and were granted leave to remain in line with him.

5. On 21st November 2012 the Respondent decided to curtail the first Appellant's leave to remain, that leave to expire on 20th January 2013. The leave of his two dependents was similarly curtailed. However on 14th December 2012, before the expiry date of their leave, the three Appellants made application for leave to remain in the United Kingdom on the basis of their private and family life under Article 8 ECHR. Those applications were duly considered and refused by a decision dated 5th December 2013. In addition t the Respondent issued removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The applications were refused because the Appellants were unable to meet the requirements of the Immigration Rules nor could they meet the family and private life requirements in Appendix FM and paragraph 276ADE of the Rules.

   (Insofar as it is relevant, the first Appellant was found not to be able to meet the requirements of ELTRP 1.1 because he only ever had limited leave to remain in the United Kingdom; likewise the second and third Appellants held discretionary leave only as his dependants.)

6. The Respondent refused the applications in accordance with paragraph 276ADE because she was not satisfied that the first Appellant had been in the UK for a continuous period of twenty years, nor could it be shown, considering he had lived in his own country of Mauritius for 43 years, that he had lost all ties with his home country. The second and third Appellants' applications were refused in line with that.

7. The Appellants appealed to the First-tier Tribunal claiming that it would be unreasonable to expect them to return to Mauritius since the third Appellant had lived here for six years, been educated here and was unfamiliar with the culture in Mauritius. It should be noted that when the applications for leave to remain were made, the third Appellant was aged 17 years 11 months. He had been in the United Kingdom since the age of 12 years, had attended school here, had completed his A levels and had an offer of a university place at Middlesex University.

8. Their appeals were heard in the First-tier Tribunal on 1st May 2014, by First-tier Tribunal Judge Boyd. The First-tier Judge acknowledged in his determination at [8] that it was conceded on behalf of the Appellants that they could not meet the requirements of Article 8 under Appendix FM. He noted that this was *"an appeal in relation to paragraph 276ADE and thereafter to establish Article 8 outside the Immigration Rules".*

9. It was said at the First-tier Tribunal hearing, that the first and second Appellants would not be able to gain employment in Mauritius, whereas the second Appellant was in gainful employment in the UK. The third Appellant (who by the time of the hearing before the First-tier Tribunal Judge was over 18 years of age) was now working at a doctor's surgery for fifteen hours a week. He wanted to attend university in the UK to follow a biomedical science course. The particular course he wished to follow was not available in Mauritius. If he had to return there it would set him back a year or two and in addition he has friends here and has grown up in the UK.

10. In coming to his findings the First-tier Tribunal Judge said at [22],

> "In essence, this is a case related primarily to the private life of the three Appellants. The first Appellant entered the United Kingdom on 8th March 2004. He has now been in the United Kingdom for ten years. Whilst I cannot take into account the ten year residence Rule, I cannot ignore the fact that the first Appellant has been living in the United Kingdom for ten years though, since August 2012, he has neither worked nor attended any college or university. He then brought the second and third Appellants to join him in the United Kingdom. They entered the United Kingdom on 4th February 2007. At that time the second Appellant was 41 years old (she will be 50 in August next year). The first Appellant, when he came to the United Kingdom, was age 43. Tellingly though the third Appellant, when he came to the United Kingdom, was 12 years of age. Since then he has spent now seven years in the United Kingdom. He has grown from a young boy to an adult. He is integrated into this country. He has been educated here and substantial amounts of educational documents have been lodged for him. He has friends here. It appears to me that although he did not have the seven years' residence as a child (by the time he turned 18 he had been here for six years and nine months approximately), he is extremely well-established in the United Kingdom and sees himself as part of this country. The United Kingdom is his home. It appears to me that as a young single adult male who looked upon his future as being in the United Kingdom as that is how he had been brought up, it would be extremely difficult for him to return to Mauritius, a country which he knew only as a boy".

The Judge then went on and allowed the appeal of all three Appellants under Article 8 ECHR.

11. The Respondent sought and was granted permission to appeal on the grounds that the First-tier Tribunal had erred by failing to take the correct approach in considering cases that engage Article 8 as set out in **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)**

and for failing to give adequate reasons for concluding that removal of the three Appellants to Mauritius would be a disproportionate consequence.

Appeal before the Upper Tribunal

12. The appeal came before me on 5th August 2014 I heard submissions initially on the error of law application. Mr Jack submitted that the Judge had plainly erred in his approach in that he had failed to adopt the proper approach as set out in **Gulshan** when considering the issue of whether there were arguably good grounds for granting leave to remain outside the Rules. He had failed to consider whether there were compelling circumstances not sufficiently recognised by the Rules.

13. Further the Judge had failed to recognise that if the appeals failed under the Immigration Rules (as these ones did) only then should he have gone on to consider whether the Appellants had demonstrated that there were exceptional or compelling circumstances not covered by the Rules, rather than engaging in a freewheeling Article 8 exercise. All told the Judge's consideration and findings amounted to one short paragraph which said

> "Due to the length of time for which all three Appellants have been in the United Kingdom together, taking into account their integration into this country, and their son's education here, I am satisfied that there is a good arguable case to consider this matter outwith the Rules."

14. Mr Jack submitted that there was a wholly inadequate analysis of reasoning here and this amounted to legal error. The decision needed to be set aside and remade dismissing all three appeals.

15. Ms Bhatt sought to argue that the Judge had considered whether compelling or unusual circumstances were present in these appeals. She suggested that the Judge's findings at [24] showed his reasoning for considering that the Appellants' circumstances fell outwith the Immigration Rules. That reasoning was further fortified by the unusual circumstances of the third Appellant who had been educated here and lived here since the age of 12 years and therefore had fully integrated into this country. The Judge had, therefore, considered exceptional circumstances, namely the circumstances of the family as a whole and the position of the third Appellant who had lived in the United Kingdom for almost seven years, before his 18th birthday.

Consideration and Findings

Error of Law

16. In my judgment the First-tier Tribunal Judge's decision plainly shows that in reaching that decision he erred in law. He seems to have been unaware of the decision in **Gulshan**, since he makes no mention of it in the body of the determination. That being so the Judge appears to have set out on a freewheeling assessment of Article 8 outside the Rules. The

Appellants did not meet the Immigration Rules (which now provide a complete code as regards Article 8 – see **MF (Nigeria) [2013] EWCA Civ 1192**). The first Appellant had not lived continuously in the United Kingdom for at least twenty years. 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, 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. Other than the Appellants' stated preference to remain in the United Kingdom, the Judge identified no grounds for concluding that there were any practical or other problems preventing the Appellants from returning to Mauritius. By failing to undertake any proper assessment of such factors the Judge plainly fell into legal error and his findings on the impact of the Appellants' removal on their family or private life are accordingly unsustainable.

17. The Judge's findings completely ignore the approach to be taken in circumstances where the Immigration Rules could not be met, as set out in particular in the cases of **Nagre**, **MF Nigeria** and **Gulshan**.

18. The correct approach has most recently been set out by the Upper Tribunal in **Shahzad (Article 8: legitimate aim) Pakistan [2014] UKUT 85**. That case endorsed the principles in earlier cases. It is plain that no consideration was given to the existence of arguably good grounds for granting leave so as to justify going on to consider Article 8 in a wider context and neither was any consideration given to whether compelling circumstances existed that were not sufficiently recognised under the Rules.

19. In these circumstances I find that the Judge's decision has to be set aside for reason of error in law and remade.

Remaking the Decision

20. Whilst Mr Jack submitted that the decision could simply be remade on the evidence already available, it was Ms Bhatt's request that the appeal be remitted to the First-tier Tribunal in order for there to be further oral evidence. When I enquired what further oral evidence would be brought forward to justify returning the matter to the First-tier Tribunal, she was unable to indicate any other than handing in an English Language test certificate for the first Appellant. There was no suggestion that the family's circumstances had changed substantially since the appeals were heard at the First-tier tribunal. Accordingly I considered there to be no reason why I should not proceed to remake the decision myself.

21. For the same reasons as given above for finding the Judge to have erred in law, I consider that the Appellants' appeals have to fail. It is not disputed

that they cannot meet the requirements of Appendix FM and paragraph 276ADE of the Immigration Rules. In terms of the principles in **Nagre**, **Gulshan** and **Shahzad** there are no arguably good grounds for granting leave to remain outside the Rule and thus it is not necessary to go on to consider Article 8 in any wider context. However, and in any event, the Appellants have failed to establish that there are any compelling circumstances in their case. The First-tier Tribunal Judge properly considered the issue of family life and concluded that removal meant that the family would be returned to Mauritius together and therefore removal would not interfere with family life.

22. The Judge also properly considered whether there was any evidence to suggest that the Appellants had lost all contact with family members and friends in Mauritius but gave sustainable reasons for finding that this was not the case.

23. As the grounds granting permission indicate, it is clear that the First-tier Tribunal Judge was more concerned with the facts as they affected the third Appellant who was 18 years old the day after the applications were lodged. This allowed the Judge to find that the extent of the third Appellant's private life which had been acquired in the seven years since he had entered the United Kingdom and which included successfully completing his secondary education and gaining A levels, outweighed the Respondent's entitlement to control immigration.

24. It can only be assumed that the Judge proceeded from his dismissal of the Immigration Rules appeal to considering Article 8 outside the Rule because the third Appellant happens to have completed his education in the United Kingdom, gained his A levels and wishes to continue with that education by going to university here. Can that properly be said to be circumstances not anticipated by the Immigration Rules? I think not. Those circumstances are hardly unusual or compelling. The Appellants would be returned to Mauritius as a family and there was nothing to prevent the third Appellant from applying to return to the UK as a foreign student and making that application through the proper channels. The circumstances of the three Appellants are neither unusual nor compelling nor can they be said to fall outside the detailed provisions of the Immigration Rules.

Decision

25. The determination of the First-tier Tribunal which was promulgated on 19th May 2014 is set aside. I have remade the decision. The appeals of the three Appellants are dismissed.

Signed Date

Upper Tribunal Judge Roberts