Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48394/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 11 June 2014	**On 12 June 2014**

Before

Deputy Upper Tribunal Judge Pickup
Between

Secretary of State for the Home Department

Appellant

and

Ebuka Cletus Enumah
[No anonymity direction made]

Claimant

Representation:

For the claimant: Mr J Dhanji, instructed by UK Immigration Lawyers
For the respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimant, Ebuka Cletus Enumah, date of birth 12.4.83, is a citizen of Nigeria.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Dickinson, who allowed the claimant's appeal against the decision of the respondent, dated 5.11.13, to refuse his application made on 14.10.13 for leave to remain in the UK as a Tier 1 (Entrepreneur) Migrant under the Points Based System (PBS) and to remove him from the UK by way of directions under section 47 of the

Immigration, Asylum and Nationality Act 2006. The Judge heard the appeal on 25.2.14.

3. First-tier Tribunal Judge Osborne granted permission to appeal on 15.4.14.

4. Thus the matter came before me on 11.6.14. as an appeal in the Upper Tribunal.

Preliminary Issue

5. At the outset of the hearing, Mr Dhanji explained that the claimant's representatives had submitted a late application for permission to cross-appeal the decision of Judge Dickinson in relation to the Immigration Rules, together with an application for permission to apply out of time. By Rule 24 that is an application to the First-tier Tribunal and is to be determined on the papers by a First-tier Tribunal Judge.

6. It was explained that the applications were made late because of the recent decision of Mr Ockelton, Vice President and Upper Tribunal Judge Grubb in the case of Shebl (Entrepreneur: proof of contracts) [2014] 00216 (IAC), in which the panel held that the requirement to prove the existence of "contracts" in paragraph 41-SD of Appendix A to the Immigration Rules does not itself require the contracts in question to be contained in documents. There is, however, a need for such contracts tob e evidenced in documentary form.

7. This may be highly relevant to the decision under the Immigration Rules, as Judge Dickinson found that an invoice could not be described as a contract and whilst the judge was satisfied that the claimant may have had an oral agreement, he had to provide an original document or a signed copy.

8. Mr Dhanji asserted that the applications had been served on the First-tier Tribunal by fax on 3.6.14. However, a check of the Tribunal's computer system revealed no such applications have been recorded as lodged. Even if it had been lodged, it had not been determined. In the circumstances, I could not entertain the cross-appeal application.

9. The Secretary of State's appeal against the decision of Judge Dickinson is based on the finding that the decision was disproportionate to the legitimate aim to be achieved when considering the claimant's private life rights.

10. I need not rehearse the grounds of application for permission to appeal, but in summary it is asserted that the First-tier Tribunal Judge materially erred in his approach to article 8 and failed to provide adequate reasons why the appellant's circumstances are either compelling or exceptional. In fact there was no reference at all to MF (Nigeria) or Gulshan, both of which were promulgated before the First-tier Tribunal appeal hearing.

11. Briefly, recent authority is to the effect that the Immigration Rules are a complete code and there is no need to look outside the Rules unless there are arguably good grounds for consideration that there are compelling circumstances not adequately

recognised in the Rules, which render the decision of the Secretary of State unjustifiably harsh. I set out below a summary of some of the recent case law.

12. In MF (Nigeria) v SSHD [2013] EWCA Civ 1192, the Court of Appeal held that in relation to deportation cases the 'new' Immigration Rules are a complete code but involve the application of a proportionality test. Whether that is done within the new rules or outside the new rules as part of the article 8 general law was described as a sterile question, as either way the result should be the same. MF (Nigeria) was followed in Kabia (MF: para 398 - "exceptional circumstances") 2013 UKUT 00569 (IAC).

13. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) has set out, inter alia, that on the current state of the authorities:

    (a) the maintenance requirements of E-LTRP.3.1-3.2 stand, although Blake J in R (on the application of MM) v Secretary of State for the Home Department [2013] EWHC 1900 (Admin) said that they could constitute an unjustified and disproportionate interference with the ability of spouses to live together; he suggested that an appropriate figure may be around £13,400, and highlighted the position of young people and low wage earners caught by the higher figure in the rules;

    (b) 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: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);

    (c) the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.

14. It is illustrative that in Gulshan the Upper Tribunal considered that it was not unduly harsh for a husband who originated from Pakistan but was now a British national, to return to Pakistan with his wife who was seeking leave to remain as his spouse. The panel acknowledged that the couple would suffer some hardship, as he had been in the UK since 2002, he had worked here and was receiving a pension, and housing benefit and other state benefits, some of which could not be transferred to Pakistan.

15. More recently, in Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), the Upper Tribunal held:

    (i) Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it.

(ii) "Maintenance of effective immigration control" whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of "prevention of disorder or crime" or an aspect of "economic well-being of the country" or both.

(iii) "[P]revention of disorder or crime" is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.

(iv) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.

(v) It follows from this that any other rule which has a similar provision will also constitute a complete code;

(vi) 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.

16. It is clear that the determination does not address any of these issues and does not in any way justify the exceptional consideration of private and family life under article 8 ECHR outside the Immigration Rules by reference to compelling circumstances. The article 8 exercise was conducted merely by reference to the Razgar steps, from §17 of the determination onwards. I find that the failure to justify consideration of private and family life outside the Immigration Rules was an error of law.

17. I further note that at §25 the judge relies on his assessment that the claimant fell marginally short of achieving the relevant points and thus meeting the requirements of the Immigration Rules. In Miah & Others [2012] EWCA Civ 261, the Court of Appeal confirmed that there is no near miss principle applicable to the Immigration Rules and the matters set out at §25 were not relevant. For that reason also there is error of law in the decision of the First-tier Tribunal.

18. Mr Dhanji did not resist the Secretary of State's appeal.

19. For the reasons set out above I find that there was such error of law in the making of the decision of the First-tier Tribunal that it should be set aside.

20. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the

function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

21. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh. It will then be possible for the appellant to seek to rely on Shebl in relation to the contractual evidence required under the Immigration Rules.

Conclusions:

22. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the decision in the appeal to the First-tier Tribunal.

Signed: Date: 11 June 2014

Deputy Upper Tribunal Judge Pickup

Consequential Directions

23. The appeal is to be heard afresh in the First-tier Tribunal with no findings preserved.

24. Either party may submit further evidence in respect of the issues in the appeal, not later than 7 days before the adjourned hearing date.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be determined in the First-tier Tribunal.

Signed: Date: 11 June 2014

Deputy Upper Tribunal Judge Pickup