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Gulshan disapproved in High Court | Free Movement

By Colin Yeo

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This post is a largely academic one for the lawyers and judges amongst Free Movement readers. The latest case in the interminable parade of cases addressing the interaction of Article 8 and the Immigration Rules is the case of *R (on the application of Sunassee) v Upper Tribunal (Immigration and Asylum Chamber) & Anor* [2015] EWHC 1604 (Admin). Interestingly, this is a rare example of a judicial review of a decision of the Upper Tribunal refusal of permission to appeal to itself. These cases rarely reach a hearing because they are dealt with on the papers under CPR 54.7A. Read Desmond's post on all this for a full procedural background: Challenging a refusal of permission to appeal by the Upper Tribunal.

However the matter reached court, Edis J respectfully suggests that the case of *Gulshan* is wrong:

> With great respect to the Upper Tribunal which decided Gulshan it seems to me to go a little further than the source from it purports to be derived. It is the origin of the problem with paragraph 55 of the decision in the present case, and I have already averted to the difficulty with it. It is unclear to me how a Tribunal could decide whether it was arguable that there

> may be good grounds for granting leave to remain outside the Rules without first considering whether there may be compelling circumstances not sufficiently recognised under them. Moreover, a Tribunal exercising statutory powers and bound by the Human Rights Act 1998 is traversing dangerous ground if it circumscribes its ability to consider the facts of the particular case before it in the round by a procedural filter.

The judge goes on to say of the procedural filter approach adopted in *Gulshan*:

> This is a misstatement of the law, which I have tried to state accurately above. The Tribunal cannot consider whether there are arguable grounds for granting leave to remain outside the Rules without deciding whether or not there are such "compelling circumstances". The absence of such circumstances may abbreviate the second stage, and the way in which the decision is expressed, but does not eliminate it.

He is even clearer at paragraph 56 of the judgment, holding that *Gulshan* is clearly wrong and there is no need for further clarification.

You heard it here first, in my earlier review of that determination, the genesis of many a generic Home Office appeal. Apart from confused legal analysis, in my view no judge should ever consider the cases that come before him or her to be "run of the mill". Such an attitude is not only plain rude to those the tribunals and courts are supposed to serve but demonstrates case hardening and unsuitability for continued judicial work. Any such judge should at the very least consider getting help. More on that later, perhaps, but in the meantime do have a look at a BAILII search for "run of the mill" and see what you find when you look at the context in which

the phrase is used in different courts and tribunals. I've only looked at the first 10 or so but what I saw was quite striking. Comments below, please.

None of this avails the particular litigant in *Sunassee*. Although the First-tier judge had fallen into error in trying to follow the convoluted *Gulshan* approach, he had despite that considered the relevant factors and reached a lawful decision.