Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **VA 12138-13**

THE IMMIGRATION ACTS

At **Field House**	Decision signed: **31.03.2014**
on **31.03.2014**	sent out: **03.04.2014**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

MMR HAFEZ

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: Mr Amir Fouladvand (working under the supervision of MAAS)
For the respondent: Mr D Mills

DETERMINATION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Shahzad Aziz), sitting at Hatton Cross on 3 January, to allow a family visit appeal by a citizen of Egypt, born 1 August 1992. Since the appellant's mother and sister had only limited leave to remain in this country, he had a right of appeal only on human rights grounds.

2. The judge allowed his appeal on article 8 grounds, without dealing, even in passing, with any of the recent authorities of the Court of Appeal, the Administrative Court, or this Tribunal about cases of this kind: of course there would have been nothing wrong with that, so long as he had made it clear that he was following the principles laid down in them.

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3. Those authorities start, in order of importance, with *MF (Nigeria)* [2013] EWCA Civ 1192, where the Court of Appeal considered the meaning of 'exceptional circumstances' in paragraphs 399 and 399A of the 'new Rules' (in force from 9 July 2012) made it necessary for cases which did not satisfy them to be 'exceptional', applying expressly only to deportation cases. There had already been *Nagre* [2013] EWHC 720 (Admin), and *Gulshan* (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC) was to come. However, the parties before me did not find it necessary to refer in detail to any decision, apart from *MF (Nigeria)* itself, and to *Shahzad* (Art 8: legitimate aim) Pakistan [2014] UKUT 85 (IAC).

4. The relevant part of the judicial head-note in *Shahzad* is this:

> *(iv) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.*
>
> *(v) It follows from this that any other rule which has a similar provision will also constitute a complete code;*
>
> *(vi) 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.*

5. In plain language, the process to be followed by judges in cases of the present kind is this:

(a) first decide whether the application satisfies the requirements of the Rules; if so, allow the appeal on that basis, but if not, then

(b) consider whether "*there may be arguably good grounds for granting leave to remain outside them*"; if not, dismiss the appeal, but if so, then

(c) "*go on to consider whether there are compelling circumstances not sufficiently recognised under them*"; if not, dismiss the appeal, but if so, then

(d) decide it on the result of the conventional article 8 balancing exercise.

6. The judge did not answer the question posed at (c), because he had neglected to inform himself of the present state of the law, relying as he did on *MF* (Article 8 - new rules) Nigeria [2012] UKUT 393 (IAC), since overruled by the Court of Appeal. In those circumstances, Mr Fouladvand agreed that the decision on the appellant's human rights grounds needed to be re-made.

7. There was another issue before the judge, as to the Home Office's contention that the application had to be refused on the basis of 320 (7B) of the Immigration Rules, in force at the date of the decision under appeal in this case, which made refusal of entry clearance mandatory for

(d) using Deception in an application for entry clearance, leave to enter or remain (whether successful or not);

unless the applicant:

(i) Overstayed for 28 days or less and left the UK voluntarily, not at the expense (directly or indirectly) of the Secretary of State;

(ii) used Deception in an application for entry clearance more than 10 years ago;

(iii) left the UK voluntarily, not at the expense (directly or indirectly) of the Secretary of State, more than 12 months ago;

(iv) left the UK voluntarily, at the expense (directly or indirectly) of the Secretary of State, more than 5 years ago, or

(v) was removed or deported from the UK more than 10 years ago.

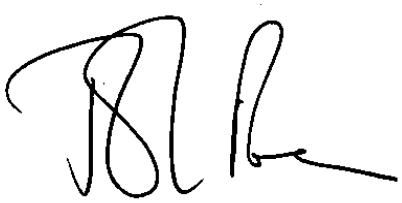
8. This contention was based on the appellant's having made a previous visit application in 2012, saying he only had an uncle in this country; but he had come here in 2011 with his mother and daughter, who stayed on to claim asylum. Unlike the rest of the case, here the burden of proof was on the entry clearance officer, and the judge dealt with the issue at paragraphs 43 – 44. He noted that the appellant's representative had required strict proof of the deception used; but counsel for the Home Office had no copy of the appellant's 2012 visa application form with him; so the judge was "not persuaded" that the application fell to be refused under paragraph 320 (7B).

9. Mr Mills nevertheless argued that this was not a final decision on the paragraph 320 (7B) point, which remained open for one to be made on the re-hearing which would be required, as discussed at **3 – 7**. As I pointed out, there was no challenge to the judge's findings on this point in the Home Office grounds of appeal to the Upper Tribunal, nor had permission been given on it. In those circumstances, this part of the judge's decision is not before me, and anything I might say on it would be *obiter*.

10. However, in my view the judge was fully entitled to expect that the Home Office should disclose the visa application form on which they relied, and which would have been in their custody ever since the appellant sent it in. They ought to have put all the evidence on which they relied before the judge in the first place, and, if they wished to challenge his decision on it, to have done so in their grounds of appeal to this Tribunal.

11. It will be for the judge who sits on the fresh hearing I am about to direct to consider whether this ground is still open to the Home Office; but the least they can do is to file and serve that evidence now.

Home Office appeal allowed by consent
Decision to be re-made following fresh hearing in First-tier Tribunal (not before Judge Aziz)
Fresh judge to decide whether paragraph 320 (7B) point still available to Home Office, and, if so, to deal with it on its merits



(a judge of the Upper Tribunal)