Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33887/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 10th July 2014	**On 16th September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR JOHN ABUGA GUTO
(NO ANOMYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sadiq, Solicitor
For the Respondent: Mrs K Heaps, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Kenya born on 3rd October 1974. The Appellant was granted leave to enter the UK as a student on 12th January 2004. His leave to remain as a student was subsequently renewed on three occasions expiring on 27th October 2012.

2. On 25th May 2012 the Appellant applied for leave to remain on the basis of his private life in the UK.

3. The Appellant's application was refused by the Secretary of State by Notice of Refusal dated 8th August 2013.

4. The Appellant appealed and the appeal came before Immigration Judge Crawford sitting at Manchester on 7th March 2014. In a determination prepared on 10th March 2014 and promulgated on 18th March the Appellant's appeal was dismissed under the Immigration Rules and pursuant to Article 8 of the European Convention of Human Rights.

5. On 2nd April 2014 the Appellant lodged Grounds of Appeal to the Upper Tribunal. Those grounds made the following contentions:-

   (i) that the First-tier Tribunal Judge had made a mistake of fact on the evidence;

   (ii) that the First-tier Tribunal Judge reached his conclusions in paragraph 19 of the determination regarding the nature of the Appellant's research without the matter having been put to the Appellant directly at the hearing and thus breached principles of natural justice;

   (iii) that the judge had failed to consider the implications as to whether the Appellant should be able to conduct his research outside the United Kingdom;

   (iv) had failed to properly direct himself as to the law and carefully consider all the facts in the Appellant's case in his assessment of private life under Article 8.

6. On 2nd May 2014 Designated Judge Woodcraft granted permission to appeal. In granting permission Judge Woodcraft considered that it was arguable that the proportionality exercise was unduly influenced by the application of arguably the wrong Immigration Rules. He noted that although this point was not raised in the ground of onward appeal as this issue went to this country's obligations under the Human Rights Convention it was appropriate to consider whether it was "Robinson obvious" such that permission to appeal could be granted. He considered that all grounds could be argued.

7. No reply pursuant to Rule 24 has been served by the Secretary of State. The matter comes before me to determine whether there is a material error of law in the decision of the First-tier Tribunal Judge and if so as to whether I can or cannot remake the decision today. The Appellant appears by his instructed solicitor Mr Sadiq. The Secretary of State appears by her Home Office Presenting Officer Mrs Heaps.

Submissions/Discussions

8. Mr Sadiq starts by querying whether an analysis of the new Rules has led to the judge over-influencing his proportionality assessment and that looking at the determination the new Rules played a strong part based on proportionality but that the grounds given in support of the application are

also strong and arguable. He submits that the crux of this matter is Judge Crawford's finding that the PhD course can be conducted from Kenya as set out at paragraph 70 of the determination. He points out that the Appellant's leave as a student was due to expire on 27th May 2012 but that the Appellant was unable to extend his leave as a student because of the change of the Rules that took place in April 2012 prohibiting grants of leave as a postgraduate non PhD student if as a consequence of that grant of leave the applicant would spend more than five years in total in the UK as a student.

9. Mr Sadiq takes me in some detail through his very lengthy grounds of appeal which run to some 57 paragraphs and ask me to find that there is a material error of law in the decision of the First-tier Tribunal Judge.

10. Mrs Heaps in her response starts by referring to the authority of *Edgehill [2014] EWCA Civ 402* which decided that the transitional provisions introduced into the Immigration Act when Appendix FM and paragraph 276ADE were introduced meant that an application made before 8th July 2012 would be decided in accordance with the Rules in force at that date. However she submits that the judge has looked at this issue and that at paragraph 12 of the determination it is conceded that the Appellant cannot meet the Immigration Rules. Thereafter the judge has gone on to consider the Appellant's rights pursuant to Article 8 and has analysed the factors set out in *Razgar*. She submits that there is no material error of law.

The Law

11. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of

evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

13. In this case the judge has firstly considered whether or not the Appellant can succeed under paragraph 276ADE of the Immigration Rules. Mr Singh on his behalf has conceded that he cannot do so and this is well-documented at paragraph 12 of the First-tier Tribunal Judge's determination. A finding under the Immigration Rules certainly does not show any material error of law. However I am satisfied that there is a material error of law in the assessment carried out by the First-tier Tribunal Judge so far as it relates to the Appellant's appeal pursuant to Article 8 outside the Immigration Rules. Whilst I acknowledge that the judge has recited the Appellant's personal history he has made two errors. One is an error of fact namely that the Appellant is able to complete his PhD research in his home country using funding partially from Kenya and secondly he has failed to consider the relevant case law relating to claims pursuant to Article 8 outside the Immigration Rules. On that basis I set aside the decision of the First-tier Tribunal and proceed to go on to remake the decision.

The Law on Appeal outside the Immigration Rules under Article 8

14. The Tribunal in *Gulshan* made clear and has repeated subsequently in *Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)* at paragraph (31):

> *"Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."*

15. The Court of Appeal in *MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985* at paragraph 128 went on to state:

> *"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. That will have to be determined by the relevant decision maker."

Findings on the Remaking of the Appeal

16. The authorities consequently focus firstly on whether there are arguably good grounds for granting leave to remain outside the Immigration Rules and then for considering whether there are compelling circumstances not sufficiently recognised under them. Further subsequent to the statutory changes introduced by the Immigration Act 2014 it is appropriate to give due consideration to the statute even though the hearing for both in this case the First-tier Tribunal and before myself took place prior to the statute coming into force but in this instance my determination is promulgated after that event. I have given due consideration to the statute.

17. This is a very exceptional case. The Appellant has been allowed to address the Tribunal as to his present circumstances. He has been offered a place at the University of Manchester to complete his PhD. He has previously completed a postgraduate diploma. He is the co-writer of a paper entitled Estimated Burden of Fungal Infections in Kenya which has been submitted for publication in the East African Medical Journal and is currently at the review stage with a schedule of being published in November. He is also a member of a proposed research team which has recently had a protocol approved entitled "Cross-sectional study to determine the point prevalence of chronic pulmonary aspegillosis in tuberculosis patients in Kenya."

18. The Appellant is unquestionably a law-abiding citizen who has no intention of circumventing the law or the Immigration Rules. I am further satisfied that his attendance to complete his PhD would unquestionably be for the benefit of the public good not just in Kenya and Africa but in the United Kingdom. It is regrettable that the provisions of the Immigration Rules would effectively bar the Appellant from completing this research and that this scenario has only arisen due to the accepted fact that the Appellant has had very serious health problems and that his attempt to continue with his studies as a result of his medical condition has been repeatedly hindered. He is the first to admit that he has been granted numerous periods of interruption to his studies by the university who have been most generous in their assistance and continue to be so. In March 2012 he was given the medical all clear following surgery which took place some twelve months previously and has returned to his studies full-time and is now in a position to complete his studies.

19. The Appellant has explained exactly what his studies will entail. He points out that the word research should not be confused with analysis and that the process in Kenya is one simply of obtaining relevant samples which will constitute the data for his research. His medical PhD thesis comprises essentially two components, firstly data collection in Kenya and secondly data analysis and research in the laboratories at the University of

Manchester. The required data collection has commenced and is being conducted by identified local medical experts in Kenya and is then transferred to the Manchester University laboratories in ongoing batches for detailed scientific analysis which he intends to conduct. It is this detailed scientific analysis rather than the data and sample collection in Kenya on which his PhD is based. I am satisfied that such analysis can only be conducted in Manchester as the specialised machinery required for the analysis of blood samples, sputum and DNA breakdown namely PCR machines and hamecrine machines are not available in Kenya.

20. Consequently I am satisfied that the finding of the judge in paragraph 19 that the research would mainly be carried out in Kenya is wrong. That constituted the material error of law but the fact thereafter remains that for the Appellant to complete all aspects of his investigation, research, analysis and drafting of reports and thereafter to complete his PhD that work can be carried out in Manchester without his actually having to travel to Kenya. The corollary namely of carrying out his PhD from Kenya without coming to Manchester is I am satisfied entirely impossible.

21. In such circumstances I am of the view that a proper consideration of the Appellant's interference with his Article 8 rights following the basic principle set out in *Razgar* are such that the interference with the Appellant's private life by expecting him to return to Kenya for the purpose of completing his course would breach his Article 8 right, be an unnecessary interference and would not be proportionate to the legitimate public end sought to be achieved. Further I am of the view that it would not be practical for all the reasons set out above for the Appellant to continue his private life in the manner in which he seeks by returning to Kenya.

22. I emphasise that this is a very exceptional case which turns very much on its own facts and on that basis I am satisfied that the Appellant's appeal pursuant to Article 8 should be allowed. It goes I anticipate without saying and certainly will be noted both by the Appellant and by the Secretary of State (albeit that it is the Secretary of State to dictate the length of such allowance), that the length of time by which the Appellant's visa should be extended should in my view be solely for the length of time that his PhD is anticipated to take as laid down by the University of Manchester.

Decision

23. The decision of the First-tier Tribunal having contained a material error of law is set aside and is remade insofar as the Appellant's appeal pursuant to Article 8 of the European Convention of Human Rights is allowed.

24. The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris