Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/12307/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 March 2015	**On 20 April 2015**
Delivered orally	

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

MR OLALEKAN OLADIMEJI IDOWU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Iqbal, Counsel instructed by ICS LEGAL
For the Respondent: Mr C Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellant, a citizen of Nigeria born on 19 June 1978, against the decision of the First-tier Tribunal who sitting at Richmond on 7 October 2014 and in a determination subsequently promulgated on 17 October 2014 dismissed his appeal against the decision of the Respondent dated 3 March 2014 to refuse his application to vary his leave to remain and to remove him from the United Kingdom by

way of directions under the Immigration, Asylum and Nationality Act 2006 (as amended).

2. The brief immigration history of the Appellant is that he entered the United Kingdom on 26 January 2010 as a student and after a succession of failed Tier 4 Student applications on 8 October and 16 December 2010 he was finally granted leave in that capacity until 31 May 2012. Subsequently the Appellant successfully made a Tier 1 Post-Study visa application granted on 30 December 2011 until 30 December 2013. On 24 December 2013 the Appellant applied for leave to remain on the basis of his relationship with Nadam Adjook Adam. In that regard the Respondent noted that the Appellant was not married and that his partner had not yet legally divorced her spouse.

3. Further there was no evidence before the Respondent to demonstrate that the Appellant and his partner had met and that they were currently in a genuine and subsisting relationship together. Thus, because the Appellant had not demonstrated that he and his partner had any intention to live together and that her previous relationship had broken down it was concluded that the Appellant failed to meet the requirements of the relevant Immigration Rules.

4. The application was also refused under the Rules because the Appellant did not meet the income threshold requirements. In that regard the wage slips provided to demonstrate the Appellant's partner's earnings could not be accepted as they did not fully corroborate the bank statements submitted with the Appellant's application. The application was also refused under the five year or ten year route under Appendix FM of the Immigration Rules.

5. In his determination the First-tier Judge heard oral evidence from the Appellant that he clearly considered in conjunction with the Appellant's witness statement and the bundle of documents that the Appellant had provided in support of his appeal. In that regard he noted the Appellant's explanation that his partner's delay in her divorce proceedings was partly due to the fact that she could not obtain the original marriage certificate. She was a practising Muslim and for that reason they were unable to live together but would do so when they married. It was recorded that the Appellant stated the couple were unable to live together in Nigeria. The Appellant had been away from Nigeria for nearly five years and claimed there was no accommodation for them in Nigeria. Further his partner was a British citizen and it would be unfair on her and her children to make them all live in Nigeria.

6. The Judge concluded that as set out in the refusal letter, the Appellant could not meet the requirements of the Immigration Rules either under the five year or ten year route nor could he meet the requirement as a partner because the couple were required to be living together for two years under GEN.1.2. of Appendix FM. It was accepted that the couple could not live

together for religious reasons and the Judge observed that they had only been in a relationship for six months prior to the Appellant's application. The Judge further recorded that the Appellant in evidence before him, had conceded that he could not meet the requirements of paragraph 276ADE of the Rules in respect of private life. The Judge thus continued that:

> "The only issue therefore is whether this matter can be considered outside the Immigration Rules under Article 8 ECHR."

With that issue in mind, the Judge continued that he could not see any factors pursuant to the guidance in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) on the facts as found that "would justify this matter being considered outside the Immigration Rules as there are no exceptional circumstances to justify such a step."

7. The Judge continued that he had taken into account that the applicant's partner did not attend the hearing. He noted there had been a previous application for an adjournment made on 1 October 2014, a few days before the hearing, and that application was based on Ms Adam's sickness certificate that prevented her from working for one month from 28 August 2014 but, said the Judge,

> "No updated certificate was provided (and therefore) it was not possible for her evidence to the challenged under cross-examination and for the relationship to be tested. I therefore have some concerns about the genuineness of the relationship in any event."

8. The Judge was clear when reaching his decision, that account had been taken of Section 19 of the Immigration Act 2014 and the public interest considerations therein that included the maintenance of effective immigration control and the necessity for financial independence. He concluded:

> "For all these reasons I do not consider that because the Appellant cannot meet the Immigration Rules the matter should therefore be considered outside of the Immigration Rules."

9. First-tier Tribunal Judge Saffer in granting permission to appeal stated that he was satisfied that it was arguable that the Judge

> "erred in not conducting an Article 8 assessment given e.g. R (Ganesabalan) [2014] EWHC 2712 (Admin) as Appendix FM and paragraph 276ADE were not a complete code as far as Article 8 compatibility was concerned."

10. The Respondent in her Rule 24 response dated 22 January 2015 submitted that the Judge directed himself appropriately and that it was entirely open to the Judge following MF (Nigeria) [2013] EWCA Civ 1192 to conclude that there were no exceptional factors to support a consideration outside the

Rules. Therefore there was no material error of law demonstrated within the determination of the First-tier Judge.

11. Thus the appeal came before me on 17 March 2015 when my first task was to decide whether or not the determination of the First-tier Judge disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.

12. The question for me is therefore not whether the appeal against the immigration decision under challenge by the Appellant should be allowed or dismissed. The appeal before me is concerned only with the question of whether the Judge made an error of law of a nature such as to require his decision to be set aside. It is only if that question returns a positive answer that it is open to the Upper Tribunal to disturb the decision of the First-tier Judge.

13. Mr Iqbal provided to me at the outset of the hearing the decisions in:

R (on the application of Esther Ebun Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre) (IJR) [2014] UKUT 539 (IAC);

Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC).

14. The latter-mentioned case related to the question of "fairness" and it would be as well to set out the head note of that decision of the President of this Tribunal which reads as follows:

> *"If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284."*

15. In that regard Mr Iqbal acknowledged that a few days prior to the hearing of the appeal before the First-tier Judge, there had been a written application for an adjournment request that had been refused. His point, however, was that in all the circumstances it was open to the First-tier Judge on his own motion to adjourn the case notwithstanding that, as Mr Iqbal accepted, there was nothing in the determination of the Judge which suggested that that adjournment application had been renewed before him. Mr Iqbal maintained that it was arguably a "Robinson obvious" point.

16. With reference to the Judge's findings of fact as set out in what was a somewhat lengthy paragraph 15 of the determination, Mr Iqbal maintained that given that the Judge had stated that in consequence of Ms Adam's absence he had some concerns about the genuineness of the relationship in any event, that this could be interpreted as the Judge having moved from the position of the Immigration Rules into a consideration of Article 8 outside of them in that such an observation arguably met the first question of the Razgar test. Mr Iqbal concluded his submissions by stating that in all the circumstances and mindful of the guidance in Nwaigwe, the Judge should have exercised fairness and on his own motion adjourned the hearing of the case. In that there had been, in his submission, such procedural unfairness it followed that this would amount to an error of law material to the outcome of the appeal.

17. Mr Avery in response maintained that the Judge considered if it was appropriate to deal with this matter further outside of the Immigration Rules but gave clear reasons as to why he saw no reason to do that and that in any event it was apparent on a reading of the determination as a whole, that the nature of the relationship was not necessarily determinative of the appeal and, again with reference to the Judge's findings at paragraph 15, he exemplified the point that he had just made by pointing out that the Judge had said "I therefore have some concerns about the genuineness of the relationship **in any event**" (my emphasis).

18. Mr Iqbal in response persisted in the argument that fairness warranted an adjournment of this case, given the particular circumstances and the need, in his submission, not least that the Appellant's claimed partner was a British citizen with two British citizen children aged 7 and 5, that it was a case where the circumstances warranted a consideration of the Appellant's circumstances outside the Immigration Rules and that could have been properly investigated had the Judge, as Mr Iqbal submitted, exercised such fairness and adjourned the hearing of the appeal to enable Ms Adam to attend any resumed hearing.

Assessment

19. Despite the eloquence of Mr Iqbal's submissions I have had no difficulty in concluding that the determination of the First-tier Tribunal Judge does not disclose an error of law that was material to the outcome of the appeal. As I have earlier mentioned at the outset of the hearing Mr Iqbal had helpfully presented me with a transcript of the decision in Oludoyi (above). The head note of that decision states as follows:

> *"There is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC) or Shahzad (Art 8: legitimate aim) [2014] UKUT 85 (IAC) that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. These authorities*

> *must not be read as seeking to qualify or fetter the assessment of Article 8. This is consistent with para 128 of R (MM & Others) v SSHD [2014] EWCA Civ 985, that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule. As is held in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations."*

20. Much of that head note was set out within paragraph 20 of the Judge's substantive decision in which she gave examples in explaining:

> "If, for example, there is some feature which has not been adequately considered under the Immigration Rules but which cannot on any view lead to the Article 8 claim succeeding (when the individual's circumstances are considered cumulatively), there is no need to go any further."

21. I am satisfied upon a reading of the determination as a whole that the First-tier Judge provided sustainable reasons that were supported by and open to him on the evidence that led him to conclude that there was "nothing which had not already been adequately considered in the context of the Immigration Rules which could lead to a successful Article 8 claim". He therefore clearly had the guidance to which I have above referred in mind in, following a consideration of the evidence, reaching that conclusion. I am also satisfied that the decision in MF (above) demonstrated that it could not be an error of law for a Judge upon a careful consideration of the evidence in its totality to conclude that it was open to the Respondent after applying the requirements of the Rules to find there to be no arguably good grounds for granting leave to remain outside of them and no particular features as to the applicant's circumstances demonstrating that his removal would be unjustifiably harsh, see indeed also Nagre (above) and Gulshan (above).

22. As the First-tier Judge found, it was open to the Respondent on the evidence before her to conclude that the applicant's immigration history demonstrated that there was no basis for a grant of leave to remain in the United Kingdom either under the family and private life provisions of the Immigration Rules or by virtue of the assistance of any exceptional circumstances and that the applicant thus no longer had any known basis for remaining in the United Kingdom. At the time of the Appellant's application he was aged 35, having spent 31 years in his home country before coming to the United Kingdom, and as the Judge noted, it was not accepted that in the period of time that the applicant had been in this country and in the absence of evidence to the contrary, he had lost ties to Nigeria and although his claimed partner had two British children, the Appellant did not live with them or share any parental responsibility for them.

23. I find that it is not correct as submitted in the grounds, that at paragraph 15 of the determination (and I appreciate that Mr Iqbal did not settle those grounds) that "the Judge accepted that the Appellant's partner could not attend because of her depression and illness". On the contrary, in circumstances where no adjournment request had been made before him the Judge took into account that she did not attend the hearing, thus preventing the Respondent from challenging the veracity of her written evidence under cross-examination "and for the relationship to be tested". It was thus properly open to the Judge to draw an adverse conclusion from her non-attendance and indeed no evidence-based justification as to the reason for her absence at the hearing had been provided. It follows that the concerns of the Judge were reasonably open to him.

24. In the light of his treatment of the authorities I do not think it can reasonably said that the Judge did not had the correct principles in mind nor do I think there is any basis for saying that he misdirected himself by applying the wrong legal test. Mindful of the guidance of the Court of Appeal in R (Iran) [2005] EWCA Civ 982, I find that it cannot be said that the First-tier Tribunal Judge's finding was irrational and/or Wednesbury unreasonable such as to amount to perversity. It cannot be said that they were inadequate. This is not a case where the First-tier Judge's reasoning was such that the Tribunal was unable to understand the thought processes that he employed in reaching his decision.

25. As Mr Iqbal most fairly accepted there was nothing in the determination of the Judge to suggest that the Appellant renewed his adjournment request before him and the Judge had in mind not only the fact that such a request had already been refused a few days before the hearing but for the reasons he gave within his determination, it is apparent that the question of a further adjournment did not arise. It was not, contrary to Mr Iqbal's submission, a Robinson obvious point, and again, and typical of him, he most fairly accepted that in making that submission he might arguably be stretching the point.

26. I find that the Judge properly identified and recorded the matters that he considered to be critical to the decision on the material issues raised before him in this appeal. The findings that he made were clearly open to him on the evidence and are thus sustainable in law.

Decision

27. The making of the previous decision involves the making of no error on a point of law and I order that it shall stand.

No anonymity direction is made.

Signed Date 9 April 2015

Upper Tribunal Judge Goldstein