



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/33012/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 8<sup>th</sup> September 2014**

**Determination  
Promulgated**

**On 6<sup>th</sup> October 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**MR YAMINE DAHMANI**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr J Wells, Legal Representative, M & K Solicitors

For the Respondent: Mr N Bramble, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Algeria born on 12<sup>th</sup> August 1975 and he claims to have entered the UK on 4<sup>th</sup> January 1998 and applied for indefinite leave to remain on the basis of fourteen years' residence. He

made an application on 6<sup>th</sup> July 2012 which was rejected as an invalid application because his solicitors had failed to sign the cheque for the fee which accompanied the application. A further application was made on 26<sup>th</sup> September 2012 to remain outside the Immigration Rules on compassionate grounds.

2. The appeal was heard by First-tier Tribunal Judge Eban on 13<sup>th</sup> June 2014 and she promulgated a determination dismissing the appeal on 25<sup>th</sup> June 2014. An application for permission to appeal was filed by the appellant's representatives on effectively three grounds. The first ground was that the judge had failed to give consideration to the immigration history of the case and failed to give weight to fairness to the appellant. It was submitted that **Edgehill v Secretary of State for the Home Department [2014] EWCA Civ 402** should apply because the application should have been decided under the Rules existing as at the date of 6<sup>th</sup> July 2012.
3. Further to **JH (Zimbabwe) v Secretary of State for the Home Department [2009] ECWA Civ 78** where it was held by that an application was in the wrong form it was in fact a valid application even if it was ultimately doomed to fail. It was submitted that this principle should be applied. The Secretary of State retained the application for a period of almost two and a half months before returning it back to the solicitors.
4. This had serious consequences and the judge had failed to consider **FP (Iran) [2007] EWCA Civ 13** such that human error caused the application to be invalid and **BT** (former solicitor's alleged misconduct) Nepal [2004] UKIAT 0311.
5. Further the appellant sought to rely on **MM (unfairness; E & R) Sudan [2014] UKUT 105 (IAC)**. This confirmed that if there was no material error of law in the judge's determination permission could be granted where it would cause the appellant a great deal of unfairness.
6. The appellant had been in the UK for fourteen years and on the face of it would succeed under paragraph 276 of the Immigration Rules.
7. Further the judge without having dealt with the requirements of paragraph 276ADE simply went on to consider whether there were exceptional circumstances such that the judge should have made specific findings in relation to paragraph 276ADE under the Rules before considering whether the appellant could meet the Rules. It was not conceded that the appellant could not meet Paragraph 276 ADE. The judge failed to consider the Court of Appeal decision of **MF (Nigeria) v SSHD [2013] EWCA Civ 1192** superseded **Izuazu (Article 8 - new rules) [2013] UKUT 425 (IAC)**.
8. The third ground was that the judge had erred in consideration of Article 8 outside the Rules. She failed to consider whether or not there were

arguably good grounds for granting leave to remain outside the Rules but considered only whether there were exceptional circumstances by reference to unjustifiably harsh consequences. The fact relevant here was the appellant's length of residence together with the private life established over fourteen years.

9. The judge's consideration of the issue did not follow logical process.
10. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchinson on the basis that it was arguable that the judge erred in law by not considering paragraph 276ADE(vi) of the Immigration Rules could apply in terms of the appellant's private life that he was over the age of 18 and lived in the UK for sixteen years before going on to consider whether there was an arguably good case to be considered outside the Immigration Rules in terms of Article 8.
11. At the hearing Mr Wells submitted his grounds on the basis of the written grounds previously submitted. He submitted that the respondent had a residual discretion to have acted to accept the application. The solicitors openly admitted a genuine error but this was not considered at all. The judge failed to consider the arguably good grounds on that basis. The Secretary of State had failed to act fairly.
12. Mr Bramble stated that the judge had set out her approach in paragraphs 9 to 12 of her determination. The fact was the cheque was not signed and that was a mandatory requirement. There had not been appropriate payment made. Any residual discretion lay with the Secretary of State and it was not for the Tribunal to question how the Respondent went about that. The judge addressed the fairness point.
13. In respect of paragraph 276ADE the judge set out the findings and considered any merits outside the Immigration Rules. The merits of the grounds are merely a disagreement by the appellant.
14. Mr Wells submitted that the judge had not fully addressed Article 8 and paragraph 276ADE and she had failed to take into account the overall argument in relation to the application when considering the Article 8 argument.

## **Conclusions**

15. The judge set out the arguments with respect to the fairness of the consideration of the application and as to whether it should be considered as a variation or a new application after the 9<sup>th</sup> July Immigration Rules were introduced and found that the fault lies squarely with the solicitors as they did not sign the cheque which accompanied the appellant's application even though the appellant had paid and put them in funds to pay the appropriate fee. As the judge stated at paragraph 10 she did not find how the respondent could be unfair and that further at 11 it did not mean that there was any unfairness on the respondent's part.

16. Particularly at paragraph 12 the judge found

*“I do not see that the respondent has any responsibility towards the appellant to ensure that he is not adversely affected by negligent advice from solicitors or changes in the Immigration Rules. In the circumstances I do not consider that the respondent’s consideration of the appellant’s application under the new Immigration Rules which were in place when a valid application was made, rather than under the old Immigration Rules, can be said not to be in accordance with the law.”*

17. On consideration of **Basnet (validity of application - respondent) [2012] UKUT 00113 (IAC)** I note that the solicitors accepted that it was their error and that they had failed to sign the cheque and this led to the rejection of the first application. As highlighted at paragraph 17 of **Basnet** the Immigration and Nationality (Fees) Regulations 2011 (2011 No. 1055) provides at Regulation 37

*“Consequence of failing to pay the specified fee*

*Where an application to which these Regulation refer is to be accompanied by a specified fee the application is not validly made unless it has been accompanied by that fee.”*

18. As found by the Tribunal the question whether the first application was valid depends not upon whether payment was successfully processed but whether the application was accompanied by a fee.

19. Further the Tribunal noted that as held in **BE** (application fee: effect of non-payment) Mauritius [2008] UKAIT 00089 an application is accompanied by a fee if it is “accompanied by such authorisation (of the applicant or other person purporting to pay) as will enable the respondent to receive the entire fee in question, without further recourse having to be made by the respondent to the payer”.

20. Paragraph 16 of **BE** confirmed ‘To my mind that is clear and that the solicitors have accepted that authorisation of the fee was not present when the application was submitted. Further BE ‘There will in practice be a wide range of reasons why an application is unaccompanied by a fee, ranging from deliberate deceit or omission to innocent inadvertence. Any system which expressly seeks to distinguish between various kinds of failure risks being administratively unworkable’.

21. The regulation was not found to be ultra vires and the regulation for accompanying payment was found to be essential. In this instance the appellant was not deprived of an appeal and the application of a change in the immigration rules is a legal requirement **Haleemudeen v SSHD [2014] EWCA Civ 558**. Although I was provided with **MM(unfairness E & R Sudan [2014] UKUT 00105 (IAC)** I am not persuaded that this applies - there was no suggestion that the judge herself failed to take into account

material or that there was a defect or impropriety of a procedural nature in the actual proceedings of the first tier tribunal. **BT** was also cited in the grounds of appeal but this was not the case of misconduct or an allegation of deliberate misconduct by the solicitors. They accepted the mistake was made through clerical error. The argument was put that the Secretary of State had a residual discretion to decide the application prior to the change of the rules. That respondent did not do so was not a decision, in the light of the regulations and the mandatory requirements and the lack of fault on the part of the Secretary of State, one for the judge to go behind.

22. I therefore find no error in this aspect of the judge's determination. The requirement for a payment of fee is an essential part of the normal course of events. It was not the case that there was discretion on the part of the judge to decide whether to direct the Secretary of State to admit the application as valid when it was not and in the face of very clear rules. There are many applications made which are invalid and need to be returned.
23. Mr Wells submitted that further to paragraph 276ADE of the Immigration Rules he accepted only that the appellant had not been in the UK for twenty years.
24. The judge at paragraph 18 stated that the Immigration Rules were the starting point and she made various findings not least that the appellant by the time he came to the UK had not lived half his life in the UK and that he would be returning to a country where he was brought up and that he still had family in Algeria although he was not close to them. The judge also made a finding that the appellant retained his social and cultural ties to Algeria as all of his witnesses were Algerian and there was a letter from the Arab Advice Bureau indicating that he was a member of their community. In essence she found, even though the appellant did not accept the point, that he could not comply with Paragraph 276 ADE and made the relevant findings.
25. Although the judge did not specifically record her findings in relation to paragraph 276ADE in relation to loss of linguistic, social and cultural ties it is quite clear from her finding that the appellant could not succeed under paragraph 276ADE. On an overall reading of the determination together with her conclusions at paragraph 20 although the judge may have been more specific in her conclusions it is clear that she did not consider that he could not comply with paragraph 276ADE.
26. I also note that the grounds of appeal largely rest on a criticism of the lack of consideration by the judge of Article 8 outside the Immigration Rules.
27. Having made her findings the judge stated that "there are no exceptional circumstances on the evidence before me. I find there are no arguably good grounds for granting leave to remain outside the Immigration Rules."

28. The judge did not take into account at this point is the unfortunate situation that the appellant's solicitors had failed to sign the cheque which would have allowed him to have his application considered under the old Rules and which in effect precluded him from being able to succeed under that previous Rule. There was no doubt that the judge found that he had been in the UK for sixteen years albeit illegally and that he had worked under a false name. However, the judge made findings on the application, and, as indicated above a valid application was not made prior to the change of the immigration rules and thereafter the appellant could not succeed. As indicated above this is not an exceptional circumstance and the rules are clear and thus there was no reason why the judge should find this an arguably good ground for considering the matter outside the Immigration Rules.
29. **Shahzad (Art 8: legitimate aim)** [2014] UKUT 00085 (IAC) confirms
- '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'*
30. **Gulshan** remains good law and the judge applied **Gulshan** after finding relevant facts but even if an application of the **Razgar principles** were required the judge found the relevant facts and accepted that the appellant had established a private life and it is clear that the threshold in that respect is low. She considered whether there were compelling circumstances not sufficiently recognised under the Immigration Rules. The appellant, I note had not been deprived of an appeal, and the fact that the immigration rules had changed in the intervening time is unfortunate for the appellant but a reality.
31. The judge identified that he had entered the UK illegally and that his private life had been formed whilst his status was precarious. He worked under a false name. She identified that he would return to a country where he was brought up and there was no evidence of ties or dependency which went over an above what one might expect between adults siblings. She did not find that he had family life with his brother who was not even shown to have a residence card. She found that the appellant had family in Algeria and he retained links to Algeria. All of his witnesses were of Algerian origin and there was a letter from the Arab Advice Bureau indicating he was a member of the community. He could keep in contact through visits and. She found the appellant was independent resourceful and had good health and had managed to work all the time he had been in the UK. The judge did not cite the failure to comply with the previous long residence rule because that did not apply.

32. Judge Eban, added nonetheless, the appellant's network of friends may be different if he returns to Algeria but his private life will continue in respect of all its essential elements and this is what the judge found.
33. In essence the judge found that no valid application was made prior to the change of rules, the new Immigration rules applied to him, there were no arguably good grounds to consider the matter outside the Immigration rules and concluded in paragraph 20 that the judge had no claim to remain under the Immigration rules or under article 8.
34. **MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192** confirmed that the test of exceptionality had ***not*** been resurrected and further the court remarked obiter that if "insurmountable" obstacles were literally obstacles which it is impossible to surmount their scope was very limited indeed and that for the reasons stated in **Izuazu (Article 8: new rules) [2013] UKUT 45 (IAC)** such a stringent approach would be contrary to Article 8. Thus the use of the term "exceptional circumstances" in the new Rules does not restore the pre-**Huang** exceptionality test rather the term is employed in the sense to be found in the Strasbourg case law where ties are forged in the knowledge that immigration status is precarious.
35. The judge as indicated above looked at all the circumstances and in view of his status the appellant's private life was not found by Judge Eban to be seriously prejudiced and as such I find there was no error of law such that it would have made a material difference to the outcome. The determination of Judge Eban shall stand.

Signed

Date

Deputy Upper Tribunal Judge Rimmington