Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/04575/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 March 2016	**On 17 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

LUKEMAN OLATUNDE ANIMASHAUN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms K Joshi, Counsel instructed by A Bajwa & Co Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 26 April 1988. He is appealing against the decision of First-tier Tribunal ("FtT") Judge Hussain, promulgated on 17 September 2015, to dismiss his appeal against the respondent's decision to refuse to grant him leave to remain.

2. The appellant entered the UK in April 2011 as a Tier 4 Student with leave to remain until 27 October 2014.

3. On 24 October 2014 he applied for discretionary leave for three months outside the Immigration Rules in order to enable him to take an English test and thereafter make an application to enable continuation of his studies.

4. In October 2014 the appellant met his current partner, who is a British national, and in November 2014 they commenced their relationship.

5. On 14 January 2015 the appellant's application was refused and he appealed, contending that it was unreasonable for the respondent to refuse it.

6. The appellant's partner became pregnant in February 2015.

First tier Tribunal Hearing

7. The FtT dealt briefly with the appellant's original appeal, which concerned the Secretary of State refusing to grant him discretionary leave in order to facilitate the making of a further application as a Tier 4 Student. The FtT stated that it was not open to it to review this exercise of discretion outside the Rules.

8. The FtT then turned to consider the appellant's claim to private and family life, arising from his relationship with a British woman who was pregnant with his child and with whom he did not cohabit (but claimed he intended to cohabit once she obtained larger accommodation from the Council).

9. The FtT noted that Article 8 grounds were not raised in the appellant's grounds of appeal. That appeal was made in January 2015, when the relationship had only recently commenced and before the appellant's partner became pregnant.

10. The FtT then gave brief consideration to the Article 8 claim and found, at paragraph [19], that:

> *As things stand at the date of the hearing, I find that the appellant's relationship with his claimed partner is no more than one of boyfriend/girlfriend. This gives rise to private life but any interference with this private life, in my view, is not of sufficient seriousness to engage the United Kingdom's obligations under the Human Rights Convention.*

Grounds of appeal and submissions

11. The grounds of appeal argue that the FtT erred by failing to take into account, when determining whether Article 8 was engaged, that the appellant's partner was pregnant and that the appellant and his partner intended to cohabit.

12. In her submissions, Ms Joshi expanded on the grounds of appeal. She argued that the FtT should have assessed the proportionality of removing

the appellant, given that his partner was pregnant and they intended to cohabit. She maintained that too much weight was placed on them not living together and she commented that the FtT accepted the relationship was genuine.

13. Mr Melvin's response was that the FtT made a clear finding that the appellant and his partner were no more than boyfriend and girlfriend. It was clear that the Immigration Rules could not be met and there were no exceptional circumstances to warrant allowing the appeal outside the rules. The FtT was aware the appellant's partner was pregnant and that they claimed they intended to cohabit and took this into account in reaching its decision. At the time of the FtT hearing the appellant was in a short term relationship with a girlfriend and the FtT was entitled to find Article 8 was not engaged.

Consideration

14. This is an appeal in which there was no attempt on the part of the appellant to show that he was able to satisfy the Immigration Rules and the only question before the FtT, in respect of his private and family life, was whether leave to remain should be granted outside the Rules.

15. Where Article 8 is considered outside the Rules, it is well established that the structured approach as set out in Razgar [2004] UKHL 27 should be followed. Razgar poses five questions:

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private life or (as the case may be) family life?
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
> (3) If so, is such interference in accordance with the law?
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

16. The FtT concluded that the appellant's claim failed at the second of the five questions. It found that there would be an interference with the appellant's private life (thereby answering the first Razgar question in the affirmative) but that the interference would not be sufficiently serious to engage the UK's obligations under the Human Rights Convention (thereby answering the second question in the negative).

17. It is apparent from reading paragraph [19] of the FtT's decision, as quoted above at paragraph [10], as well as considering the decision in the round, that the FtT reached its finding that the second question under Razgar was

not satisfied because it considered that the relationship between the appellant and his partner was "no more than one of boyfriend/girlfriend".

18. The evidence before the FtT, however, was that the appellant's partner was pregnant with his child. That being the case, the relationship was clearly not, as found by the FtT no more than a boyfriend/girlfriend relationship. There was something significantly more – the appellant's girlfriend was pregnant with his child.

19. Had the appellant's girlfriend not been pregnant the FtT might well have found that the appellant failed at the first Razgar question and it would have been open to it to find, in answer to the second question, that any interference with the appellant's private or family life would not have consequences of such gravity as potentially to engage the operation of Article 8. See, for example, BM (Iran) (2015) EWCA Civ 491.

20. However, in this case the appellant's girlfriend was pregnant. That was a factor the FtT should have taken into consideration when determining whether Article 8 was engaged and its failure to do so was a material error of law the consequence of which was that the FtT did not proceed to the latter three questions under Razgar and did not undertake an assessment, having regard to the mandatory requirements of Section 117A-D of the Nationality, Immigration and Asylum Act 2002, as to whether removal of the appellant would be a proportionate interference with his private life.

21. Given the further fact finding necessary to remake this decision, I have decided, having regard to section 7.2 of the President's Practice Statement, to remit the appeal to the First-tier Tribunal.

Decision

a. The decision of the First-tier Tribunal contains a material error of law such that it should be set aside and the appeal heard afresh.

b. The appeal is remitted to the First-tier Tribunal for hearing afresh before a judge other than First-tier Tribunal Judge Hussain.

Signed

Deputy Upper Tribunal Judge Sheridan Dated: 14 March 2016