**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/00009/2014

**THE IMMIGRATION ACTS**

| **Heard at Manchester** | **Determination Promulgated** |
|---|---|
| **On 16th July 2014** | **On 24th July 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE LEVER**

**Between**

**MR BASHIR OLAITAN ADEBAYO**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: No representation
For the Respondent: Mr Harrison

**DETERMINATION AND REASONS**

**Introduction**

1. The Appellant born on 7th January 1976 is a citizen of Nigeria. The Appellant had first entered the United Kingdom on 21st September 2004 as a student. His lawful leave to remain had expired on 10th February 2010 following the refusal of his appeal for further leave to remain. Thereafter the Appellant had applied outside of the Rules

on 30th March 2010 and had made further application for leave to remain outside of the Rules on 9th May 2011. That application had been refused and certified in November 2012 but had then been further considered and a refusal had been maintained on 29th November 2013. The Appellant had appealed that decision and his appeal was heard by Judge of the First-tier Tribunal Law sitting at Manchester on 10th April 2014. The judge had refused the Appellant's application under both the Immigration Rules and Article 8 of the ECHR. Application for permission to appeal had been made and granted by First-tier Tribunal Judge Kelly on 21st May 2014. It was found arguable that the Tribunal had failed to find whether the claim that one of the children could not return to Nigeria because of exposure to bright sunlight following burns had been considered and whether or not that amounted to a compelling circumstance for the matter to have been considered under Article 8 of the ECHR. Directions were issued to the parties. On 9th June 2014 the Home Office had opposed the application by letter.

2. The matter comes before me in accordance with the directions set.

**The Appellant's Submissions**

3. The Appellant and his wife were both present and spoke English. They were unrepresented. I indicated that the Grounds of Appeal which had been submitted in their case and upon which permission to appeal had been granted would be regarded by me as the basis of their submissions.

**The Respondent's Submissions**

4. Mr Harrison relied upon the letter of 9th June 2014 and made no separate submissions.

5. I provide my decision with reasons below on the issue of the error of law.

**Decision and Reasons**

6. The Appellant's application to remain outside of the Rules under Article 8 of the ECHR was made on 9th May 2011 and not finally determined by the Respondent until November 2013. There is no suggestion that the Appellant or his dependants had any basis for remaining within the terms of either the old or the new Immigration Rules following changes made on 9th July 2012 to those Rules. The application and consideration of this case has always focused on whether there was a right to remain under Article 8 of the ECHR.

7. The Respondent in their consideration of the Appellant's case finally on 29th November 2013 was considered solely on the basis of the new Immigration Rules. There does not appear to have been an examination of the case generally to see whether there were any compelling or exceptional circumstances that would allow the Appellant to remain outside of the Rules.

8. The case of **Edgehill** and the commencement legislation of the new Immigration Rules suggests that for an application predating 9th July 2012 a consideration of that

case should have taken place within the ambit of the case law at that time in particular the case of **Razgar**. That does not appear to have been done by the Respondent within the refusal letter.

9. The judge at the First-tier Tribunal had set out the evidence, facts and submissions. The judge's findings are contained between paragraphs 16 and 21 of the determination. Paragraphs 16 to 20 was essentially a consideration of, and a finding that the Appellant failed to meet the requirements of the new Immigration Rules. Given the date of application it may well be that the new Immigration Rules were not in any event applicable to this case that the consideration of the new Rules by the judge did not lead to any material error of law because it has never been suggested or pleaded the Appellant met the Immigration Rules old or new.

10. The central consideration of this case therefore was always an examination of Article 8 of the ECHR.

11. At paragraph 21 of the determination the judge stated "the Respondent had correctly analysed the Appellant's claims and dealt with the family and private life elements within the new Immigration Rules. In going further and bearing in mind the decision in **Gulshan** I have looked at the five stage test in **Razgar**." As indicated above it is not necessarily the case that the Respondent had correctly analysed the Appellant's claim by referring to the new Immigration Rules but that is an academic point. Whilst the judge at paragraph 21 refers to **Gulshan** he does not appear to have applied the test in **Gulshan** or given reasons why if he followed **Gulshan** he had found compelling circumstances that would then allow him to examine the Appellant's case outside of the Rules exceptionally and by reference to the five stage test in **Razgar**. He had then referred to the final stage test in **Razgar** whether it would be proportionate for the Appellant and his family to be removed. Essentially that had always been the central if not sole basis of the Appellant's application and therefore that aspect of the case that required the central or indeed sole consideration of the evidence. The judge's consideration of this aspect of the case amounts to seven lines and is in essence merely a statement that he found nothing within the Appellant's case that would establish the actions of the Secretary of State to be disproportionate. Whilst brevity is exemplary this was a case that did require a greater examination of the facts and an explanation for the decision reached by the judge. The only reason given within those seven lines appears to be based on the Appellant's behaviour as being an overstayer since 2010. That is certainly a factor worthy of consideration. The Appellant was an overstayer because of the failure of the Respondent to remove him. However this was a case where the Appellant had been in the UK for nearly ten years was married and at the date of hearing had three children all of whom were born in the UK. The reference by the Appellant within his witness statement to the unfortunate burns suffered by one of his children was a factor although it should be noted that there was no medical evidence within the Appellant's bundle. However the length of stay of the Appellant within the UK, the birth of three children within the UK and the circumstances of the family generally did mean it was incumbent upon a judge to have provided clear reasons why he did not find it disproportionate for the removal of all the Appellants to Nigeria.

Additionally, if as the judge indicates he had in mind the case of **Gulshan** that would suggest that he had already decided there were compelling circumstances that allowed him to consider the matter outside of the new Immigration Rules by application of the test of **Razgar**.

12. It cannot be said that the ultimate decision of the judge is wrong or entirely unreasonable because in reality there are simply no reasons provided for that decision reached. It is an error capable of being material to fail to provide adequate reasons to support a conclusion reached in such a case. It is for those reasons I find an error of law was made in this case.

**Decision**

13. An error of law was made by the judge in this case such that I set aside the decision of the First-tier Tribunal and issue directions for remaking the decision afresh.

Signed Date

Deputy Upper Tribunal Judge Lever