Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05792/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 September 2014	**On 22 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR E. A. TANU

Respondent/Claimant

Representation:

For the Secretary of State: Mr Wilding, Specialist Appeals Team
For the Respondent/Claimant: Mr Slatter, Counsel instructed by Victory Law Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the appellant's appeal on human rights grounds against the respondent's decision to refuse to grant him continued leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant, and against her concomitant decision to remove him from the UK by way of directions under Section 47 of the Immigration,

Asylum and Nationality Act 2006. The First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is required for these proceedings in the Upper Tribunal.

2. The claimant is a national of Nigeria, whose date of birth is 28 August 1978. On 4 February 2008 he was granted leave to enter the United Kingdom as a student until 30 September 2009. He was granted leave to remain as a Tier 1 (Post-Study Work) Migrant until 7 October 2011. His last grant of leave to remain was as a student, and his leave in this capacity ran until 2 March 2013. He is recorded as having made an application for leave to remain as a Tier 1 (Entrepreneur) Migrant during the currency of his student leave, which was refused on 20 May 2013. As evidence of access to funds, he had provided a bank letter from the United Bank of Africa; a declaration from Mr Adebiyi Saheed; and a letter of validity from Alfred Olawale & Co (barristers and solicitors in Nigeria). The bank letter from the United Bank of Africa was not acceptable as it did not confirm that the institution was regulated by the appropriate regulatory body nor did it confirm Mr Saheed's contact details. Furthermore, the letter of validity from the Nigerian legal representatives was not acceptable as it did not show the registration authority of the legal representatives to practice legally in Nigeria which was where the declaration from Mr Saheed was made. He had not therefore submitted the specified evidence as listed under paragraph 41-SD to establish that he had access to the funds that he was claiming.

3. The appellant made a fresh application for leave to remain as a Tier 1 (Entrepreneur) Migrant on 1 October 2013. He relied on access to funds of £200,000 held in the United Bank of Africa in Nigeria. He had not already invested any of the funds in a UK business. He was the director of a new or existing business, and his standard occupational classification most closely matched that of engineering professionals not elsewhere classified. He said he had access to available funds to support himself, and he was relying on personal bank or building society statements covering a consecutive 90 day period.

4. In support of his application he relied for evidence of maintenance on documents from Crest Microfinance Bank in Nigeria. In a letter dated 24 July 2013 the bank confirmed that the appellant was the prime mover of the "captioned accounts" and he held a savings account with one of their branches of which he was the sole signatory. The address given for the claimant on the account was an address in Nigeria. The closing balance in the account as of 22 July 2013 was 1,840,385.90 naira. The appellant also provided a business current account statement for the company which he had set up, Elight Integrated Services Limited.

5. In a letter of 13 January 2014 the Secretary of State explained why she was refusing the claimant's application. He had stated he had access to at least £200,000 to invest in business in the UK. But as his last grant of leave to remain in the United Kingdom was that of a Tier 4 (General) Student, he did not qualify for the award of points under the provisions in table 4A located in Appendix A, as per paragraph 36A of that Appendix. His application could only be considered under table 4B. For the award of points he must have access to not less than £50,000 from either (i) one or more

registered venture capitalist firms regulated by the Financial Services Authority, (ii) one or more registered UK entrepreneurial seed funding competitions which meets the requirements defined in Appendix A of the Immigration Rules; or (iii) one or more UK government departments or devolved government departments in Scotland, Wales or Northern Ireland. As he had provided no suitable evidence that he was receiving the funding from one, or a combination, of the above sources, he was not eligible for the award of points for attributes.

6. The application was also refused on maintenance grounds. He had provided bank statements from Barclays Bank plc and Crest Microfinance Bank to demonstrate that he had been in possession of at least £900 of available funds for a consecutive 90 day period ending no more than 31 days before the date of his application. The most recent bank statements provided were dated more than 31 days prior to the date of the application. The Barclays Bank statements also showed that the specified account was a business account, and so did not meet the specified requirements.

7. In line with paragraph 245DD(l) of the Rules, an assessment as detailed in paragraph 245DD(h) of the Rules had not been carried out. The SSHD reserved the right to carry out this assessment in any challenge of the decision or in future applications for Tier 1 (Entrepreneur) Migrant status.

The Hearing Before, and the Decision of, the First-tier Tribunal

8. The claimant's appeal came before Judge Metzer sitting in the First-tier Tribunal at Taylor House on 30 June 2014. Mr Slatter of Counsel appeared on behalf of the claimant, and Ms Jones, Home Office Presenting Officer, appeared on behalf of the Secretary of State. Included in the claimant's bundle for the hearing was the refusal letter of 21 May 2013 in respect of the claimant's original Tier 1 application of 20 November 2012. As evidence of access to funds, he had provided a bank letter from the United Bank of Africa; a declaration from Mr Adebiyi Saheed; and a letter of validity from Alfred Olawale & Co (barristers and solicitors in Nigeria). The bank letter from the United Bank of Africa was not acceptable as it did not confirm that the institution was regulated by the appropriate regulatory body nor did it confirm Mr Saheed's contact details. Furthermore, the letter of validity from the Nigerian legal representatives was not acceptable as it did not show the registration authority of the legal representatives to practice legally in Nigeria which was where the declaration from Mr Saheed was made. He had not therefore submitted the specified evidence as listed under paragraph 41-SD to establish that he had access to the funds that he was claiming.

9. In his witness statement for the hearing, the claimant accepted that there had been evidential deficiencies in his earlier application. As a result of establishing, among other things, that Mr Olawale did not produce a practising certificate, he had been advised to withdraw his appeal against that decision. Elight Integrated Services Limited was operating in the business of telecommunication, oil and gas services. It had been operating in the UK telecommunications industry since January 2013. The company currently had a good business relationship with major telecom and oil

companies like Ericsson UK, Vodaphone, Shell Nigeria and others who supplied them with quality products at competitive prices. He pleaded with the court to allow his appeal as his business was subsisting and ongoing. His business had not moved due to the travel restrictions placed on him. If they were lifted, he would be able to bring more business to the UK and to employ about five British people, and more, immediately.

10. He briefly referred to his family circumstances at paragraph 23. He had two children, a boy born on 1 April 2011 and a daughter born on 12 April 2014 and they both needed him to be in the country to look after them.

11. Mr Slatter's skeleton argument for the hearing in the First-tier Tribunal refers to a letter of sponsorship from Mr Saheed dated 1 October 2012. In that letter, Mr Saheed described the claimant as being an in-law. At paragraph 4, he observed that although not raised in the first refusal decision, the second refusal decision relied upon paragraph 36A of Appendix A. Mr Slatter submitted it was not obvious what the sufficiently important legislative objective was for awarding points in a manner that was based on a last grant of leave as opposed to a previous grant of leave. The claimant had enjoyed Tier 1 (Post-Study Work) status immediately prior to his last grant of leave as a Tier 4 (General) Student Migrant. There was no rational connection between the legitimate aim of the economic well-being of the country and the specific provisions of the Rules. This was relevant to an assessment of proportionality under Article 8.

12. He went on to say that the claimant had a wife and two children who had lawfully resided with the claimant in the UK. There had been no breaches of immigration law. The family had developed private life ties in the UK which would be interfered by the decision to remove. The general issues of needing to limit numbers who have access to public services and the benefits of the NHS, and who would be able to compete or housing and employment with those already here, did not outweigh the economic interests of permitting the development of the claimant's business and his economic investment into the UK.

13. The First-tier Tribunal was invited to allow the appeal as being not compatible with the private life rights of the claimant and his family members, and therefore unlawful. This was so applying the general law in relation to Article 8, rather than any provisions of the Immigration Rules.

14. In his subsequent determination, Judge Metzer records Mr Slatter as conceding that the claimant could not succeed under the Rules but submitting that he should succeed under Article 8. Ms Jones conceded that his right to private life was engaged under Article 8(1) of the ECHR, and the sole issue requiring the judge's determination was whether it would be disproportionate under Article 8(2) for the claimant to be returned to Nigeria.

15. The judge found that the claimant was presently a telecom engineer and the chief executive officer of Elight Integrated Services Limited, which had operated in the UK

telecommunications industry since January 2013 when he became a director of it. He found that the documents demonstrated that cash money was available to the claimant who had permission to use the money to invest in a business in the United Kingdom and was transferrable. That money remained available. The United Bank of Africa was regulated by the Central Bank of Nigeria, and it was clear that the claimant's business enjoyed a good working relationship with a number of well-known and substantial companies. The judge continued:

> "Although it is acknowledged that the [claimant] cannot succeed under the Rules, I find that the [claimant] has established that he has substantial funds and backing available to him and that such sums would be immediately transferrable as and when required. Taking into account the [SSHD's] legitimate interest in immigration control, and bearing in mind the [claimant] and his family have been in the United Kingdom for some time and in the [claimant's] case for over six years and taking into account what he has achieved both as a student and subsequently in regard to the business he has set up in the United Kingdom and the substantial funds which he is proposing to invest in that business likely to create further job opportunities, I find that taking into account the [SSHD's] legitimate interest in immigration control and applying the **Razgar** five limb test, it would be a disproportionate interference with the [claimant's] rights under Article 8(2) of the ECHR were the [claimant] to be returned to Nigeria."

The Application for Permission to Appeal

16. A member of the Specialist Appeals Team settled an application for permission to appeal to the Upper Tribunal on behalf of the Secretary of State. The judge had erred in law by finding that the refusal engaged the operation of Article 8. Secondly, the judge erred by having regard to the claimant's apparent near-miss against the requirements of the Rules as a relevant consideration in the proportionality analysis. Thirdly, the judge erred in law by failing to identify compelling circumstances not sufficiently recognised under the Rules in order to ground an arguable case for the grant of leave outside the Rules. Fourthly, the judge erred in law by failing to have regard in the proportionality exercise to the public interest in effective immigration control.

The Grant of Permission

17. On 31 July 2014 First-tier Tribunal Judge Fisher granted permission to appeal for the following reasons:

> It is clear that the judge was not assisted at all by the SSHD's representative at the hearing, who conceded that Article 8 was engaged, and submitted that the sole issue for determination was that of proportionality. It is equally clear that the SSHD gave no consideration to either paragraph 276ADE or Appendix FM in her refusal letter. Nevertheless, in accordance with the decision in **Gulshan [2013] UKUT 00640 (IAC)**, the judge was required to consider whether there were any compelling circumstances for warranting consideration of Article 8 on conventional grounds. Instead, he proceeded to consider Article 8 of the ECHR on the basis of the concession that the claimant was unable to meet the Tier 1 requirements. It is also arguable that his reasoning on proportionality was inadequate.

The Hearing in the Upper Tribunal

18. At the hearing before me, Mr Slatter mounted a robust defence of Judge Metzer's determination, developing the arguments advanced by him in an extensive Rule 24 response.

19. Mr Wilding submitted that the Rule 24 response highlighted another flaw in the judge's determination which had not been specifically raised in the grounds of appeal, which was a lack of adequate reasoning. The claimant's application was always doomed to fail, as he was not eligible to rely on funding from a private individual. The Rule which prevented him from doing this had been attacked by Mr Slatter as irrational, but the judge had wholly ignored this aspect of the case, and had simply purported to exercise a general dispensing power, which was completely contrary to authority, in particular paragraph [57] of the Supreme Court case of **Patel**. Mr Slatter's attack was in any event unjustified. The restriction had been introduced to combat extensive abuse, and therefore it had a legitimate objective.

20. After hearing Mr Slatter in reply, I ruled that an error of law was made out. I gave my reasons for so finding in short form, and my extended reasons are set out below. Mr Slatter and Mr Wilding were in agreement that no further evidence needed to be elicited for the purposes of the decision being remade, and that the Upper Tribunal was the appropriate forum for the remaking of the decision. I received brief further submissions from both parties as to how the decision should be remade.

Reasons for Finding an Error of Law

21. A concession of fact by a Presenting Officer should be accepted by the Tribunal, but not a concession of law if that concession is erroneous. The concession made by Ms Jones was erroneous in law. While the claimant had clearly resided in the United Kingdom for a sufficiently long period such that his private life rights were engaged, Judge Metzer should not have embarked on an old-style Article 8 assessment, applying the five point **Razgar** test, without first analysing whether there was a viable claim under Rule 276ADE; and, if there was not, applying the test set out in **Nagre [2013] EWHC 720 (Admin)** and **Gulshan [2013] UKUT 640 (IAC)**, namely that only if there may be arguably good grounds for granting leave to remain outside the Rules, is it necessary for Article 8 purposes to go on to consider whether those compelling circumstances are not sufficiently recognised under them.

22. It does not matter that the claimant did not apply for leave to remain on private life grounds, or that the Secretary of State did not consider Rule 276ADE when making a removal decision against him. By raising an Article 8 claim in his appeal, the claimant brought Appendix FM and Rule 276ADE into play. These Rules set out how the Secretary of State considers the balance should be struck in family and private life claims. So it is necessary to consider a family or private life claim through the prism of the new Rules first, in order to get to the point of being able to ascertain whether there are arguably good grounds for granting leave to remain outside the Rules.

23. Mr Slatter referred me to **MM (Lebanon) [2014] EWCA Civ 985**, where Aikens LJ at [128] said:

> **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.

24. Mr Slatter submitted that this showed that **Nagre** and **Gulshan** are no longer good law. I do not consider this to be case, not least because Aikens LJ's remarks are *obiter* and the **Nagre** threshold test was cited with approval by the Master of the Rolls in **MF (Nigeria) v SSHD**. So far as I am aware, Aikens LJ is a lone voice at Court of Appeal level in questioning the utility of applying a threshold test (i.e. is there a good arguable claim outside the rules?) before deciding whether it is necessary to embark on an old-style Article 8 assessment, applying the five point **Razgar** test.. In any event, Aikens LJ is not giving his approval to what occurred in this case. He says that the relevant decision-maker must determine whether there is or is not a *further* Article 8 claim. This necessarily implies an anterior requirement: which is for the decision-maker to determine first whether there is an Article 8 claim *within the Rules*.

25. At paragraph [134] of his judgment, Aikens LJ says:

> Where the relevant group of IRs, upon their proper construction, provide a 'complete code' for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of 'foreign criminals', then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to 'exceptional circumstances' in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a 'complete code' then the proportionality test will be more at large, albeit guided by the **Huang** tests and UK and Strasbourg case law.

26. As there is not a complete code in respect of the Article 8 rights of failed Tier 1 (Entrepreneur) Migrants, the proportionality test is more at large, but it is very far from being unfettered. The following passage in paragraph [105] of **Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)** is pertinent to this case:

> Applying the main principles we have derived from case law on Article 8(2) to the judge's assessment of the claimant's case, it will be immediately apparent that the judge wrongly addressed his task when considering the proportionality of the legitimate aim of 'economic well-being' (which was the only legitimate aim he considered to be engaged). Although making reference to 'the legitimate aim of securing the economic well-being of the UK by sensible immigration control' (which clearly identified that this head extended to the general (or 'macro') level, he wholly confined his actual assessment of the weight to be attached to the legitimate aim pursued by the decision of the SSHD to a simple calculus at the individual or 'micro' level, so that all that appeared in the balance sheet were the funds the claimant had paid in course fees and the fact that he had enough to maintain and accommodate

> himself. He wholly overlooked that even in cases where there is no cost to the state incurred by an individual student in terms of fees and maintenance and accommodation, the immigration rules reflect an assessment made by the government with the sanction of Parliament of what requirements are necessary in order to ensure sufficient control on the number of persons entering into or being able to stay in the UK and for how long and under what conditions. Their terms quintessentially require an assessment at the 'macro' level. He failed to take into account whether general aspects of 'economic well-being', including the need to limit the numbers who have access to public services and the benefits of the NHS and who are able to compete for housing and for employment with those already here …

27. This passage highlights the flaw in Judge Metzer's approach. In Rules which have been laid before Parliament the Secretary of State has deliberately limited the eligibility of applicants in the position of the claimant to those who can show access to investment funds from designated sources within the UK. The justifications for such a limitation lie at a macro level. But Judge Metzer confined his assessment of the weight to be attached to the legitimate aim pursued by the decision of the Secretary of State to a simple calculus at the individual or micro level, so that all that appears in the balance sheet are what the claimant can personally contribute to the UK through his business, and the employment opportunities which he says it will create. Judge Metzer wholly fails to take into account the general aspects of economic well-being, including the need to limit the numbers who have access to public services and the benefits of the NHS and who are able to compete for housing and for employment with those already here.

28. In addition, the judge does not mention at all the central argument relied on by Mr Slatter in support of the Article 8 claim, which was that there was no rational connection between the legitimate aim of preserving the country's economic well-being and the specific provision in the Rules which prevented the claimant from relying on investment funding from a relative in Nigeria. It is reasonable to infer that this argument underpins Judge Metzer's conclusion on proportionality. But as it is not discussed, the losing party does not know why she has lost.

29. In conclusion, the decision of the First-tier Tribunal is vitiated by an error of law due to a lack of adequate reasoning, such that the decision should be set aside and remade.

The Remaking of the Decision

30. Paragraph 36A was introduced into the Rules by HC 760 on 13 December 2012. The appellant's first application as a Tier 1 (Entrepreneur) Migrant was made before this date, and this may explain why the provision was not invoked when this first application was refused. In any event, the first application fell to be refused for other reasons.

31. It is not suggested that the claimant has a viable claim under Appendix FM of the Rules, or indeed under Rule 276ADE. The claimant has strong connections to Nigeria, as he and all members of his family are Nigerian nationals. They would be

returning together, and so there is no question of the children being left behind in the UK without their mother or father. Moreover, the claimant is related as an in-law to Mr Saheed, the source of the investment funds, and the claimant has an address in Nigeria, as evidenced by his account with Crest Microfinance Bank. So there is no indication that the claimant would have any difficulties whatsoever in living and working in Nigeria, rather than living and working in the UK.

32. Turning to an Article 8 claim outside the Rules, in the claimant's favour is the principle that the threshold for the engagement of private life rights is relatively low. On the other hand, there is no right to work or study per se in the country of one's choice, and equally there is no right per se to set up a business in the country of one's choice. The claimant has never had a legitimate expectation of being able to remain with his family in the United Kingdom on an indefinite basis. He entered the United Kingdom for a temporary purpose, and his extensions of leave have also only been for a temporary purpose. The expectation has been that he will return to Nigeria at the end of his limited leave, unless he can bring himself within a Rule enabling him to further extend his stay here with his family.

33. As he is facing removal, I am persuaded that questions 1 and 2 of the **Razgar** test should be answered in his favour. I consider that questions 3 and 4 of the **Razgar** test should be answered in favour of the respondent, so the issue in controversy is proportionality.

34. Mr Slatter's principal argument on proportionality is that the Rule preventing the claimant from relying on funding from Mr Saheed is irrational, or can be stigmatised as being arbitrary and objectionable. Alternatively, it can be said to operate disproportionately in relation to him, as the effect is to require him to return to Nigeria in order to apply for leave to enter.

35. Mr Slatter's attack on paragraph 36A is not supported by any evidence. The general principle is that he who asserts, must prove. In any event, I am satisfied that as originally introduced the Tier 1 (Entrepreneur) Migrant scheme was open to abuse, and that the introduction of Rule 36A was part of a package of measures introduced in December 2012, and subsequently in the spring of 2013, to prevent abuse.

36. Judge Metzer found that the funding in question was genuinely available to the claimant. But it was not open to him, nor is it open to me, to rewrite the Rules so as to fit in with the facts of a particular case. The claimant has at all times had the benefit of legal representation, and following the introduction of paragraph 36A in December 2012, he had no legitimate expectation of being able to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant relying on investment funding from a relative in Nigeria. The claimant's last grant of leave to remain was as a student, and studying is what he is supposed to have been doing during the currency of this student visa. So he has no grounds for complaint that the effect of the removal decision is to prevent him from continuing to operate a telecommunications business which he set up in January 2013, during the currency of his student visa. He was never going to be able to obtain leave to remain to pursue such a business.

Furthermore, it was not part of the evidence before the First-tier Tribunal that he had committed funds or resources to the development of the business in the UK which would be lost if he had to return to Nigeria. The burden of his complaint was simply that he could not realise his ambition to grow the business which he had set up.

37. Against this background, there is no substance in the argument that it is unreasonable to require the claimant to return to Nigeria. It is a matter for him whether he seeks to return as a Tier 1 (Entrepreneur) Migrant. In such circumstances, he will not have to surmount the barrier of paragraph 36, which only applies to those seeking leave to remain. It is not disproportionate that the claimant should be faced with this choice: the choice between remaining in Nigeria to pursue his business interests there or seeking to return to the United Kingdom as a Tier 1 (Entrepreneur) Migrant.

38. I am satisfied that the proposed interference strikes a fair balance between the rights and interests of, on the one hand, the claimant and affected family members, and, on the other hand, the wider interests of society. It is proportionate the legitimate public interests ought to be achieved, namely the protection of the country's economic well-being and the prevention of disorder.

Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: this appeal is dismissed on all grounds raised.

Signed Date

Deputy Upper Tribunal Judge Monson