



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/11842/2014

THE IMMIGRATION ACTS

Heard at Field House

On 15 September 2014

Determination

Promulgated

On 18 September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

**MR ISMAIL ADEMOLA TALABI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Revill of Counsel

For the Respondent: Mr Tarlow, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant Ismail Ademola Talabi is a citizen of Nigeria born on 18 January 1982. On 30 December 2013 he made application for further leave to remain which was refused by the respondent on 24 February 2014. The appellant applied as the spouse of Intunu Comfort Awolesi. He said in his application that she had discretionary leave to remain, having been here for a long time as a child dependant. Her parent and other sibling had been granted indefinite leave to remain. The Secretary of State refused the application. She did not accept that the appellant satisfied the requirements of Appendix FM R-LTRP1.1(d). The appellant's spouse was in the UK with discretionary leave. To qualify for leave under

Section D-LTRP the appellant's partner needed to be either a British citizen present and settled in the UK or be in the UK with refugee leave or humanitarian protection. As the appellant's spouse did not fulfil those requirements, he failed to qualify for leave by virtue of E-LTRP1.2 of Appendix FM. It was not considered that the appellant met the eligibility requirements such as to benefit from the criteria set out at EX.1. Further, the appellant did not satisfy Rule 276ADE(1)(iv) and 276ADE(1)(v). Given the appellant had spent the majority of his life living in Nigeria, in the absence of any evidence to the contrary, it was not accepted that in the period of time he had been in the United Kingdom, he had lost ties to Nigeria. Further, he had family still living in Nigeria. As a result, the respondent was not satisfied the appellant could meet the requirements of Rule 276ADE(1)(vi). It was not considered the application raised or contained any exceptional circumstances in terms of Article 8 to warrant consideration of grant of leave to remain in the United Kingdom outside the Immigration Rules.

2. The appellant's appeal against the adverse decision was dismissed by FTT Judge Hussain ("the judge") in a determination promulgated on 25 June 2014. There was no representation before the judge. He recited what the appellant had to say in his application which I have set out at [1] above. The judge found the respondent had not engaged with the application and instead, that it was refused on grounds that the appellant did not meet the requirements of Appendix FM or paragraph 276ADE. As to the grounds of appeal lodged on the appellant's behalf, the judge found that they did no more than recite some of the grounds available to the appellant under Section 84 of the Nationality, Immigration and Asylum Act 2002 such that it was not possible to establish in what way the appellant wished to make his claim. The judge said that the burden of proof was on the appellant and that he had not discharged that burden.
3. An application was made for permission to appeal to the Upper Tribunal. It was contended that the judge erred because he failed to make findings as to whether the appellant enjoyed family life in the UK and if so, whether the refusal disproportionately interfered with that family life. Further, that the judge erred in dismissing the appeal in circumstances where, owing to poor representation, the appellant had been deprived of a fair hearing.
4. In more detail, the grounds claimed that the evidence before the judge was that the appellant was married to a person with discretionary leave to remain in the United Kingdom, the respondent did not take issue with the genuineness of the relationship such that it was arguable the appellant enjoyed family life here. Bearing in mind the case law **Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC)** affirming **Nagre** and **Gulshan**, if the Rules were not met then only if there were arguably good grounds for granting leave to remain outside the Rules was it necessary for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised by them. (**Gulshan** at [24(b)]). There was no requirement for "exceptional circumstances" in the form of a

threshold that must be reached before a breach of Article 8 could be found. (**Nagre** at [49]).

5. It was submitted that the judge had failed to assess whether or not there were “arguably good grounds” for granting leave to remain outside the Rules and he also failed to consider whether there were “compelling circumstances” not recognised by the Rules. He should have made that assessment and the failure to do so was an error which flawed the entire determination. If he had made a proper assessment and found in the appellant’s favour, it would have been arguable that the decision interfered with his family life and it would have then been incumbent upon the respondent to justify that interference failing which her decision would be disproportionate. In any event it was arguable that the respondent’s decision in the section “Decision on Exceptional Circumstances” illegitimately applied an “exceptional circumstances” test contrary to what was said in **R (on the application of Nagre) [2013] EWHC 720 (Admin)**.
6. In any event, the appellant had been denied a fair hearing. **Shen (Paper appeals; proving dishonesty) [2014] UKUT 00236 (IAC) at [27]** provided that if the judge entertained doubts in a paper appeal it was open to him to direct the appellant to produce further documentary evidence. If the papers did not disclose the footing upon which the appellant’s case was put then he erred in not seeking clarification from the appellant. See also **MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)** at [22] and [23]. As a result of the defects in the appellant’s representative’s conduct of the appeal, he had been denied a fair hearing.
7. In granting permission to appeal, FTT Judge Colyer found that it was arguable the judge erred in his approach given there was no reference by him to the skeleton argument prepared by the appellant’s solicitors or any findings on the facts set out in the witness statements of the appellant and the sponsor. Accordingly, there was a failure to give adequate reasons.

Submissions on Error of Law

8. Ms Revill adopted the grounds. Mr Tarlow adopted the Rule 24 response. Ms Revill submitted that Article 8 was in issue and the judge failed to engage with the terms of the application which was that the appellant and the sponsor were living together as a family. It was **Robinson** obvious that the judge should have dealt with Article 8. In any event, merely in terms of procedural fairness with regard to **Shen**, the judge should have made directions for further information to be produced, in all likelihood at an oral hearing.
9. Mr Tarlow submitted that the burden was upon the appellant to make out his case. The judge did the best he could. It was unclear what were the compelling reasons with which he was meant to engage.

Conclusion on Error of Law

10. I find the appellant's grounds are made out. I find that there was evidence before the judge with regard to family life and that an Article 8 assessment should have been carried out although the case law in the meantime has moved on from **Gulshan**. See [128] of **MM [2014] EWCA Civ 985** per Aikens LJ:

"..... **Nagre** does not add anything to the debate, save for the statement that if a particular person is outside the rule then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is or there is not a further Article 8 claim."

and at [134]:

"..... 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."

11. **Gulshan** was disapproved of in the sense that there should not be a test of exceptionality to consider circumstances outside the Rules when the test in Article 8 is one of reasonableness and proportionality. See also **Patel [2013] UKSC 72**. The Rules are no more than the starting point for the consideration of Article 8.
12. I find that the appellant was denied a fair hearing as it was open to the judge to direct him to produce further documentary evidence. Further, the judge appeared to have overlooked the skeleton argument and the contents of the witness statements of the appellant and the sponsor which were before him.
13. I conclude that the determination does contain material errors of law such that the decision is set aside in its entirety to be remade in the First-tier Tribunal.

Decision

14. The decision of the First-tier Tribunal contains errors of law, is set aside and shall be remade in the First-tier Tribunal.

No anonymity direction is made.

Signed

Date 15 September 2014

Deputy Upper Tribunal Judge Peart