Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/53519/2013
IA/53529/2013
IA/53533/2013
IA/53532/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 31st July 2014	**On 29th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

A S K (FIRST APPELLANT)
T A K (SECOND APPELLANT)
M A K (THIRD APPELLANT)
A A K (FOURTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr D Balroup, Counsel
For the Respondent: Mr G Saunders, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are citizens of India. The first Appellant was born on 3rd May 1975. The second Appellant was born on 13th May 1982. They are husband and wife. The third and fourth Appellants are their children born on 23rd May 2006 and 10th September 2011. On 7th September 2013 the Appellants' solicitors applied on their behalf for leave to remain on the basis of their family and private life. The Home Office gave due consideration to the application under Article 8 noting that from 9th July 2012 the application fell under Appendix FM of the Immigration Rules. The second Appellant was in the UK as a Tier 4 (General) Student. The Appellants' application was refused by Notice of Refusal dated 2nd December 2013.

2. The Appellants appealed and the appeals came before Judge of the First-tier Tribunal Walters sitting at Hatton Cross on 13th May 2014. In a decision promulgated on 16th May 2014 the Appellants' appeals were allowed on human rights grounds. The judge made an anonymity direction because of the ages of the third and fourth Appellants. No application is made to vary that order and that order is maintained for the purpose of these proceedings and this determination.

3. On 16th May 2014 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. The grounds note the Immigration Judge at paragraph 23 of his determination referred to the guidance in *Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)* namely that if there are arguably good grounds for granting leave to remain outside the Immigration Rules it is necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the Rules. However the grounds submit that the Immigration Judge misapplied the approach outlined in *Gulshan* and that an Immigration Judge is required to make findings by reference to case specific arguably good grounds and compelling circumstances not sufficiently recognised under the Immigration Rules. The grounds contend that the Immigration Judge's findings on this issue amounted to perceived omissions within the refusal letter and the possible applicability of the Immigration Rules. They submit that the Immigration Judge made inadequate findings as to arguably good grounds and compelling circumstances not sufficiently recognised under the Rules and that the Judge has erred in law by considering Article 8.

4. On 9th June 2014 First-tier Tribunal Judge Saffer granted permission to appeal stating

> "I am satisfied that the grounds are arguable for the reasons set out in the application, namely a possible failure to assess the evidence in the light of *Gulshan*. All ground may be argued."

5. It is on that basis that the appeal comes before me. I appreciate that the appeal is brought by the Secretary of State. However for the purpose of continuity within these proceedings the Secretary of State is referred to as the Respondent and Mr A S K and his family as the Appellants. All reference herein to the Appellants are to Mr A S K. The appeals of the second to fourth Appellants rise and fall as family members on that of the first Appellant. The parents are represented by Mr Balroup their instructed Counsel. Mr Balroup is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer Mr Saunders. The issue before me is to determine whether or not there is a material error of law in the decision of the First-tier Tribunal.

Facts

6. The factual issues in this matter are not challenged. The first Appellant entered the UK on 10th February 2006 in possession of entry clearance as a student dependant valid from 25th January 2006 to 31st October 2007. That leave was extended until his most recent leave to remain expired on 6th October 2013. The second Appellant who is T A K entered the UK on 15th September 2005 in possession of entry clearance as a student valid from 24th August 2005 to 31st October 2007. She obtained further leave to remain as a student and as a Tier 4 (General) Student under the points-based system until her most recent leave to remain expired on 6th October 2013. The third Appellant was born in the United Kingdom and has resided there since her birth in 2006. The fourth Appellant was born in Mumbai in September 2011. I therefore assume that the second Appellant returned to India for the purpose of giving birth and entered the United Kingdom on 20th November 2011 in possession of a valid entry clearance. The fourth Appellant's leave also expired on 6th October 2013.

7. The first Appellant had therefore at the time of his hearing before the First-tier Tribunal lived in the United Kingdom for almost eight years and he noted to the First-tier Tribunal that he and his family considered the United Kingdom their home and that he was unaware of his Indian roots. He stated that his friends, places of enjoyment and his general life was based in the United Kingdom. Having said all that I note that at paragraph 17 of his determination Immigration Judge Walters found that the first Appellant had exaggerated his account as he has lived by far the majority of his life in India and could easily be expected to readjust to that life upon return albeit with different employment and friends. I further note the factual detail provided with regard to the family's employment, education, home life and academic history set out at paragraphs 17 to 22 of the First-tier Tribunal Judge's determination. No challenge is made to those factual findings by the Secretary of State. I note that the First-tier Tribunal Judge found at paragraph 22 that the accounts of the second Appellant and the first Appellant's mother to be credible. The First-tier Tribunal Judge does not appear to have made any specific finding as to the credibility of the first Appellant save for the issue mentioned above and referred to at

paragraph 17 of his determination with regard to an exaggeration of his account. There is nothing within the determination to suggest that the First-tier Tribunal Judge did not find generally speaking that the first Appellant's evidence was not credible.

Submissions and Discussions

8. Mr Saunders on behalf of the Secretary of State takes me back to the Grounds of Appeal pointing out that the Immigration Judge may have recited that the correct jurisprudence includes *Gulshan [2013] UKUT 00640* but that the judge has failed to properly apply it. He submits that paragraph 24 of the judge's determination is hopeless and that it does not sit with paragraph 36 of his determination. Mr Saunders is prepared to acknowledge paragraph 24 of the First-tier Tribunal Judge's determination may stand as his analysis of compelling circumstances but that the judge is fundamentally wrong to conclude they are not sufficiently recognised by the Respondent in the Notice of Refusal stating that in the Secretary of State's view they most certainly are.

9. He submits that it is the reality of the circumstances that the judge has to address and that the circumstances fall far short of compelling circumstances. He asks me to find that there is a material error of law, to set aside the decision of the First-tier Tribunal and to remake on the facts before me particularly bearing in mind that changes to Section 117 of the Nationality, Immigration and Asylum Act 2002 came into force on Monday 28th July 2014 i.e. predating the hearing of this appeal.

10. Mr Balroup submits that the law has moved on since *Gulshan* relying on *MM (Lebanon) and Others v Secretary of State for the Home Department [2014] EWCA Civ 985*. He contends that paragraph 23 shows that the judge had given due consideration to the test in *Gulshan*. It is conceded and accepted that there is an error in paragraph 36 in that the third Appellant is not a British citizen. He takes me to paragraph 37 pointing out that that is a detailed analysis of the position of the third Appellant, that she has been in the UK for eight years and that she speaks English. He indicates that the judge has given due and proper consideration to the case law thereafter and has made findings at paragraph 44 that he was entitled to. He asked me to find that there is no material error of law.

The Law

11. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

13. The law on Article 8 outside the Immigration Rules is constantly changing. The approach to be adopted by the judiciary is also changing. *Gulshan* was the starting point. It has to be remembered that when this matter came before the First-tier Tribunal Judge the law had to a certain extent moved on beyond *Gulshan* in that there had been additional authorities but that there have been authorities and statutory legislation which postdate the appeal. The question before me is whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. I am satisfied that there is not. It is not the purpose of the Upper Tribunal to decide whether or not the Upper Tribunal Judge would have come to the same finding on the factual evidence to that of the First-tier Tribunal Judge. Providing the First-tier Tribunal Judge has carried out a proper analysis then he is entitled to make the findings that he does.

14. It is appropriate to look at the law. The Tribunal in *Gulshan* made clear and has repeated subsequently in *Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)* at paragraph (31):

> *"Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."*

15. The Court of Appeal in *MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985* at paragraph 128 went on to state:

> *"Nagre does not add anything to the debate save for the statement that if a particular person is outside the Rule then he has to demonstrate, as a preliminary to a consideration outside the Rule that he has an arguable case that there may be good grounds for granting leave to remain outside the Rules. I cannot see much utility in imposing this further intermediary test. If the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision maker."*

16. Ironically (because *MM (Lebanon)* had not been determined at that time) that approach appears to be exactly what the First-tier Tribunal Judge has done in this instant case. At paragraph 23 he has referred to *Gulshan*. He has thereafter looked at the factual scenario and analysed a considerable amount of case law and Section 55 of the Borders, Citizenship and Immigration Act. He has analysed the position carefully of the third and fourth Appellants and made findings of fact which are not challenged by the Secretary of State. Having weighed the jurisprudence in the evidence before him he then found that there was nothing in the evidence to persuade him that the third Appellant should be removed from the United Kingdom and has gone on to give reasons. He has then analysed the test set out in *Razgar* and the principles enunciated in *Huang v the Secretary of State for the Home Department [2007] UKHL 11* and the need to balance the interests of society with those of individuals and groups. Judge Walters has considered the issue of proportionality in some detail at paragraph 43 and made overall conclusions at paragraph 44 that Article 8 is engaged under paragraph 46 and the decisions appealed against would cause the United Kingdom to be in breach of the law or its obligations under the Human Rights Act.

17. The analysis that the judge has carried out is a full and thorough one and whilst I acknowledge that he has put considerable reliance on the fact that the youngest child is now aged 8, speaks English, has never been to India and has spent all of her life in the UK, these are factual findings that he was entitled to make and an assessment that he was also entitled to make.

18. In such circumstances the decision of the First-tier Tribunal Judge does not disclose a material error of law and the appeal of the Secretary of State is dismissed. This decision applies for all Appellants.

Decision

19. The decision of the First-tier Tribunal Judge discloses no material error of law and the appeals of the Secretary of State are dismissed and the decision of the First-tier Tribunal Judge is maintained.

20. The First-tier Tribunal Judge made an order pursuant to Rule 45(4)(1) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made and the anonymity direction is therefore maintained.

Signed Date 14th August 2014

Deputy Upper Tribunal Judge D N Harris