Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42709/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 19 December 2014	**On 6 January 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Theodore Ufuah
[No anonymity direction made]

Claimant

Representation:

For the claimant: Mr J Howard, instructed by McGrath Immigration Solicitors
For the appellant: Mr N Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Theodore Ufah, date of birth 26.8.72, is a citizen of Nigeria.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Sangha promulgated 2.7.14, allowing on human rights grounds the claimant's appeal against the decision of the respondent, dated 1.10.13, to refuse his application for leave to remain in the UK outside the Immigration Rules on the basis of private and/or family life as the spouse of Sandra Wellington, a British citizen,

and to remove him from the UK pursuant to directions under section 47 of the Immigation Asylum and Nationality Act 2006. The Judge heard the appeal on 28.5.14.

3. First-tier Tribunal Judge Lambert granted permission to appeal on 4.9.14.

4. Thus the matter came before me on 19.12.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Sangha should be set aside.

6. It is clear that the claimant could not satisfy the requirements of Appendix FM in respect of family life or paragraph 276ADE in respect of private life. The grounds of application for permission to appeal submit that the judge failed to identify compelling circumstances not sufficiently recognised in the Immigration Rules justifying consideration of the case outside the Rules on the basis of article 8 ECHR.

7. The second ground of appeal is that in the article 8 proportionality exercise, following the Razgar five steps, the First-tier Tribunal Judge failed to have regard to the public interest in maintaining firm immigration control.

8. In granting permission to appeal, Judge Lambert noted that, "The content of the second sentence of paragraph 18 of the determination amply supports this contention. There is the barest reference to Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 00640 and no engagement at all with the question whether or why on the facts of the case the Article 8 exercise was justified. There is therefore an arguable error of law disclosed by the application."

9. I have considered and taken into account the claimant's Rule 24 reply, under cover of letter dated 18.12.14.

10. I agree with the claimant that there no merit in the first ground of appeal. It follows from section 86 of the 2002 Act that if raised, the Tribunal was obliged to address the article 8 ECHR private and family life claim. On the facts of this case, it is inevitable that an article 8 assessment would have to be made, especially since Ganesabalan v SSHD [2014] EWHC 2712 Admin) has made it clear that there can be no threshold requirement to consideration of article 8 ECHR, unless the Rules are a complete code, which they are not for consideration of private and family life claims cases other than in respect of deportation decisions.

11. Although case law continues to develop, the current position is perhaps best expressed in paragraph 135 of R(MM (Lebanon)) v SSHD [2014] EWCA Civ 985:

> 135. Where the relevant group of IRs [immigration rules], 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 reference 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."

12. In respect of the second ground of appeal, it is correct that at §18 of the decision, the First-tier Tribunal Judge made reference to the public interest and the legitimate aim of maintaining immigration control, deciding that the refusal decision was in accordance with the law. It was also noted that the task before the judge was, "to achieve a just balance between the appellant's interest interest in maintaing his family/private life in the UK including the sponsor and the public interest of securing immigration control." However, that was the full extent of the consideration of the public interest and it does not feature at all in the factors considered in the proportionality balancing exercise. For example, the fact that the claimant cannot meet the requirements of the Rules for leave to remain is not taken into account. There is no adequate assessment as to whether it would be reasonable to expect the appellant and the British spouse to continue family life in Nigeria, or, even though other aspects of Appendix FM could not be met, whether the test in EX1 could be met, that there are insurmountable obstacles to continuing family life outside the UK. That she cannot be required to leave the UK does not mean that family life could not be continued outside the UK. At the time of marriage, the claimant and the sponsor must have understood that his status in the UK was precarious and that he had no right to remain. He came to the UK as a student and he must be expected to have intended to leave the UK on completion of his studies or by the expiry of his leave in July 2012. Cases such as Nasim and Patel have made it clear that the sort of private life a student acquires in the UK does not engage the protection of article 8, which looks to the physical and moral integrity of the individual. Further, it is not a factor mitigating against removal that the claimant has been law-abiding and paid taxes, as relied on by the judge at §19. The judge found that there was no evidence to show that medical facilities would be available to her in Nigeria, but neither had the claimant shown that the medical facilities would not be available.

13. In the circumstances, I find that the article 8 proportionality assessment was one-sided, failed to take proper account of the public interest in removal of the claimant, and thus unfair to the Secretary of State. The decision cannot stand and must be set aside and remade.

14. 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 findings are unclear on crucial issues 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 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.

15. 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 Secretary of State 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.

Conclusion & Decision:

16. 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 making of the decision in the appeal to the First-tier Tribunal for a fresh hearing.

Signed: Date: 31 December 2014

Deputy Upper Tribunal Judge Pickup

Consequential Directions

17. The appeal is to be remitted to the First-tier Tribunal sitting at Birmingham;

18. The hearing is to be de novo, with no findings preserved;

19. The estimated length of hearing is 1.5 hours;

20. No interpreter is required.

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 decided.

Signed: Date: 31 December 2014

Deputy Upper Tribunal Judge Pickup