Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32246/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 September 2014	**On 12 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ADESANYA ADELENE SOMUYIWA

Claimant

Representation:

For the Appellant: Mr N Bramble (Home officer presenting officer)
For the Claimant: Mr T Ogunnubi (Legal Representative)

DETERMINATION AND REASONS

1. In this appeal the appellant is referred to as the Secretary of State and the respondent is referred to as the claimant.

2. This matter comes before me for consideration as to whether or not the determination before First-tier Tribunal (Judge Bart-Stewart) promulgated on 23 June 2014 discloses a material error of law.

3. The claimant is a citizen of Nigeria and was born on 19 November 1974.

Background

4. The claimant was granted leave as a student from 2003 to 2005 to study on an ACCA course. On 15 October 2012 the Secretary of State refused the claimant's application under paragraph 245ZX(ha) and on maintenance grounds. The reason for refusal was that the overall period of leave for degree level study was limited to a period of five years. An earlier Tribunal allowed an appeal on human rights grounds on the maintenance issue and under the Immigration Rules to the extent that the removal decision made under Section 47 Immigration, Asylum and Nationality Act 2006 was unlawful. As a consequence of that Tribunal's decision the Secretary of State granted to the claimant a short period of leave (seventeen days) from 17 April 2013 – 4 May 2013 in which to pursue his application.

5. The claimant submitted a further application on 4 May 2013 but this was not supported with a valid CAS. The Secretary of State refused the application to vary leave to remain on 24 June 2013 and made directions under section 47 of the Immigration, Asylum and Nationality Act 2006. The claimant appealed to the First Tier Tribunal which was heard before First Tier Tribunal Bart-Stewart.

6. First-tier Tribunal Judge Bart-Stewart dismissed the appeal under the Immigration Rules. She found that the appellant had not produced a valid CAS. She allowed the appeal on human rights grounds under Article 8 ECHR (private life) having found that the grant of leave of seventeen days was insufficient to give effect to the previous Tribunal's determination.

7. The Tribunal concluded that the Secretary of State had unfairly exercised discretion by granting only seventeen days' leave which was insufficient [12].

Grounds of Appeal

8. The Secretary of State argued that the Tribunal erred in its assessment of Article 8 ECHR by failing to follow **MF (Nigeria) [2013] EWCA Civ 1192** which confirmed that the Immigration Rules are a complete code forming the starting point of any Article 8 assessment which should only be carried out after consideration of the relevant immigration Rules. Furthermore, the Tribunal did not identify "compelling circumstances" as per **Gulshan [2013] UKUT 00640 (IAC)** and **Nagre [2013] EWHC 720 (Admin)** as to the meaning of exceptional circumstances. The Tribunal failed to provide adequate reasons why the appellant's circumstances were either compelling or exceptional. The claimant was granted a sufficient period of leave in order to give

him an opportunity to make another application and obtain a CAS which he did not do.

Permission to appeal

9. Permission to appeal was granted on 14 July 2014 by Designated Judge Garratt on the grounds that it was arguable that the judge failed to adopt the approach recommended in **Gulshan** and did not identify any compelling circumstances justifying consideration outside of the Rules.

Submissions

10. Mr Bramble submitted that having found the case could not succeed under the Rules and dismissed same, the Tribunal went on to pursue the issue of fairness using the mechanism of Article 8 ECHR. The Tribunal was effectively attempting to rectify what she perceived as unfairness caused to the claimant by granting him insufficient time in which to pursue his application. Mr Bramble submitted that this issue did not form the basis of a human rights claim. The Tribunal failed to make proper findings under Article 8. Mr Bramble relied on the Upper Tribunal decision in **Marghia (procedural fairness) [2014] UKUT 00366(IAC)** which emphasised the clear distinction between procedural fairness and a decision that was unfair.

11. Mr Ogunnubi responded by emphasising the delay on the part of the Secretary of State in complying with the earlier Tribunal decision promulgated on 25 January 2013. That delay together with the short period of leave, seventeen days as opposed to 28 days, resulted in the claimant being unable to obtain a valid CAS. He therefore was forced to submit a further application without the CAS. The decision made by the Tribunal at [12] was correct in finding that Article 8 private life was engaged.

12. Mr Bramble submitted that the appellant was fully aware of the decision made once the determination was promulgated on 25 January 2013. It was questionable therefore whether he had had adequate time in which to pursue his application and to obtain the necessary CAS.

13. In any event the Tribunal erred by considering the issue of fairness absent any other Article 8 factors such as length of time in the UK, public interest factors and accumulation of private life. In addition there was no balancing or proportionality exercise conducted by the Tribunal. Following **Patel & others V SSHD 72 [2013]**, the prospect of a student now succeeding under Article 8 where he or she cannot meet the Immigration Rules is remote. Paragraphs 56 and 57 of that judgment states:

> "56. Although the context of the rules may be relevant to the consideration of proportionality, I agree with Burnton LJ that this cannot be equated with a formalised 'near-miss' or 'sliding scale' principle, as argued for by Mr Malik. That approach is unsupported by Strasbourg authority, or by a proper reading of Lord Bingham's words. Mrs Huang's case for favourable treatment outside the rules did not turn on how close she had

come to compliance with rule 317, but on the application of the family values which underlie that rule and are at the heart also of article 8. Conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit.

57. It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in *Pankina* for 'common sense' in the application of the rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8."

14. At the end of the hearing I announced my decision that the determination disclosed a material error of law. I set aside the determination in part. I now give my reasons for my decision.

Discussion and Decision

15. This matter can be dealt with quite shortly. In summary the claimant submitted an application for further leave to remain on 4 May 2013 even though he was unable to produce a valid CAS in support. He claimed that the Secretary of State had acted unfairly by granting him a period of only seventeen days' leave which was insufficient for him to obtain a CAS. It appears that the Secretary of State granted leave to enable the claimant to complete his proposed course of studies which was less than six months which he had completed. The period of leave amounting to seventeen days in fact gave him an additional ten days to the standard period of seven days. Nevertheless the claimant argued that the short period of leave and a postponement of the programme for his studies resulted in him being unable to produce the CAS.

16. I am satisfied that there was a material error of law in the assessment of Article 8 private life by the First-tier Tribunal. The Tribunal failed to give reasons why the unfair decision was capable of engaging Article 8. The Tribunal made no findings and did not carry out any assessment of relevant factors to private life. The decision made focused on the issue of unfairness to the appellant following the Secretary of State's decision to grant seventeen days' leave. In the circumstances it cannot be said on the facts that the Secretary of State acted through any procedural unfairness (**Marghia**). The Tribunal wrongly used Article 8 as a vehicle to remedy the decision made perceived to be unfair by the claimant. In addition the Tribunal failed to carry out the step by step approach in **Razgar** and/or when considering proportionality

failed to take into account all relevant factors in particular the public interest and the failure to meet the Immigration Rules. This amounts to a clear error of law that was material to the outcome.

17. The appellant has studied in the UK since 2003, any private life established has been temporary by definition as he is a student. He failed to meet the requirements of the Rules under paragraph 245 in light of the fact that he has studied in excess of the five year period for degree level courses and would not be entitled to a further grant of leave. He did not submit a valid CAS and did not do so having been given further opportunity to do so by the Secretary of State. Following **Patel** (cited above) there is no basis on which the appeal can succeed on human rights grounds. I dismiss the appeal on human rights grounds

Decision

18. There was a material error of law in the determination.

19. The decision is set aside to the extent that the appeal was allowed on human rights grounds.

20. The decision dismissing the appeal under the immigration rules stands.

Signed Date 11.9.2014

Deputy Upper Tribunal Judge G A Black

No anonymity order made.

NO FEE AWARD

Signed Date 11.9.2014

Deputy Upper Tribunal Judge G A Black