Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/51825/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 2 July 2014	**On 31st July 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

STANLEY ATUEYI
Respondent

Representation:

For the Appellant: Ms R Pettersen, Senior Home Office Presenting Officer
For the Respondent: Ms S Khan, instructed by Parker Rhodes Hickmotts, Solicitors

DETERMINATION AND REASONS

1. I shall refer to the appellant, the Secretary of State for the Home Department, as the respondent and to the respondent (Stanley Atueyi) as the appellant (as they were respectively before the First-tier Tribunal). The respondent, Stanley Atueyi, was born on 11 February 1979 and is of uncertain nationality; he claims that he does not know where he was born

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but lived in Nigeria until he was a teenager. It appears he came to Europe from Nigeria in 1991 or 1992. In 1999, he met a Ms Howson, who is a British citizen. Ms Howson was working in Spain until January 2005 and she returned to the United Kingdom in the summer of that year and had a child by the appellant. In November 2005, the appellant and Ms Howson married. It appears the appellant entered the United Kingdom illegally in 2007. In October/November 2010, the appellant and Ms Howson separated.

2. On 12 September 2013, a decision was taken to refuse to issue the appellant with a residence card as confirmation of a right of residence as the family member of a British citizen (Ms Howson) who was previously working or self-employed in another Member state. The appellant appealed to the First-tier Tribunal (Judge Agnew) which, in a determination promulgated on 27 March 2014, dismissed the appeal in respect of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") but allowed the appeal on Article 8 ECHR grounds. The Secretary of State now appeals against that decision, with permission, to the Upper Tribunal.

3. The appellant has not cross-appealed against the decision to refuse his application under the 2006 Regulations. I do not propose to refer to the complex litigation history in which this appellant has been involved in which it is discussed in some detail in Judge Agnew's determination [7–16]. Both parties accept that the appellant was able to appeal against this decision on Article 8 ECHR grounds although the respondent asserts in the grounds of appeal that the judge erred in law by failing to have proper regard to relevant jurisprudence, including *Gulshan* [2013] UKUT 00640 (IAC). Paragraphs 5 and 6 of the grounds of appeal read as follows:

> (v) It is respectfully submitted that the Tribunal has failed to provide adequate reasons why the appellant's circumstances are either compelling or exceptional [see *Gulshan*]. At paragraphs 47–50 the Tribunal has found that it would be in the best interests of the children to remain in the UK. However, it is submitted the Tribunal has failed to provide adequate reasons for their findings (*sic*) given that at paragraph 35–39 the appellant is not and does not intend to continue to take an active role in their upbringing. It is submitted the appellant has limited contact with the children and the Tribunal has failed to provide adequate reasons why he cannot maintain contact with them from abroad and via visits. It is submitted that the appellant has shown no commitment to being a part of his children's lives and their best interests will continue to be served by remaining with their mother who is their primary carer.
>
> (vi) It is submitted that had the Tribunal taken these issues into consideration they [sic] would have found that the decision to remove is proportionate.

4. However, before I deal with that matter, Ms Khan, for the appellant, has raised both in her Rule 24 notice and also in her oral submissions a problem concerning the grant of permission by Judge Cox on 12 May 2014.

The application for permission by the Secretary of State included this explanation for the late submission of the application:

> It is respectfully asked that the Tribunal extend the time limit for making this application. The main reason for delay was because of an unexpected illness. I was allocated this work on Thursday 3 April 2014, unfortunately I was taken ill the same day and did not return to work until Monday 7 April 2014. In my absence my work was not covered. On my return to work I dealt with this case as soon as possible. An extension of time is respectfully requested.

5. The First-tier Tribunal determination was received by the respondent on 29 March 2014. The author of the grounds was one David Neale.

6. The grant of permission incorrectly states [1] that the application for permission was made "in time". The parties agree that it was not. Ms Khan relies on the decision of the Upper Tribunal in *Boktor and Wanis (Late application for permission) Egypt* [2011] UKUT 442 (IAC). The headnote reads:

   Where permission to appeal to the Upper Tribunal has been granted, but in circumstances where the application is out of time, an explanation is provided, but that explanation is not considered by the judge granting permission, in the light of AK (Tribunal appeal - out of time) Bulgaria [2004] UKIAT 00201 (starred) and the clear wording of rule 24(4) of the Asylum and Immigration (Procedure) Rules 2005, the grant of permission to appeal is conditional, and the question of whether there are special circumstances making it unjust not to extend time has to be considered.

7. Ms Khan submitted there had been no explanation why the case had not been reallocated to another caseworker during Mr Neale's absence from work.

8. I find that time should be extended. The application for permission to appeal should have been submitted by 4 April 2014; it was submitted on 8 April 2014. Given the short period of the delay and the lack of any significant prejudice caused to the appellant and the unexpected nature of Mr Neale's illness, I find that there are special circumstances which render it unjust not to extend time. Whether the Secretary of State's procedures are adequate for dealing with the illness of a member of staff is not material; the fact remains that Mr Neale's work was not reallocated to another officer and that is the explanation for the delay. I notified the representatives of my decision at the Upper Tribunal hearing. I therefore proceeded to consider their submissions in respect of the merits of this appeal.

9. I find that the First-tier Tribunal erred in law such that its determination falls to be set aside. I have reached that conclusion for the following reasons.

10. In a thorough and detailed determination, Judge Agnew has, in relation to Article 8, first considered whether the appellant met the requirements of the Immigration Rules (in particular, E-LTRPT2.4). At [39], she wrote:

> I do not find it has been established that the appellant is taking and intends to continue to take an active role in the children's upbringing. He may play some role in that he is their father and he sees them occasionally, but I do not find it is active in relation to their upbringing. The appellant has failed to establish he meets the requirements of ELTRPT2.4.

11. The judge then went on [40] to consider *Gulshan* recording, correctly, that for Article 8 outside the Immigration Rules to be considered, "the appellant has to show he has a good arguable case". She found that "given that there are children in the family I find that there is a good arguable case to proceed to Article 8". The grounds of appeal take issue with the judge's decision to consider Article 8 outside the Rules in the light of her findings at [39] which I have quoted above. E-LTRPT2.4 provides:

    (a) The applicant must provide evidence that they have either –

        (i) sole parental responsibility for the child or that the child normally lives with them; or

        (ii) access rights to the child; and

    (b) The applicant must provide evidence that they are taking or intend to continue to take an active role in the child's upbringing.

12. The judge did not seek to resile from her earlier finding at [39] when she proceeded to consider Article 8 outside the Rules. At [44], in the course of her Article 8 analysis, the judge found that, if the only reason the appellant did not visit the children as much as she did so previously, "he would have found a way to live much nearer to the children than he does". What appears to have been uppermost in the judge's mind is the fact that, as she says more than once in her determination, "there are children involved" [48]. That approach is problematic. The Immigration Rules are predicated upon the basis that there children are likely to be "involved" as is evidenced in E-LTRPT2.4 (see above). It is not clear how the very same "compelling circumstances" which fall squarely into the provisions of the Immigration Rules may justify a determination of an appeal on Article 8 ECHR grounds outside the Immigration Rules. The Immigration Rules incorporate domestic and Strasbourg jurisprudence relating to Article 8 and strike a balance between the rights of the individual and the public interest; they are intended to provide a complete code as regards Article 8 ECHR (see *MF (Nigeria)* [2013] EWCA Civ 1192). Had the appellant been able to show that he had access rights to the child (which it appears, informally, he does have) **and** that he could prove that he was taking or intended to continue to take an active role in the children's upbringing, then he may have satisfied the requirements of the Rule. The judge expressly found that he could not satisfy the second part of that requirement and yet she went on to find that it would not be in the best

interests of the children "that they be deprived of their father wherever he may choose to go hereafter for an indeterminate length of time" whilst "it is difficult to see how the children could visit and keep in contact with a person who claims he does not know his nationality and appears to be determined to remain in Europe regardless of the authorities' desires to exclude him" [48]. Although I accept Ms Khan's submission that some of the Immigration Rules constitute a more complete code as regards to Article 8 [for example, the provisions concerning deportation] than other parts of the Rules, the problem here is that the judge has found a compelling circumstance to exist where the Rules fairly and squarely address that same circumstance. The impression given by the determination is that, in any case involving children, it will be necessary for the Tribunal to consider Article 8 outside the Rules even where the existence of children and their best interests have been fully addressed within the context of the Immigration Rules. To put it another way, a circumstance which causes an application to be refused under the Rules cannot *per se* constitute a "compelling circumstance" justifying a grant of Article 8 ECHR leave outside the Immigration Rules. The judge has, in effect, embarked upon the very kind of "free-wheeling" analysis of Article 8 outside the Rules specifically discouraged by the Tribunal in *Gulshan*. By doing so, I find that she has erred in law. I find that there were no compelling circumstances in this case which required the judge to consider Article 8 outside the Rules. It follows that I should set aside the judge's determination and remake the decision dismissing the appeal on human rights grounds.

DECISION

The determination of the First-tier Tribunal is set aside. I have remade the decision. The appeal against the immigration decision dated 12 September 2013 is dismissed.

Signed Date 25 July 2014

Upper Tribunal Judge Clive Lane