



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/37061/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 27th June 2014**

**Determination
Promulgated
On 2nd July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR PATRICK NWABUEZE OFILI
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr J Parkinson, Home Office Presenting Officer
For the Respondent: Mr D Aihe, of Wisestep Immigration Specialists

DETERMINATION AND REASONS

Introduction

1. This is an appeal by the Secretary of State but I will refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Nigeria born on 12th June 1980. He arrived in the UK on 25th September 2008 as a student and had leave to remain in this capacity until 22nd February 2013. On 21st February 2013 he applied to remain as a Tier 2 (general) migrant. This application was refused on 25th July 2013 because he had no certificate of sponsorship assigned so could receive no points under Appendix A, although the necessary points were awarded under Appendix B and C. The appellant began a relationship with Ms Sarah Oyenuga (the sponsor), a Citizen of Nigerian born on 17th July 1985 in 2010. The couple say that they are in a durable relationship, and have been cohabiting for the past two years. The sponsor came to the UK on 22nd August 2003 as a student and has limited leave as a Tier 2 (general) migrant until 22nd January 2015. She applied for indefinite leave to remain on 13th March 2014; her passport is with the respondent; and she is still awaiting a decision on her application. The appellant's appeal against the decision was allowed by First-tier Tribunal Judge Canavan in a determination promulgated on the 8th April 2014 on the basis that the decision was a breach of Article 8 ECHR.
3. Permission to appeal was granted by Designated Judge of the First-tier Tribunal McClure on 19th May 2014 on the basis that it was arguable that the First-tier judge had erred in law in failing to apply the case of Gulshan (Article 8 - new Rules - correct approach) 2013 UKUT 00640 and R (on the application of) Nagre v SSHD [2013] EWHC 720, and there was nothing in the facts that was exceptional to allow the matter to be allowed under Article 8 ECHR.
4. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions

5. Mr Parkinson relied upon the grounds of appeal. He contended that this was a case which concerned an appellant who had precarious immigration status as this was to be equated with anyone who did not have indefinite leave to remain. In such circumstances the arguments in Nagre should be applied, as the Court of Appeal had approved that approach at paragraph 41 of MF (Nigeria) v SSHD [2013] EWCA Civ 1192. There were no compelling circumstances in this case. The appellant could return to Nigeria and maintain his relationship by other means of communication. If there was a period of separation then this was not disproportionate. It was not unduly harsh to expect the couple to have their family life in Nigeria. Judge Canavan had noted that the human rights claim had been raised at a late stage and that the appellant and sponsor could not meet the Immigration Rules at Appendix FM. It might be difficult or inconvenient for the appellant to return to Nigeria but this was the correct and lawful approach.
6. Further the finding by Judge Canavan that the couple had cohabited for two years at paragraph 18 of her determination was not compatible

with her finding at paragraph 15 that the appellant's spouse had not explained why her bank statements and wages slips did not go to the couple's address. The Tribunal had not properly considered this discrepancy, and there was inadequate reasons supporting her conclusion.

7. Mr Aihe submitted that the decision of Judge Canavan was a safe one. She had looked at all the evidence in the round with regards the couple's cohabitation. She had heard from the appellant, the sponsor and a friend. She had other documentary evidence of cohabitation from things such as bills. She had noted the evidence which did not support the appellant's case but ultimately had found herself satisfied to the correct standard of proof.
8. With respect to the approach under Article 8 ECHR Judge Canavan had followed Gulshan. She had identified the appellant as being in a "Catch 22" situation whilst the sponsor's application for indefinite leave to remain was pending. She had found that this was an exceptional situation where it would be unduly harsh to require the appellant to return to Nigeria as he could not currently make an application to return despite having a genuine relationship which had lasted for two years. In these circumstances Judge Canavan has made a very specific and limited finding that until the sponsor's application for indefinite leave to remain was determined that it would be a breach of Article 8 ECHR to remove the appellant.
9. At the end of the hearing I informed the parties that I was satisfied that there was no error of law in the determination of Judge Canavan, but that I would set out my full reasons in writing.

Conclusions

10. Judge Canavan carefully considered the evidence with respect to the two year cohabitation of the appellant and sponsor. She finds the appellant, sponsor and friend all credible witnesses, and that they all gave consistent evidence regarding the cohabitation of the appellant and sponsor. There was evidence of their joint tenancy agreement and a landlord's letter; evidence from the bank statements regarding payment of rent by the sponsor on behalf of the appellant via transfers; evidence re the payment of bills at the address; and evidence re preparatory steps for a marriage. All this evidence is set out at paragraphs 15 to 18 of the determination. Judge Canavan does give weight to the fact that the sponsor has not explained why her bank statements and wage slips do not have the cohabiting address on them (and notes that the appellant had an explained arrangement for his to be sent to a friend's address) but ultimately she states at paragraph 18 of her determination that she is satisfied on the balance of probabilities that the appellant and sponsor have been cohabiting as claimed. This was a reasoned decision she was entitled to reach on the evidence before her.

11. Judge Canavan explicitly applies Gulshan to the facts of this case, at paragraph 24 of her determination, despite having some reservations of its compatibility with MF (Nigeria), Huang v SSHD [2007] UKHL 11 and Patel & Others v SSHD [2013] UKSC 72. She notes that it would normally be expected that the appellant should return to Nigeria and apply for entry clearance to return at paragraph 23 of her determination. However she finds, at paragraph 24 of her determination in this case that there are compelling circumstances as the appellant is in a “Catch 22” situation whereby he cannot apply for entry clearance as a durable partner on return due to the sponsor’s pending indefinite leave to remain application. Further it is not possible to know how long the indefinite leave to remain application will take: some applications take months or even years. It would not be reasonable or proportionate to expect the sponsor to leave the UK given her long residence, job and pending settlement application. Judge Canavan is very specific that her finding is just that it would be disproportionate to remove the appellant limited to the time when the sponsor’s indefinite leave application is determined. At this point the appellant can reasonably be expected to follow the normal route and return to Nigeria to apply for entry clearance.
12. I find that Judge Canavan has followed Gulshan as she finds that there are arguably good grounds for granting leave outside the Article 8 ECHR Rules (as required by b) of the headnote) as the Immigration Rules do not sufficiently recognise the appellant’s circumstances, see paragraph 25 of her determination. She also identifies non-standard and particular features demonstrating that removal would be unjustifiably harsh (as required by c) of the headnote in Gulshan). She finds the situation is that that the appellant is unable to apply for entry under the Immigration Rules for an unknown and possibly long period of time due to the sponsor’s limbo status (which could persist for a very long period of time), see paragraphs 24 and 25 of her determination. This is clearly found to be unjustifiably harsh in the context of the findings in the determination that the appellant and sponsor have a genuine and durable relationship, involving a period of cohabitation of two years, and their having adequate accommodation and support.

Decision

13. The decision of the First-tier Tribunal did not involve the making of an error on a point of law.
14. The decision of the First-tier Tribunal allowing the appeal on Article 8 ECHR grounds is upheld.

Deputy Upper Tribunal Judge Lindsley
27th June 2014