IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20512/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 November 2014	**On 28 November 2014**

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING
UPPER TRIBUNAL JUDGE I A LEWIS

Between

OGOCHUKWU OBINNA OGBOGU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No Legal Representation
For the Respondent: Mr M Shalliday, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal with the leave of First-tier Tribunal Judge Gibb who granted permission to appeal on 20 October 2014. In his reasons for granting permission he recounted that the appellant was a citizen of Nigeria who was refused leave as a Tier 4 Student dependant on 1 May 2014 and whose appeal against removal had been dismissed by Judge of the First-tier Tribunal R A Cox in a determination promulgated on 8 September 2014. The First-tier Judge recounted that the grounds (which were in time) complained that the judge erred in his approach to Article 8.

First-tier Tribunal Judge Gibb went on to say that the appellant was not legally represented and that he had read the determination carefully with an eye to any point of law not raised.

2. He then said that he decided there was an arguable legal point flowing from the case of Zhang [2013] EWHC 891 (Admin) which dealt with a similar issue under paragraph 319C of the Immigration Rules. In Zhang it had been decided that the effect of the prohibition on switching from other categories to be a dependant of a points-based migrant breached Article 8. The Secretary of State then changed the relevant paragraph of the Immigration Rules ("the Rules") to allow switching. Zhang predated the determination of this appeal by some months. First-tier Judge Gibb went on to say that he did not criticise Judge Cox for not being aware of Zhang, but nevertheless, if the same issues applied directly, and if there was an acceptance by the Secretary of State that the relevant rule had to be changed, then this reflected significantly on how much weight should have been given to immigration control in the proportionality assessment. The issue of whether there was an error on a point of law therefore merited further consideration. He said that the parties should be prepared to show when and how the Rules were changed post-Zhang.

3. We take the facts briefly from the determination.

4. The appellant was a national of Nigeria, born on 2 May 1986. He appealed under Section 82 of the Nationality, Immigration and Asylum Act 2002 against a decision taken by the Secretary of State on 1 May 2014 to refuse him leave to remain as a Tier 4 (General) Student Migrant dependant and to give directions for his removal under Section 47 of the 2006 Act.

5. The First-tier Tribunal heard oral evidence from the appellant and from his wife, Mrs Efe Victoria Ohihoin, who was also a Nigerian. They had been married in Luton on 3 July 2013. The appellant and his wife were not legally represented. The First-tier Tribunal sought to enable their evidence in the first instance by asking them open questions before permitting cross-examination. The Tribunal also heard submissions. It took those into account, with the material set out in the Record of Proceedings. The Tribunal also took into account the respondent's bundle which was in the usual form, and witness statements both by the appellant and by his wife, which they adopted as their evidence-in-chief at the hearing.

6. The appellant's immigration history was that he came to the United Kingdom in September 2010 with a Tier 4 student visa in order to study a Masters degree in Business Management, which he obtained. After that he was granted a Tier 1 (Post-Study) Work visa valid until a date in April 2014. Before the expiry of that leave he made his present application as the dependant of his wife, a Tier 4 student with leave until a date in 2017. She first entered the United Kingdom on 10 October 2010 to study for a Masters degree in Maritime Law at the University of Hertfordshire. She too entered on a Tier 4 student visa. She was then granted a Tier 1 (Post-

Study) Work leave until February 2014. While that leave was current she sought a placement on a PhD research course but received no positive response in the time available. She therefore decided to study on a CIMA plus MBA course for which she obtained a Confirmation of Acceptance for Studies and then made an in-time application for further leave to remain as a Tier 4 student. That was granted and it was at that stage that the appellant made his Tier 4 dependant application.

7. The Tribunal then turned to the relationship between the appellant and his wife. They met first towards the end of 2010 in St. Albans where they were both studying. The relationship developed. They became engaged in January 2013. Neither of their families in Nigeria very much approved of the match despite their having travelled to Nigeria to meet each other's families and to "make peace". There was a difference in age and tribal affiliation, and, in addition, the appellant's wife had been supposed to marry someone else on returning to Nigeria from her studies. Nevertheless the parties decided to go ahead with the wedding and thus it was that they got married on 3 July 2013. Throughout the relationship the appellant's wife has suffered from medical problems of some seriousness, details of which were given in the witness statements which the Tribunal did not repeat. Unfortunately she had a miscarriage earlier that year. She concluded in her witness statement:

> "The appellant has been a pillar of support to me, we are newlyweds who just lost our baby after trying for years and I know I don't have a life without him. Separating us will be detrimental to my health, academics and life in general. I just had major surgery (open myomectomy) and just learning to get back on my feet. He bathes me, does the cleaning and most of the chores because the doctor advised against any form of heavy lifting. The appellant works as a night care worker, returned home and cares for my needs as well. We don't have any support from family since we got married without their consent. We may not have much but we have each other. We are a family."

8. It is apparent from the discussion of the Secretary of State's reasons for refusing the application that the First-tier Tribunal was considering an earlier version of the relevant paragraph of the Rules, 319C, than the version that was current at the time of the application and the hearing and is current now. It seems to us that that reduces the force of the observation made by First-tier Tribunal Judge Gibb when he granted permission to appeal on 20 October 2014 because it is apparent to us that the current version of the Rules has been amended in order to take on board the point that was made by the Administrative Court in the case of Zhang. So it seems to us firstly that there may have been an error of law by the First-tier Tribunal in that it was looking at the wrong version of the Rules but, secondly, that that error was not material, and that the point made by First-tier Tribunal Judge Gibb when granting permission to appeal based on Zhang is not at any rate directly engaged, precisely because the

Rules have since been amended to take on board the point made in Zhang.

9. In Zhang Mr Justice Turner had held that the earlier version of paragraph 319C was not compatible with the claimant's human rights because it required a person who was in the United Kingdom and who otherwise satisfied paragraph 319C to leave the United Kingdom and apply for entry clearance if he or she had leave to be in the United Kingdom in a category different from that of the spouse or partner of a Tier-4 student. That particular requirement has been removed from the current version of the Rules under which this application was considered. It was accepted by the appellant (see paragraph 6 of form IAFT-1) that the appellant did not satisfy the requirements of the Rules. Prima facie the Rules have been drafted so as to encapsulate the Article 8 considerations in the majority of cases and they have been specifically amended since the decision of Zhang to accommodate the aspect of the then current Rules which the High Court held was incompatible with the claimant's Article 8 rights in that case. It seems to us therefore that the First-tier Tribunal would have been correct to decide, on the applicable version of the Rules, that the appellant did not qualify under the Rules.

10. The First-tier Tribunal then went on to consider Article 8 appreciating correctly that the Rules were not a complete statement of all the factors that might be relevant to the Article 8 consideration and dealing with the enquiry on what the Tribunal referred to as "classic" Article 8 ECHR lines, while taking into account the five steps in Razgar. While it might be interesting for us to speculate on the Article 8 compatibility or otherwise of the current version of the Rules, we do not consider that it would be right for us to do so given that the appellant is not here to prosecute the appeal this morning.

11. For those reasons therefore it seems to us that the appropriate course is to dismiss the appeal. There was an error of law but it was not material. The appellant did not qualify under the Rules and as it seems to us the consideration of the Razgar analysis by the First-tier Tribunal does not disclose any error of law. We dismiss this appeal.

Signed Date: **27 November 2014**

Mrs Justice Laing