Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29950/2013

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 29 August 2014	**On: 10 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RICHARD BAMUZIBIRE
(anonymity direction not made)

Respondent

Representation

For the Appellant: Mr S Whitwell, Home Office Presenting Officer
For the Respondent: In person

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the determination of First-tier Tribunal Judge Herbert in which he allowed the appeal of Mr Bamuzibire, a citizen of Uganda, against the Secretary of State's decision to refuse to vary leave to remain as a Tier 4 (General) Student migrant. I shall refer to Mr Bamuzibire

as the Applicant, although he was the Appellant in the proceedings below.

2. The application under appeal was made on 17 May 2013 and was refused by reference to paragraph 245ZX(ha) of the Immigration Rules (HC395) on 2 July 2013. The Applicant exercised his right of appeal to the First-tier Tribunal. This is the appeal which came before Judge Herbert on 16 May 2014 and was dismissed by virtue of the Immigration Rules but allowed by reference to Article 8 of the Human Rights Convention. The Secretary of State applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge T R P Hollingworth on 9 July 2014 in the following terms

> The findings in paragraphs 12 and 13 of the determination are given insufficient weight.
>
> The reality is the Appellant could not satisfy the requirements of the rules. No consideration of Gulshan (Article 8 – correct approach) 2013 UKUT 640 appears to have taken place.

3. At the hearing before me Mr Whitwell appeared to represent the Secretary of State. The Applicant appeared in person and was not legally represented. The Applicant's nominated legal representative, Mr Okech of Ukimas Consultancy Limited, contacted the Court by telephone to say that he was detained in a First-tier Tribunal hearing at the Hatton Cross hearing centre. The Applicant requested an adjournment of the proceedings and I heard representations in this respect from both parties. The Applicant said that he had not been able to get any document from his representative to request an adjournment or explain his failure to attend. His representative told him that he started at Hatton Cross at 10:00 and when he called the Applicant at 13:24 he told him that his case at Hatton Cross was floating. He said that he would send a text message but this still has not arrived. I pointed out to the Applicant that his representative had not made contact with the Tribunal prior to the hearing listed at 14:00 and no papers had been submitted in response to the grant of leave to appeal. The Applicant said that he had been told by his representative that there was no need to submit any documents. Mr Whitwell opposed the application. He said there was no good reason for an adjournment. It was unclear why the Applicant's representative had chosen to prioritise a float case in the First-tier Tribunal at a different venue. There had been no response to the grounds of appeal or grant of leave. Looking at the situation with a cynical eye this could be seen as a vehicle to prolong the Applicant's status.

4. I decided that an adjournment was not justified. In the first place the conduct of the Applicant's legal representative is at best discourteous and falls short of the professional standards expected of representatives before this Tribunal. Where a representative has

cases listed before different courts or tribunals on the same day he is expected to make proper arrangements to cover all venues. Where, as is sometimes inevitable, circumstances are such that a representative is unable to attend the very least that is expected is a written explanation and application and where the individual representative is unable to access facilities to do so it should come from his office. This case was listed for 14:00, it was not called until 15:00 and was not concluded until 15:30. There was an ample time for a written explanation to be given. In the second place this application for an adjournment must be seen in the specific context of the decision under appeal. The application made on 17 May 2013 was for leave to remain to continue a course ending on 27 December 2013. The Notice of Appeal to the First-tier Tribunal stated *"My final examination for the last papers will be in December 2013. I therefore need to sit for that examinations and collect my certificate before I return to Uganda in February 2014"*. At the appeal hearing on 16 May 2014 the First-tier Tribunal Judge having found that the Applicant

> "clearly does not qualify under the Immigration Rules"

and dismissing his appeal in this respect (a decision that is not challenged before me) noted that his examinations

> "are due to take place … on 3 June 2014, 5 June 2014 and 10 June 2014 with results expected in September 2014".

The Judge found (at paragraph 17

> "Effectively the results come out in September 2013 (sic) and it would be advantageous to the Appellant if he was in the United Kingdom when those results are published, but he envisages returning to Uganda and coming back to the United Kingdom for any graduation ceremony in December"

It was for this reason that the Judge found

> "the balance falls for this limited period until September until the results are out in favour of the Appellant"

and allowed the appeal by reference to Article 8.

5. In my judgement, and given the context detailed above, it cannot be justified to adjourn an error of law hearing listed on the last day of August where the consequence of decision complained of could only be a grant of discretionary leave until the last day of September.

Background

6. The background to the appeal is detailed above. The facts, not challenged, are that the Applicant was born in Uganda 19 February 1978. He came to the United Kingdom with leave to enter as a student on 12 July 2004 and has been granted a series of extensions of leave to remain to enable him to continue his studies. The last grant of leave expired on 18 May 2013 and his application to extend leave having been made in time he remains lawfully present in the United Kingdom with leave extended by virtue of section 3C of the Immigration Act 1971.

.

7. The Applicant's circumstances have changed since he gave notice of appeal to the First-tier Tribunal in that his final examinations scheduled to take place in December 2013 did not take place until June 2014 with the consequence that results and certificate due to be issued in February 2014 are now due in September 2014. In any event, and as stated above, the Applicant does not challenge the First-tier Tribunal's decision to dismiss his appeal by virtue of the Immigration Rules.

Submissions

8. On behalf the Secretary of State Mr Whitwell relied on the grounds of appeal to the Upper Tribunal and referred to the decisions in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) and Patel and others [2013] UKSC 72. He said that there were two errors of law. In the first place the determination makes no finding of arguable, exceptional or compelling circumstances justifying the consideration of the appeal outside the terms of the Immigration Rules in accordance with Gulshan. The Judge embarks upon a free-wheeling Article 8 analysis of the type envisaged in paragraph 27 of Gulshan. He gives no good reason for doing so. Secondly and in any event the proportionality finding in paragraph 22 of the determination is inadequately reasoned. In paragraph 22 the Judge directs himself to relevant case law and then goes on to make a finding contrary to that case law without giving any, or any adequate, reason for doing so.

9. The Applicant said that the human rights issue is the fact that he has been here for about 10 years. If his visa was refused he would not be able to travel anywhere. He is leaving in September anyway but he may not work in Uganda in the future and does not want anything to block him being able to travel elsewhere. He said that he needed to be present for the results because there may well be difficulty getting his results and his certificates posted to Kampala.

Error of law

10. In my judgement the decision of the First-tier Tribunal discloses clear and material errors of law. Having found (at paragraphs 12 and 13) that the Applicant did not meet the requirements of the Immigration Rules the determination moves on (paragraph 14) to a consideration of Article 8 ECHR without any explanation of why it was necessary to do so. The determination does not make any reference to Gulshan or indeed Nagre v SSHD [2013] EWHC 720 (Admin), upon which Gulshan was founded, and whilst it is not necessary for a Judge to make specific reference to the source of the case law that he follows it is necessary to show that he is following the principles of that case law. The determination patently does not do that. The necessity to do so it readily apparent where the rules provide a complete code. In the circumstances of this appeal they do. The Appellant failed to meet the requirements of the Immigration Rules and that fact is not challenged. In Patel and others [2013] UKSC 72 Lord Carnworth said

> 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.

11. In the particular circumstances of this case there was no Article 8 application and the grounds of appeal to the First-tier Tribunal do not raise Article 8 merely stating, as quoted above, that the Applicant needs to sit examinations in December 2013. There is no indication either in the decision of the First-tier Tribunal or otherwise that any application was made to amend the grounds of appeal. It was in all these circumstances an error of law for the First-tier Tribunal Judge to embark on a consideration of Article 8 in paragraph 14 of his determination.

12. It is not in my judgment necessary to go on to consider the issue of proportionality at this stage because the errors of law in considering and allowing the appeal on the basis of a matter that was not pleaded as a ground of appeal, embarking on a ‘free-wheeling’ Article 8 exercise and failing to follow established case law are all material to the decision to allow the appeal. I set aside the decision of the First-tier Tribunal.

Remaking the decision

13. In remaking the decision the first aspect to consider is whether there are sufficient reasons to conduct an Article 8 exercise. In my judgement there are not. Firstly this was not an Article 8 application and the grounds of appeal do not suggest that the decision under appeal is unlawful as being incompatible with the Applicant's Convention rights. Secondly as confirmed by the Court of Appeal in MM (Lebanon) [2014] EWCA Civ 985– if the rule or rules constituted a complete code then there is no need for an Article 8 proportionality test.

> 133. . … a particular IR does not, in each case, have to result in a person's Convention rights being "guaranteed". In a particular case, an IR may result in a person's Convention rights being interfered with in a manner which is not proportionate or justifiable on the facts of that case. That will not make the IR unlawful. But if the particular IR is one which, being an interference with the relevant Convention right, is also incapable of being applied in a manner which is proportionate or justifiable or is disproportionate in all (or nearly all cases), then it is unlawful.
>
> 134. Where the relevant group of IRs, upon their proper construction, provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But 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.

14. The question therefore will not normally be whether the Immigration Rules are compliant with the requirements of Article 8 ECHR but rather whether the application of those rules in a particular case results in a breach of Article 8. Where a judge finds that the requirements of the rules are not met then before going on to conduct what was described in Gulshan as a freewheeling Article 8 exercise the question of why the application of the rules is insufficient must at least be considered.

15. So far as the particular circumstances of this matter are concerned it is apparent that the rules do constitute a complete code and that the Applicant failed to meet the requirements of that code. Apart from there being no grounds pleaded to suggest that the Secretary of State's decision to apply the Immigration Rules was in breach of the Applicant's Convention rights there was nothing put forward to suggest there was any reason to embark on a consideration of the Applicant's claim outside the terms of the Immigration Rules and by virtue of Article 8 ECHR.

16. If it were necessary to consider the Applicant's situation outside the terms of the Immigration Rules then, as identified by the First-tier Tribunal Judge the starting point is the five stage test set out by

Lord Bingham in Razgar [2004] UKHL 27. Although this is identified by the First-tier Judge as the starting point (paragraph 15) the Secretary of State's assertion that the reasoning is inadequate is made out. The finding in paragraphs 18 and 19 that a private "and family" life has been established is absent any qualitative analysis of that private life. Without there being such analysis it is impossible not to follow the guidance given by Lord Carnworth quoted above.

17. It must follow for all of these reasons that the Article 8 ECHR appeal must fail. In dismissing the appeal it is proper to add, for the benefit of the Applicant, that section 3C leave, referred to above, extends until the time allowed for an application to appeal against this decision expires. The Applicant's stated intention to leave the United Kingdom in September is therefore likely to result in his presence throughout the time that he has spent in the United Kingdom having been lawful and in these circumstances there is no reason to believe that his future travel plans may be thwarted.

Summary

18. The decision of the First-tier Tribunal involved the making of a material error of law. I set aside that decision.

19. I remake the decision by dismissing the Applicant's appeal both by virtue of the Immigration Rules and Article 8 of the Human Rights Convention.

Signed: **Date:**

J F W Phillips
Deputy Judge of the Upper Tribunal