Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/47196/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 10th July 2014	**On 16th July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MS OGHENECHAVWE NAOMI AKORODA
(ANONYMITY NOT DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Izevbizua, Legal Representative
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria who was born on the 26th May 1979. She appeals, with permission, against the dismissal of her appeal by the First-tier Tribunal (Judge Upson) from the decision of the respondent to refuse her application for leave to remain as a Tier 4 (General) Student and to issue directions for her removal.

2. The respondent's decision was primarily made on the ground that the appellant could not meet the requirement under paragraph 245ZX of the Immigration Rules that the grant of leave that she was seeking would not lead to her having spent more than five as a student studying courses at degree level or above. The argument raised against this objection in the First-tier Tribunal was that granting further leave to remain to the appellant would not in fact lead to a breach of the five-year limit of leave to remain; alternatively, that the requirement not to exceed five years leave to remain was unlawful due to its supposedly retrospective effect. Permission to renew these arguments in the Upper Tribunal was refused, by First-tier Tribunal Osborne, on the 11th April 2014. Judge Osborne did however grant permission for the appellant to argue that Judge Upson had failed to consider whether the fact that the appellant was, "very close to the end of her course", amounted to a compelling circumstance that merited a full consideration of the appellant's rights under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and in line with the decision in Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640.

3. At paragraph 16 of his determination, Judge Upson noted that he had been urged to consider the appellant's case, outside the Rules, pursuant to Article 8. He further noted that it was conceded by the appellant that she was unable to meet the conditions for further leave to remain under Appendix FM or under paragraph 276ADE of the Immigration Rules. Although the matter is not spelt out in the determination, it is perhaps reasonable to assume that this concession was based upon the appellant's lack of a family member who is settled in the United Kingdom, together with the fact that she has not resided in the United Kingdom for at least 20 years and continues to have ties to Nigeria. The judge then noted that it had been stated in Gulshan that it was only if there may be arguably good grounds for granting leave to remain outside the Rules that it would become necessary for Article 8 purposes to go on to consider whether there were compelling circumstances that are not sufficiently recognised under them.

4. At paragraph 17, the judge said this:

> It is, as I have said, conceded that the appellant could not succeed under the Rules. In that respect I have had regard to the case of Nasim and others (Article 8) [2014] 00025 (IAC). I am satisfied that the fact that the appellant has stayed in the UK as a student lawfully for the period outlined is not sufficient to engage Article 8. I do not find that removal of the appellant, pursuant to the decision to refuse to grant her application for leave, would potentially engage the operation of Article 8. In any event, such removal would be proportionate to the legitimate public end; namely, the operation of a coherent and fair system of immigration control. In those circumstances, pursuant to the case of Gulshan, I find there are no arguably good grounds for granting leave to remain outside the Rules.

5. Mr Izevbizua focussed (as had Judge Osborne) upon the question of whether the requirement for only a short further period of leave to remain so as to be able to complete the appellant's course of study in the United Kingdom gave rise to arguable grounds for a grant of leave to remain outside the Immigration Rules. Whilst it is true that this was argument not specifically considered by the Tribunal, I have concluded that its omission was immaterial to the outcome of the appeal. This is for the following reasons.

6. Mr Izevbizua stressed the relatively short period of leave that would now be required so as to enable the appellant to complete her course. He also stressed the fact that the appellant had entered upon her course of study in the belief that she met the requirements for further leave to remain. That belief, however, was mistaken. It was the responsibility of the appellant to ensure that she already had the requisite leave to remain - or at least to ensure that she would meet the requirements for obtaining it - prior to embarking upon a further course of study in the United Kingdom that she might otherwise be unable to complete. Otherwise, it would be open to every student to embark upon a course of study without the need to consider whether they met the requirements for leave to remain under the Immigration Rules. This is because they would know that leave to remain would in any event ultimately be granted outside Rules. That would hardly be conducive to the legitimate objective of maintaining a coherent and effective system of immigration control. It cannot therefore provide a basis for holding that there are compelling circumstances such as to justify a grant of leave to remain outside the Immigration Rules. I am of course conscious of the fact that the appellant has no doubt invested a great deal of money in her present course of study and that this may be wasted if she is removed prior to its completion. However, that was a risk that she took by failing first to ensure that she would be granted leave to remain. The situation that she now faces is therefore entirely of her own making.

7. I am therefore satisfied that the First-tier Tribunal did not make a material error of law in its determination of this appeal and that, accordingly, the appeal to the Upper Tribunal must be dismissed.

Decision

8. The appeal is dismissed.

Anonymity is not directed.

Signed Date

David Kelly

Deputy Judge of the Upper Tribunal