IAC-HX-DML-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/40359/2013
IA/42868/2013

THE IMMIGRATION ACTS

Heard at Field House
On 19th February 2015

Decision & Reasons Promulgated
On 23rd March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE E B GRANT

Between

MRS GAURI GAURI
MR KAMALDEEP SINGH

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr R Sharma of Counsel
For the Respondent: Mr M Shilliday, Senior Presenting Officer

DECISION AND REASONS

The Background to this Application

1. By a letter dated 12th September 2013 the respondent refused leave to remain in the United Kingdom on grounds of the medical problem surrounding the appellant's child. The appellant appealed that decision and it came before FTTJ Thorne who

dismissed the appeal in a decision promulgated on 22nd July 2014. The appellant sought permission to appeal and the grounds of that application are below.

> "1. The Appellants seek permission to appeal against the decisions of First tier Tribunal (FtT) promulgated on 22/07/14, dismissing their appeals against the Secretary of State's decision refusing to grant them leave to remain outside the Immigration Rules.
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> 2. It is contended that the Tribunal materially erred in that: the assessment of Article 8 and best interest and welfare of the dependent child with reference to Section 55 of the Immigration, Citizenship and Borders Act 2009 was flawed; the Tribunal failed to consider material matters; failed to make clear findings; and in not giving weight to material evidence/matters, thus rendering the decision unsafe. The Tribunal did so, on the following grounds:
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> 3. Although in considering the argument for allowing the appeal under Article 8 outside the Immigration Rules, the Judge refers to the case of **Gulshan (Article 8 new Rules – correct approach) [2013] UKUT 640** at paragraph 42 of the determination, he nevertheless fails to apply the test set out therein, consistently when considering the case for the first Appellant (referred to in the determination as "A1") and the dependent child (paragraphs 44 and 50 respectively). He refers to "compelling circumstances" and "arguably good grounds" interchangeably and looks for whether there are "compelling circumstances" that are capable of constituting "arguably good grounds" for considering the case outside the Immigration Rules and appears to conduct a balancing exercise as to the competing interests as part of that consideration. The Judge's approach is flawed and amounts to a material error of law.
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> 4. Further and or alternatively, the Tribunal inadvertently erred in its approach to Article 8 ECHR in light of the Court of Appeal's judgment in **MM v Secretary of State for the Home Department [2014] EWCA Civ 985** (which was handed down following the hearing of the appeal but before promulgation of its determination) which sets out the correct approach and held essentially that (paragraph 128) if the rules are a complete code then there will be a proportionality balance within the rules and if the rules are not a complete code then there should be a proper proportionality exercise under Article 8 ECHR, thus removing the need for an intermediary test. In this appeal it was contended that the Rules are not a complete code as Appendix FM and/or 276ADE did not allow for consideration of the first Appellant and or her daughter's medical health, their ongoing treatment (for example at paragraphs 11-12 & 18 of the skeleton argument). Reference was also made to an ongoing General Medical Council (GMC) investigation for which the Appellants had given their consent (skeleton argument paragraphs 14 & 26) and documentation concerning the same was served. Arguably the judgment in **MM** reinforces the contention that there are factors in the present for which there are no provisions in the Rules. The Judge failed to properly apply the facts of the case to the either guidance. This amounts a material error of law.
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> 5. The Judge in refusing to consider the case outside the Immigration Rules purports to go behind the apparent concession made by the Respondent in the Reasons for Refusal letter in which the case is considered outside the Rules (see

reference to "Decision on Exceptional Circumstances" and reference to Articles 3 & 8). Had the Tribunal had regard to this, he would have arguably adopted a different approach in considering Article 8 ECHR.

6. The Judge failed to consider material matters such as the policy as referred to in the skeleton argument (paragraph 16 and policy served) and the Respondent's failure to apply its own policy to grant discretionary leave where there are ongoing proceedings/investigations in the context of a GMC investigation. The Judge fails to make any specific finding in respect of this. This is an arguable error.

7. In finding at paragraph 46 of the determination that the Appellants had "failed to establish that they would not be able to access equivalent health care in India for their child as is available in the UK" and again in the same terms at paragraph 50 of the determination, the Judge again appears to go behind what the Respondent's accepts in the RFRL namely that there is a difference in the standard of medical facilities in India compared to those available in the UK. Thus failing to take into account material matters. Had the Judge had regard to this, it would have been incumbent on him to consider this as part of a proportionality assessment when looking at Article 8 as referred the case of **Akhalu (health claims: ECHR Article 8) [2013] UKUT 400**, (also cited in the determination at paragraph 43) as part of their private life in the UK.

8. The Judge fails to make credibility findings in respect of the first Appellant's (A1) oral evidence and give reasons for rejecting the same. The Judge falls into error as he looks for corroboration thus deeming the Appellant's evidence as insufficient to satisfy the standard of proof in respect of key issues such as the availability of treatment in India and GMC investigation (paragraphs 48 & 49 of the determination) the Judge appears to require corroboration. Such a requirement is unlawful. It is contended that the Judge made a material mistake and applied the wrong standard of proof to the assessment of the Appellant's oral evidence. The arguably adopted a similar approach in his treatment of the documentary evidence that was available to and submitted by the Appellants concerning the paucity of specialist treatment in India and its accessibility (referred to at paragraph 48 in the determination), rejecting the evidence because of what it did not show. The Respondent was provided with the relevant material and it was considered in the RFRL and no evidence in rebuttal was relied upon. In the circumstances the Tribunal should have attached greater weight to the evidence.

9. Further and or alternatively, the Judge failed to have regard to the witness statement of the second Appellant (A2) which was adopted at the hearing and was not challenged in cross examination. The Judge consequently also failed to have regard to material evidence as going to the issues to be decided.

10. The Judge erred in failing to have regard to the first Appellant's oral evidence and or the letter dated 6 December 2013 from Mark Lee Investigating Officer Fitness to Practice Directorate served prior to and at the hearing, concerning a GMC enquiry into possible negligence. In doing so the Judge failed to consider as part of any assessment material evidence going to the issue of the Appellants and their dependent child's private life in the UK (not covered by the

Immigration Rules). Further the Judge errs at paragraph 49 in finding "There is no evidence that any doctor in the UK working for the NHS has acted negligently or that any such enquiry is actively being pursued …"The first Appellant's evidence and the letter confirming that a doctor is being investigated in respect of his/her practice in connection with the child's delivery on 26 May 2013 was before him. Consequently, the Judge's in finding to the contrary, renders the decision is unsafe. Had the Tribunal considered the evidence properly it may have come to a different conclusion, particularly given the strong public interest factor in the Appellant's supporting the investigation.

11. The Tribunal did not properly direct itself to Section 55 and the relevant case law cited in the skeleton argument. The only reference to the child's best interest is at paragraph 50 and then only in a narrow context where the Judge finds that the best interests would met by the child remaining with her parents (paragraph 50). The Tribunal materially erred in failing to conduct an objective assessment as required, to ascertain what the child's interests may be and her welfare require (as opposed to the family being removed together) (**MK (India) [2011] UKUT 00475**) as a distinct best interests assessment**.** The Judge failed to consider the child's interests/needs in the context of ongoing medical treatment and investigations/reviews as detailed in the medical evidence provided (paragraphs 15-19). He failed to consider the impact of any disruption in that treatment and the feasibility of accessing services/treatment in India owing to the family's particular circumstances. The Judge failed to have regard to the GMC investigation as part of the best interests assessment. Arguably, the Tribunal failed to consider and make findings on material matters/evidence going to the best interests and welfare of the child, capable of affecting the decision. In the circumstances the decision is flawed.

12. Further and or alternatively, it is incumbent on the Tribunal show that factors in favour of the Appellant have been properly considered (paragraph 1 of **ML (Nigeria) v SSHD [2013] EWCA Civ 844**). The Tribunal have failed to do so in the Appellants and their dependent child's case.

13. In the circumstances, owing to the series of errors, the Tribunal is invited to find that the decision is unsafe and the decision should be set aside and the matter remitted back to the First Tier Tribunal."

2. First-tier Tribunal Judge Ievins granted permission to appeal on 12th September 2014 in the following terms:

"**REASONS FOR DECISION (including any decision on extending time)**

1. Permission to appeal is sought by a female national of India and her husband against the decision of First-tier Tribunal Judge Thorne sitting at Stoke-on-Trent to dismiss their appeals against the refusal of their applications for leave to remain in the United Kingdom outside the Immigration Rules. Mrs Gauri, the first appellant, was in the United Kingdom on a student visa with her husband as her dependant. The visa was to expire on 27 July 2013 but on 26 May 2013 she gave birth to their daughter Hareet Kaur Toor. Sadly their daughter suffered some birth injuries. Although there is an Immigration Appeal Tribunal file for

her under reference IA/42860/2013 there is no valid appeal in relation to her and the daughter's immigration status stands or falls on that of her parents.

2. After the daughter's birth an application was made by the parents for discretionary leave to remain in the United Kingdom on human rights grounds. That application was refused and an appeal was heard, and dismissed, by First-tier Tribunal Judge Thorne sitting at Stoke-on-Trent. He dismissed the appeals because the two appellants did not qualify under paragraph 276ADE of the Immigration Rules. They had not been in this country long enough. He found Article 3 of the Human Rights Convention was not breached and in relation to Article 8 adopted what he described as the "**Gulshan** approach". He concluded that there were no arguably good grounds for granting leave to remain outside the Rules so a further Article 8 assessment was not necessary once he had found that the appellants did not satisfy Article 8 within the Immigration Rules.

3. In dismissing the appeal under Article 8 outside the Immigration Rules the appellants submit that the judge employed the wrong test. This is a reference to the case of **Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 640**. He did not take into account the case of **MM v SSHD [2014] EWCA Civ 985** which was handed down following the hearing of the appeal but before the determination was promulgated. In that case the Court of Appeal held that if the Rules (as in this case) were not a complete code then if a case did not fall within the Immigration Rules there needed to be an Article 8 assessment outside the Immigration Rules. It is asserted that there are factors in the present case for which the Immigration Rules do not provide.

4. Paragraph 7 of the grounds seeking permission to appeal is also arguable as is the matter mentioned in paragraph 10. There there is reference to a doctor involved in the daughter's delivery being investigated in connection with negligence during the child's delivery. This is a factor relevant to the assessment of proportionality and in failing to take it into account it is arguable that the judge fell into material error of law. All grounds are arguable. I can see no reason why an anonymity direction might be appropriate and no such direction is made."

3. Thus the matter came before me.

4. On behalf of the appellant Mr Sharma relied on the grounds and the skeleton argument placed before the FTTJ which reiterated the same points. In summary the issue for the Tribunal was consideration of Article 8 outside of the Immigration Rules and how far the FTTJ was required to go with that consideration; and secondly the failure of the FTTJ to consider the compassionate circumstances in respect of the child.

5. On behalf of the respondent Mr Shilliday submitted that the tensions between the case law cited in the grounds have been resolved following the decision of Underhill LJ in **Singh v SSHD [2015] EWCA Civ 74**. In summary Underhill LJ has found that Aitkins LJ was not changing the test set by Sales LJ in **Nagre** and all that Underhill LJ is saying is that if an appellant's circumstances are dealt with in the Immigration Rules and they do not meet the Immigration Rules then all that needs to be done in

the Immigration Rules is an integral part of an Article 8 assessment in conjunction with the residual discretion. Mr Shilliday accepted that in this case if there were an intermediary test the FTTJ would have been entirely right to go outside of the Rules but in his submission the findings and conclusions are perfectly adequate and so while there may have been a misdirection as to the law at paragraph 42 it is not material because what follows at paragraphs 43 to 51 is a full and complete assessment of all the relevant factors. That is effectively the finding of paragraph 50 where the FTTJ found that the appellant's circumstances do not constitute compelling circumstances not sufficiently recognised under the Immigration Rules. Although the phrase "**Gulshan** approach" might be problematic and the final wording of paragraph 50 is also problematic but in fact the FTTJ has followed the correct approach and in paragraph 51 found removal is proportionate and that is ultimately the test. The decision made by the FTTJ was properly open to the judge. **GS (India)** does not assist the appellant with regard to an Article 3 claim and does assist in Article 8 which leaves the judge with **MM (Zimbabwe)**. There are problematic phrases used in this decision but when one gets down to the findings and conclusions the decision is sustainable.

6. In reply Mr Sharma said there is a clear problem with the test applied by the FTTJ at paragraph 42 and paragraphs 50 and 51 do not save the decision. It cannot be known had he approached his findings in the correct manner what he would have said. The finding about medical treatment is not the final issue in Article 8 reliance is placed on **Akhalu (health claims: ECHR Article 8) [2013] UKUT 400** (cited before the FTTJ). Counsel who appeared before the FTTJ accepted she could not argue Article 3 but that made it important to consider Article 8 outside of the Rules. The argument about compassionate circumstances is not an irrationality challenge. It is the appellant's case that the FTTJ's approach to the compassionate circumstances of this case is fundamentally flawed because of the Article 8 assessment and how he should have considered it.

The FTTJ's Findings

7. The FFTJ' findings are:-

> "31. After having heard and read all the evidence in this case, it is clear that the appellants fail to qualify under Appendix FM of the Immigration Rules. In addition I am not satisfied on the balance of probabilities that the appellants qualify under paragraph 276ADE of the Immigration Rules. They have not been resident in the UK for 20 years and their entire families are living in India. They have therefore failed to establish that they have lost their ties to that country. Indeed Ms. Masih accepted that the appellants could not succeed under either provision. Her argument was that removal of the appellants and their daughter would be a breach of Article 3 of the European Convention on Human Rights (ECHR) and Article 8 ECHR "outside the Immigration Rules".
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> 32. Article 3 ECHR
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> 33. In submissions Ms. Masih stated "I can't really argue Article 3 ECHR" but none the less said that she felt obliged to.

34. **MM (Zimbabwe) v The Secretary of State for the Home Department [2012] EWCA Civ 279** in which this area of law was reviewed by Moses LJ is binding on me. He said "The decisions of the House of Lords and of the European Court of Human Rights establish that even where a claimant is suffering from mortal illness such as advanced HIV/Aids and, if deported, would deteriorate rapidly and suffer an early death, no breach of Article 3 is established. The essential principle is that the ECHR does not impose any obligation on the contracting states to provide those liable to deportation with medical treatment lacking in their "home countries". The principle applies even where the consequence will be that the deportee's life will be significantly shortened (see Lord Nicholls in N v Home Secretary [2005] 2 AC 296, 304 [15] and N v UK [2008] 47 EHRR 885 (paragraph 44).

35. The independent documentary medical evidence in relation to the child in this case establishes that she was born with complications which resulted in the following being diagnosed at birth:

    (i) Neonatal seizures

    (ii) Encephalitis

    (iii) Abnormal imagine of skull and head

    (iv) severe ischemic injury to her brain

    (v) Hypothermia therapeutic

    (vi) Stridor

36. The child was discharged from hospital on 17/06/13 (having been born in the hospital on 26/05/13) without any active problems being noted. She was not prescribed any medication but it was recommended that she see a physiotherapist. She was described as being "well" at time of discharge.

37. The child requires ongoing physiotherapy and regular check-ups with doctors and neonatologists. She was found to be "not fit for air travel" in August 2013 but there was no evidence of her ability to travel now. She would need help when she grows up It was also likely that she would develop "hemparesis in the right side."

38. The independent documentary medical evidence in relation to A1 is that she suffers from Urinary Stress Incontinence and needs to wear incontinence pads.

39. In light of this medical evidence and the fact that article 3 ECHR is not engaged even where "a claimant is suffering from mortal illness such as advanced HIV/Aids and, if deported, would deteriorate rapidly and suffer an early death" I conclude that it has not been established that returning the appellants to India would breach the article 3 ECHR rights of A1 or her daughter.

40. Article 8 ECHR (Further Considerations)

41. As was set out by Sales J in **R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin)** the aforementioned Immigration Rules were amended to address more explicitly the factors which, according to domestic and Strasbourg case-law, weigh in favour of or against a claim by a foreign national based on ECHR Article 8 to remain in the United Kingdom. They were thus introduced to align more closely the Immigration Rules and the approach under Article 8, and to unify consideration under the Rules of Article 8 and section 55 of the Borders, Citizenship and Immigration Act 2009 with deals with the welfare of children. The Secretary of State also issued instructions regarding the approach to be applied by officials in deciding to grant leave to remain outside the Rules. Those instructions were that, if the requirements of the rule are not met, refusal will normally be appropriate but that leave can be granted where exceptional circumstances, in the sense of "unjustifiably harsh consequences" for the individual, would result. Sales J stated (at [36]) that this residual discretion "fully accommodate[ed] the requirements of Article 8".

42. The case of **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)** states "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.

43. I have also taken into account the case of **Akhalu (health claim: ECHR Article 8) [2013] UKUT 400 (IAC)** which is authority for the proposition that MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279 does not establish that a claimant is disqualified from accessing the protection of article 8 where an aspect of her claim is difficulty or inability to access health care in her country of nationality unless, possibly, her private or family life has a bearing upon her prognosis. The correct approach is not to leave out of account what is, by any view, a material consideration of central importance to the individual concerned but to recognise that the countervailing public interest in removal will outweigh the consequences for the health of the claimant because of a disparity of health care facilities in all but a very few rare cases. The consequences of removal for the health of a claimant who would not be able to access equivalent health care in their country of nationality as was available in this country are plainly relevant to the question of proportionality. But, when weighed against the public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interests in removal.

44. The independent documentary medical evidence in relation to A1 is that she suffers from Urinary Stress Incontinence and needs to wear incontinence pads. I am not satisfied that her medical condition constitutes compelling circumstances not sufficiently recognised under the Immigration Rules.

45. The evidence before me also indicates that the child was born with complications which resulted in Neonatal seizures, Encephalitis, abnormal imaging of skull and

head, severe ischemic injury to her brain. Hypothermia therapeutic & Stridor. The evidence indicates that the child was discharged from hospital within days of being born without any active problems being noted. She was not prescribed any medication but it was recommended that she see a physiotherapist. She was described as being "well" at time of discharge. The evidence also indicates that the child requires ongoing physiotherapy and regular check-ups with doctors and neonatologists. She was found to be "not fit for air travel" in August 2013 but there was no evidence of her ability to travel now. The medical opinion was that she would need help when she grows up and it was also likely that she would develop "hemparesis in the right side."

46. The child appears to require no medication. Her treatment needs appear to be ongoing physiotherapy and regular medical check-ups. I conclude (for reasons given below) that the appellants have failed to establish that such treatment is unavailable in India. In particular they have failed to establish that they would not be able to access equivalent health care in India for their child as is available in the UK.

47. The evidence submitted by the appellants concerning the provision of such treatment in India is sparse. At page 143A of the appellant's bundle was a printout from a web site of the Institute for Child Development which was described as the "only Paediatric Habilitation Centre (sic) in Delhi, India." The appellants are not from Delhi. At page 143C of the appellant's bundle was a printout from a web site of the All India Institute of Speech and Hearing in Mysore which outlined the services provided. At page 144 was an article from the Economic Times dated 26/06/14 which emphasised how excellent many aspects of healthcare in India had become but there were still problems in poor areas. From pages 147-157 were copied various newspaper articles about the shortage of free medicine in a hospital in Rajindra, shortages or doctors in Ludhiana, cancer patients being sent to defunct hospitals and rape victims being charged for treatment. It is difficult to ascertain how any of this material is relevant to the question of the availability of treatment required by the appellant's child in India.

48. A1 said that the nearest hospital is a long way away but I saw no reliable independent evidence to indicate that she could not access the required treatment nearer to her home in India. In addition she said that she had the support of family in India and there is no reason to conclude that both appellants (who were born on 16/08/91 & 11/05/83 and are reasonably fit and well educated) cannot find employment and pay for any required medical treatment.

49. In addition A1 said that she has given her consent to the GMC to investigate the circumstances of the birth of her daughter. There is no evidence that any doctor in the UK working for the NHS has acted negligently or that any such enquiry is actively being pursued or that if it was being pursued that it would be prejudiced by the appellants being returned to India.

50. I conclude that the best interests of the chid are to remain with its parents who would be returned to India as a family unit. It may well be that the appellants would prefer to stay in the UK and access what they consider to be the better (and free) medical treatment available here for their child, but that choice does

> not engage the UK's obligations under the ECHR and does not constitute compelling circumstances not sufficiently recognised under the Immigration Rules. For reasons given above it is clear that the appellants have not established that that they would not be able to access equivalent health care in India for their child as is available in the UK. Adopting the "Gulshan approach" I conclude therefore that in this case there are no arguably good grounds for granting leave to remain outside the Rules and that therefore I should not consider the matter further under Article 8 ECHR."

My Findings

8. There can be no doubt from a reading of the FTTJ's decision that he considered Article 8 outside of the Immigration Rules. Whilst he may have misstated the **Gulshan** test in §42 what matters is what he actually did with the evidence before him. It can be seen at §45 that the judge was well aware of the difficulties of the appellant's child having been born with complications which resulted in neonatal seizures, encephalitis, abnormal imaging of skull and head, severe ischemic injury to her brain, hypothermia, therapeutic and stridor. The evidence before the judge was that the child had been discharged from hospital within days of being born without any active problems being noted. She was not prescribed any medication but it was recommended that she see a physiotherapist. She was well at the time of discharge. The evidence before the FTTJ indicated the child required ongoing physiotherapy and regular check-ups with doctors and neonatologists. She was not fit for air travel in August 2013 but there was no evidence of her ability to travel at the date of the hearing before the FTTJ.

9. There was some evidence before the FTTJ about the provision of medical care for the child in India.

10. What matters is what the judge actually did with the evidence before him. He took into account the medical condition of the child. He properly applied relevant case law in particular **Akhalu (health claim: ECHR Article 8) [2013] UKUT 400 (IAC)** when considering the health issues of both the child and her mother.

11. I find this was a decision properly open to the judge on the evidence before him and that the grounds in essence amount to a lengthy disagreement with the findings of the judge and an attempt to reargue the appeal. I find that although the FtTJ misstated **Gulshan** at §42, nevertheless it is not material to the outcome because the judge carefully evaluated the evidence in favour of the appellants; he applied the relevant case law concerning healthcare issues and considered the factors in favour of the appellants and the respondent before coming to a conclusion which was properly open to him on the evidence before him. It cannot be said he took into account irrelevant factors or that he failed to take into account relevant factors when reaching his decision. On any basis given the guidance in **Akhalu** and the medical evidence before the Tribunal this is not an appeal which could ever succeed under Article 8. In summary even if the FtTJ had properly set out the approach that he had to follow in §42 there could be no other conclusion in the appeal than the one reached by the FtTJ because the FtTJ carried out within the body of his findings an Article 8

assessment and reached findings properly open to him given the evidence before him which he approached with care.

12. Accordingly I uphold the decision of the FTTJ and dismiss the application before the Tribunal.

Summary of Decision

The First-tier Tribunal decision is upheld.

Signed 20 March 2015

Deputy Upper Tribunal Judge E B Grant